**Criminal Procedure and the Constitution**

**Case Briefs & Class Readings**

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**Legend:**

**\_\_\_ Rule of Law**

**\_\_\_ Tennessee**

**\_\_\_ Key Terms**

**\_\_\_ The Words of Funk/Frogge**

**Red Font - Dissents**

**Purple Font – Syllabus**

**\*\*CASE\*\* - Cases that appear in the book**

**Case – Cases that are mentioned in the book, but do not appear in the book (or appear in full at a later date)**

**As you can see, this a rather large document. This document is ordered chronologically, according to the syllabus. Case briefs are ordered as they appear (or are mentioned) in the book. Some of the cases have multiple briefs compiled by different students. TN Statutes appear in the order they are listed in in the syllabus. Class notes that have been sent to me usually appear first, right after the class date, followed by all of the relevant readings for that date.**

**I highly suggest using the search function in Word.**

**If you have anything to add, or find that I am missing a case, or something else important, please email me at** [**rosemaryrocks@gmail.com**](mailto:rosemaryrocks@gmail.com)**.**

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**November 5, 2020**

**Chapter 1 - Criminal Justice Process Overview**

**Tennessee Rules of Criminal Procedure 1-7; TCA 40-7-118**

**County of Riverside v. McLaughlin**

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**TCA 40-7-118**

**Effective: July 15, 2020**

T. C. A. § 40-7-118

**§ 40-7-118. Definitions; citations**

[Currentness](https://1.next.westlaw.com/Document/NC8FEBE70CD4F11EA93CAAA8D5255C4BE/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.Default)&userEnteredCitation=TCA+40-7-118#co_anchor_IB2F0F6C0403611EB9152AE98B613A3F5)

(a) As used in this section, unless the context otherwise requires:

(1) “Citation” means an order prepared as a written or electronic citation and issued by a peace officer on paper or on an electronic data device requiring a person accused of violating the law to appear in a designated court or government office at a specified date and time. The signature of the person to whom the order is issued is required, and the order must be filed, electronically or otherwise, with a court having jurisdiction over the alleged offense;

(2) “Magistrate” means any state judicial officer, including the judge of a municipal court, having original trial jurisdiction over misdemeanors or felonies; and

(3)(A) “Peace officer” means an officer, employee or agent of government who has a duty imposed by law to:

(i) Maintain public order;

(ii) Make arrests for offenses, whether that duty extends to all offenses or is limited to specific offenses; and

(iii) Investigate the commission or suspected commission of offenses; and

(B) “Peace officer” also includes an officer, employee or agent of government who has the duty or responsibility to enforce laws and regulations pertaining to forests in this state.

(b)(1) A peace officer who has arrested a person for the commission of a misdemeanor committed in the peace officer's presence, or who has taken custody of a person arrested by a private person for the commission of a misdemeanor, shall issue a citation to the arrested person to appear in court in lieu of the continued custody and the taking of the arrested person before a magistrate. If the peace officer is serving an arrest warrant or capias issued by a magistrate for the commission of a misdemeanor, it is in the discretion of the issuing magistrate whether the person is to be arrested and taken into custody or arrested and issued a citation in accordance with this section in lieu of continued custody. The warrant or capias shall specify the action to be taken by the serving peace officer who shall act accordingly.

(2)(A) This subsection (b) does not apply to an arrest for the offense of driving under the influence of an intoxicant as prohibited by [§ 55-10-401](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS55-10-401&originatingDoc=NC8FEBE70CD4F11EA93CAAA8D5255C4BE&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), unless the offender was admitted to a hospital, or detained for medical treatment for a period of at least three (3) hours, for injuries received in a driving under the influence incident.

(B) This subsection (b) does not apply to any misdemeanor offense for which [§ 55-10-207](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS55-10-207&originatingDoc=NC8FEBE70CD4F11EA93CAAA8D5255C4BE&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) or [§ 55-12-139](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS55-12-139&originatingDoc=NC8FEBE70CD4F11EA93CAAA8D5255C4BE&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) authorizes a traffic citation in lieu of arrest, continued custody and the taking of the arrested person before a magistrate.

(3) A peace officer may issue a citation to the arrested person to appear in court in lieu of the continued custody and the taking of the arrested person before a magistrate if a person is arrested for:

(A) The offense of theft which formerly constituted shoplifting, in violation of [§ 39-14-103](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-14-103&originatingDoc=NC8FEBE70CD4F11EA93CAAA8D5255C4BE&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation));

(B) Issuance of bad checks, in violation of [§ 39-14-121](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-14-121&originatingDoc=NC8FEBE70CD4F11EA93CAAA8D5255C4BE&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation));

(C) Use of a revoked or suspended driver license in violation of [§ 55-50-504](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS55-50-504&originatingDoc=NC8FEBE70CD4F11EA93CAAA8D5255C4BE&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), [§ 55-50-601](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS55-50-601&originatingDoc=NC8FEBE70CD4F11EA93CAAA8D5255C4BE&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) or [§ 55-50-602](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS55-50-602&originatingDoc=NC8FEBE70CD4F11EA93CAAA8D5255C4BE&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation));

(D) Assault or battery as those offenses are defined by common law, if the officer believes there is a reasonable likelihood that persons would be endangered by the arrested person if a citation were issued in lieu of continued physical custody of the defendant; or

(E) Prostitution, in violation of [§ 39-13-513](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-513&originatingDoc=NC8FEBE70CD4F11EA93CAAA8D5255C4BE&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), if the arresting party has knowledge of past conduct of the defendant in prostitution or has reasonable cause to believe that the defendant will attempt to engage in prostitution activities within a reasonable period of time if not arrested.

(c) A peace officer may arrest and take a person into custody if:

(1) A reasonable likelihood exists that the arrested person will fail to appear in court; or

(2) The prosecution of the offense for which the person was arrested, or of another offense, would thereby be jeopardized.

(d) No citation shall be issued under this section if:

(1) The person arrested requires medical examination or medical care, or if the person is unable to care for the person's own safety;

(2) There is a reasonable likelihood that the offense would continue or resume, or that persons or property would be endangered by the arrested person;

(3) The person arrested cannot or will not offer satisfactory evidence of identification, including the providing of a field-administered fingerprint or thumbprint which a peace officer may require to be affixed to any citation;

(4) Deleted by [2019 Pub.Acts, c. 316, § 1, eff. May 9, 2019](https://1.next.westlaw.com/Link/Document/FullText?findType=l&pubNum=1077005&cite=UUID(I2CAE801075-3911E98C5BD-99530788980)&originatingDoc=NC8FEBE70CD4F11EA93CAAA8D5255C4BE&refType=SL&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)).

(5) Deleted by [2019 Pub.Acts, c. 316, § 1, eff. May 9, 2019](https://1.next.westlaw.com/Link/Document/FullText?findType=l&pubNum=1077005&cite=UUID(I2CAE801075-3911E98C5BD-99530788980)&originatingDoc=NC8FEBE70CD4F11EA93CAAA8D5255C4BE&refType=SL&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)).

(6) The person demands to be taken immediately before a magistrate or refuses to sign the citation;

(7) The person arrested is so intoxicated that the person could be a danger to the person's own self or to others;

(8) There are one (1) or more outstanding arrest warrants for the person; or

(9) The person is subject to arrest pursuant to [§ 55-10-119](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS55-10-119&originatingDoc=NC8FEBE70CD4F11EA93CAAA8D5255C4BE&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)).

(e)(1) In issuing a citation, the officer shall:

(A) Prepare a citation that includes the name and address of the cited person, the offense charged, and the time and place of appearance;

(B) Have the offender sign the citation. The officer shall deliver one (1) copy to the offender and retain the other; and

(C) Release the cited person from custody.

(2)(A) An electronic signature may be used to sign a citation issued electronically and has the same force and effect as a written signature.

(B) Whenever a citation is issued electronically, the officer shall provide the cited person with a paper copy of the citation.

(C) Replicas of citation data sent by electronic transmission must be sent within three (3) days of the issuance of the citation to the court having jurisdiction over the alleged offense.

(f) By accepting the citation, the defendant agrees to appear at the arresting law enforcement agency prior to trial to be booked and processed. Failure to so appear is a Class A misdemeanor.

(g) If the person cited fails to appear in court on the date and time specified or fails to appear for booking and processing prior to the person's court date, the court shall issue a bench warrant for the person's arrest.

(h) Whenever a citation has been prepared, delivered and filed with a court as provided in this section, a duplicate copy of the citation constitutes a complaint to which the defendant shall answer. The duplicate copy shall be sworn to by the issuing officer before any person authorized by law to administer oaths.

(i) Nothing in this section shall be construed to affect a peace officer's authority to conduct a lawful search even though the citation is issued after arrest.

(j) Any person who intentionally, knowingly or willfully fails to appear in court on the date and time specified on the citation or who knowingly gives a false or assumed name or address commits a Class A misdemeanor, regardless of the disposition of the charge for which the person was originally arrested.Proof that the defendant failed to appear when required constitutes prima facie evidence that the failure to appear is willful.

(k) Whenever an officer makes a physical arrest for a misdemeanor and the officer determines that a citation cannot be issued because of one (1) of the seven (7) reasons enumerated in subsection (d), the officer shall note the reason for not issuing a citation on the arrest ticket. An officer who, on the basis of facts reasonably known or reasonably believed to exist, determines that a citation cannot be issued because of one (1) of the seven (7) reasons enumerated in subsection (d) shall not be subject to civil or criminal liability for false arrest, false imprisonment or unlawful detention.

(l)(1) Each citation issued pursuant to this section shall have printed on it in large, conspicuous block letters the following:

NOTICE: FAILURE TO APPEAR IN COURT ON THE DATE ASSIGNED BY THIS CITATION OR AT THE APPROPRIATE POLICE STATION FOR BOOKING AND PROCESSING WILL RESULT IN YOUR ARREST FOR A SEPARATE CRIMINAL OFFENSE WHICH IS PUNISHABLE BY A JAIL SENTENCE OF ELEVEN (11) MONTHS AND TWENTY-NINE (29) DAYS AND/OR A FINE OF UP TO TWO THOUSAND FIVE HUNDRED DOLLARS ($2,500).

(2) Each person receiving a citation under this section shall sign this citation indicating the knowledge of the notice listed in subdivision (l)(1). The signature of each person creates a presumption of knowledge of the notice and a presumption of intent to violate this section if the person should not appear as required by the citation.

(3) Whenever there are changes in the citation form notice required by this subsection (l), a law enforcement agency may exhaust its existing supply of citation forms before implementing the new citation forms.

(m) This section shall govern all aspects of the issuance of citations in lieu of the continued custody of an arrested person, notwithstanding any provision of [Rule 3.5 of the Tennessee Rules of Criminal Procedure](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1008875&cite=TNRRCRPR3.5&originatingDoc=NC8FEBE70CD4F11EA93CAAA8D5255C4BE&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) to the contrary.

(n) In cases in which:

(1) The public will not be endangered by the continued freedom of the suspected misdemeanant; and

(2) The law enforcement officer has reasonable proof of the identity of the suspected misdemeanant.

(3) Deleted by [2019 Pub.Acts, c. 316, § 4, eff. May 9, 2019](https://1.next.westlaw.com/Link/Document/FullText?findType=l&pubNum=1077005&cite=UUID(I2CAE801075-3911E98C5BD-99530788980)&originatingDoc=NC8FEBE70CD4F11EA93CAAA8D5255C4BE&refType=SL&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)).

the general assembly finds that the issuance of a citation in lieu of arrest of the suspected misdemeanant will result in cost savings and increased public safety by allowing the use of jail space for dangerous individuals and/or felons and by keeping officers on patrol. Accordingly, the general assembly encourages all law enforcement agencies to so utilize misdemeanor citations and to encourage their personnel to use those citations when reasonable and according to law.

**Tenn. Code Ann. Section 40-7-118 Citation in Lieu of Arrest**

Citation means a written order issued by peace officer requiring person accused of violating the law to appear in a designated court or government office at a specified date and time**.**

Generally, Officer ***shall*** issue a citation for misdemeanors committed in officer’s presence or when officer has taken custody of person arrested by private person for misdemeanor. If serving warrant issued by magistrate, it is in the magistrate’s discretion.

Does not apply to DUI arrests, unless defendant in hospital.

(Officer **may** issue citation for )

1) Theft

2) Bad checks

3) Revoked or suspended license – other statutes require citation unless one of the following 8 factors are present

4) Assault – officer believes reasonable likelihood that person poses risk to others

5) Prostitution – officer believes reasonable likelihood that person will engage in prostitution activities within reasonable period of time if not arrested.

6) If officer chooses custodial arrest over citation then must include reason in the warrant.

(Officer **shall not** issue citation, **must make custodial arrest**

1. Person requires medical examination or care or if person is unable to care for own safety

2. Reasonable likelihood that offense would continue or resume or that persons or property would be endangered

3. Person arrested is unable or unwilling to provide satisfactory evidence of identification

4. Person demands to be taken before magistrate or refuses to sign citation

5. So intoxicated that person poses risk to self or others

6. 1 or more outstanding arrest warrants for person

Officer **may** arrest if

(1) A reasonable likelihood exists that the arrested person will fail to appear in court; or

(2) The prosecution of the offense for which the person was arrested, or of another offense, would thereby be jeopardized

**County of Riverside v. McLaughlin**

# County of Riverside v. McLaughlin

#### United States Supreme Court 500 U.S. 44 (1991)

#### Rule of Law

**A judicial determination of probable cause made within 48 hours of arrest is generally sufficiently prompt.**

#### Facts

The County of Riverside, California (County) (defendant) had a policy of combining probable-cause determinations with arraignments in cases of warrantless arrest. The policy required that arraignments must be conducted within two days of arrest, excluding weekends and holidays. Donald Lee McLaughlin (plaintiff) brought a class-action lawsuit against the County, challenging the policy. The district court certified a class of all present and future prisoners in the County jail, including people who had been arrested without warrants and detained since McLaughlin filed his complaint, as well as future detainees who were arrested without warrants and held without arraignment, probable-cause hearings, or bail hearings (plaintiffs). The plaintiffs sought a preliminary injunction requiring the County to provide judicial probable-cause determinations in cases of warrantless arrest within 36 hours of the arrest. The district court issued the injunction and ruled that the probable-cause determinations must be made within 36 hours of a warrantless arrest, except in exigent circumstances. The United States Court of Appeals for the Ninth Circuit affirmed the district court's order granting the preliminary injunction. The Ninth Circuit found that the County's policy of providing probable-cause determinations within 48 hours of a warrantless arrest did not comply with the rule announced in *Gerstein v. Pugh*, 420 U.S. 103 (1975), which required a probable-cause determination "promptly after arrest." The Ninth Circuit stated that no more than 36 hours were necessary to complete the administrative process incident to arresting someone. The United States Supreme Court granted certiorari to resolve a conflict between the circuit courts about what constituted a "prompt" probable-cause determination in accordance with *Gerstein*.

#### Issue

Is a judicial determination of probable cause within 48 hours of arrest generally sufficiently prompt?

#### Holding and Reasoning (O’Connor, J.)

Yes. A jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will generally comply with the promptness requirement in *Gerstein v. Pugh*, 420 U.S. 103 (1975). That is not to say, however, that a probable cause determination made in less than 48 hours is automatically constitutional. Determinations of probable cause must still be made without unreasonable delay, and if a determination in less than 48 hours was unreasonably delayed, it may be unconstitutional. The burden of proving that a delay was unreasonable is on the arrestee. On the other hand, a probable-cause determination made more than 48 hours after arrest is not automatically unconstitutional. If a probable-cause determination is made more than 48 hours after arrest, the burden shifts to the government to prove that there was an emergency or another extenuating circumstance resulting in the delay. Here, the County's policy is to offer combined arraignment and probable-cause proceedings within 48 hours of arrest, excluding weekends and holidays. This means that someone arrested without a warrant at the end of the week or over a holiday may wait longer than 48 hours for a probable-cause determination. The County's policy therefore regularly leads to probable-cause determinations outside the generally "prompt" 48-hour period, and the policy may be challenged, as plaintiffs have done here. The Ninth Circuit's judgment is reversed, and the case is remanded for further proceedings.

#### Dissent (Marshall, J.)

Under *Gerstein*, a probable-cause hearing is "prompt" only if it occurs immediately after the completion of all the administrative steps that are incident to a person's arrest. The Ninth Circuit correctly held that the County must provide probable-cause hearings as soon as these steps are completed. Accordingly, the Ninth Circuit's judgment should be affirmed.

#### Dissent (Scalia, J.)

The Fourth Amendment's protections against unreasonable seizure of a person include the historical common-law protection that a person arrested without a warrant must be delivered to a magistrate as soon as reasonably possible. The only element relevant to the reasonableness of any delay was the arresting officer's ability to find the magistrate to issue the warrant. In *Gerstein*, the Court relied on this common-law protection and concluded that the Fourth Amendment requires a judicial probable-cause determination to be made either before or "promptly after" a person's arrest. The *Gerstein*Court did not specifically define "prompt," but it held that a period of detention after a warrantless arrest and before a judicial probable-cause determination may only be as long as necessary to complete the administrative steps incident to the arrest. There is no requirement that the probable-cause determination be made immediately after that time. However, there is also no support for this Court's conclusion that a "prompt" probable-cause determination is one that is delayed not for completion of the administrative steps incident to arrest or arranging for a magistrate, but rather for the County's convenience in combining the probable-cause determination with an arraignment or other proceeding. Furthermore, although this Court considers a 48-hour time period to be "prompt" under *Gerstein*, the available data suggests that 24 hours is a reasonable amount of time to complete an arrest. If someone arrested without a warrant is detained longer than 24 hours without a judicial probable-cause determination, the burden should shift to the government to prove why the delay is justified.

**Key Terms:**

**Probable Cause** - A reasonable basis, amounting to more than mere suspicion, to believe that a person has committed a crime or is about to commit a crime, or that evidence relevant to a crime exists in a particular location.

**County of Riverside v. McLaughlin 500 US 44 (1991)**

**Facts: Plaintiff brought a class action alleging county’s policy and practice do not comport with Gerstein v. Pugh. “Under County policy, arraignments must be conducted without unnecessary delay and, in any event, within two days of arrest. This 2–day requirement excludes from computation weekends and holidays. Thus, an individual arrested without a warrant late in the week may in some cases be held for as long as five days before receiving a probable cause determination. Over the Thanksgiving holiday, a 7–day delay is possible.”**

**Issue: Did Riverside County’s policy violate McLaughlin?**

**Holding: Probably, Court held it was state’s burden to demonstrate extraordinary circumstances. Gerstein said the states can be flexible, but that doesn’t mean they have a “blank check” with which to fashion approaches. “Taking into account the competing interests articulated in *Gerstein,* we believe that a jurisdiction that provides judicial determinations of probable cause within 48 hours of arrest will, as a general matter, comply with the promptness requirement of *Gerstein.* For this reason, such jurisdictions will be immune from systemic challenges.”**

**GERSTEIN AND MCLAUGHLIN TOGETHER**

**When an officer makes a warrantless arrest based upon the officer’s own determination of probable cause, a neutral and detached magistrate must review the probable cause determination to ensure that the arrest and continued detention of the person is justified.**

**Generally, a judicial review of probable cause within 48 hours of arrest will satisfy the requirement.**

**If judicial review is within the 48 hour window the burden is on the individual to show that the delay was unreasonable:**

**Delay for the purpose of gaining additional evidence to support**

**probable cause**

**Delay motivated by ill will toward the arrested individual**

**Delay for the no good reason**

**After 48 hours, burden shifts to the government to prove the existence of a bona fide emergency or other extraordinary circumstance to justify the delay.**

**Weekends don’t count as extraordinary circumstances**

**Consolidating pretrial proceedings doesn’t qualify as extraordinary circumstances**

**Gerstein v. Pugh**

United States Supreme Court  
420 U.S. 103 (1975)

**Rule of Law**

**A defendant charged with a crime by information may not be detained for an extended period of time without a judicial determination of probable cause.**

**Facts**

Pugh (plaintiff) was one of two defendants arrested under an information issued by a prosecutor in Dade County, Florida. County procedures provided for a probable cause determination only by way of preliminary hearing or arraignment. A preliminary hearing could not be held any earlier than 30 days after arrest. Arraignments were commonly delayed for at least 30 days after arrest. Pugh joined a class action suit in federal court asserting a constitutional right to a prompt judicial determination of probable cause. The district court held that criminal defendants charged by information were entitled to a timely judicial determination of probable cause. Before the district court issued its opinion, the Florida Supreme Court enacted a new procedural rule governing preliminary hearings. The district court reviewed the amended rule and found that it had not addressed the constitutional issues because defendants charged by information could still be detained without a probable cause determination. The court of appeals affirmed the district court decision. Gerstein (defendant), in his capacity as State Attorney for Dade County, petitioned the Supreme Court for review.

**Issue**

May a defendant charged with a crime by information be detained for an extended period of time without a judicial determination of probable cause?

**Holding and Reasoning (Powell, J.)**

No. A defendant charged with a crime by information may not be detained for an extended period of time without a judicial determination of probable cause. The Fourth Amendment requires that any restrictions upon an individual’s liberty be justified by probable cause. Although a judicial determination of probable cause would best protect liberty rights, imposing the requirement of a judicial determination prior to arrest would hamper law enforcement activities. As such, we have upheld the warrantless arrest and brief detention of crime suspects based upon a determination of probable cause made by law enforcement officers in the field. A probable cause hearing is not required prior to the initiation of charges by information. By contrast, the need for a neutral determination of probable cause increases once a person has been placed under arrest. Prolonged incarceration can have significant consequences to an individual’s personal life. Even conditions placed upon an individual’s release pending trial can pose a substantial restriction upon individual liberties. The Fourth Amendment demands a neutral determination of probable cause to support any prolonged period of restraint against individual liberties. A prosecutor’s assessment of probable cause may provide some measure of safeguard against unreasonable seizure, but not enough to satisfy the requirements of Fourth Amendment protections. The probable cause determination need not be conducted through adversary proceedings. The determination may be made in the same fashion that it would be made in support of a warrant. A magistrate may assess the existence of probable cause on the basis of hearsay and affidavit. Because the probable cause determination is not an adversarial proceeding, it is not a critical stage in criminal proceedings that would trigger a defendant’s Sixth Amendment right to counsel. Extended detention in the absence of a probable cause determination will not provide grounds to vacate a subsequent conviction. Individual states are free to fashion probable cause procedures as they see fit, so long as the procedures afford a fair and reliable determination of probable cause within a reasonable time after arrest. We affirm that part of the appellate court’s judgment holding that a prompt judicial determination of probable cause is required by the Fourth Amendment. We reverse that part of the judgment that requires the probable cause determination to be made by adversary proceedings.

**Concurrence (Stewart, J.)**

The majority opinion goes farther than it needs to in order to address the issue before the court. Having concluded that the Florida procedure is unconstitutional for failing to provide a neutral probable cause determination to all incarcerated defendants, there is no need to get into discussion of the types of procedural protections that are not required by the Constitution.

**Key Terms:**

**Probable Cause** - A reasonable basis, amounting to more than mere suspicion, to believe that a person has committed a crime or is about to commit a crime, or that evidence relevant to a crime exists in a particular location.

**4th Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Information** - A criminal charge filed with the court, containing the crimes alleged and factual allegations supporting the charges, that commences a criminal case without a grand jury indictment.

**November 12, 2020**

**Chapter 9 – Pretrial Release**

**TCA 40-11-101 et seq. (especially 40-11-118)**

**State v. Burgins, 464 S.W.3d 298 (Tenn. 2015)**

**Chapter 2 – The Nature and Scope of Due Process**

**TWEN for parallel provisions of the US and TN Constitutions**

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**Class Notes from Lecture November 12, 2020 DUE PROCESS**

**Chapter 9**

**Pre-Trial Release** = being out on **bail**

**Bail** = temporary release of a prisoner in exchange for security given for the person’s appearance at a later hearing. Most of the time it means I am going to give the clerk some money. If the person doesn’t show up, the court keeps the money. Sometimes the security can be a mortgage on my house. Sometimes a person pledges by signing saying I will get this person back to court.

Or you can be released on your own recognizance.

**THE UNITED STATE CONSTITUTION HANDOUT**

8TH **AMENDMENT** – EXCESSIVE BAIL SHALL NOT BE REQUIRED, NOT EXCESSIVE FINES IMPOSED, NOR CRUEL AND UNUSUAL PUNISHMENT INFLICTED.

**TENNESSEE STATE CONSTITUTION HANDOUT**

THAT ALL PRISONERS SHALL BE BAILABLE BY SUFFICIENT SURETIES, UNLESS FOR CAPITAL OFFENSES, WHERE THE PROOF IS EVIDENT, OR THE PRESUMPTION GREAT. AND THE PRIVILEGE OF THE WRIT OF HABEAS CORPUS SHALL NOT BE SUSPENDED, UNLESS WHEN IN CASE OF REBELLION OR INVASION, THE GREAT ASSEMBLY SHALL DECLARE THE PUBLIC SAFETY REQUIRES IT.

Which means, everyone in TN has a right to get out of jail pre-trial unless it’s a capital offence, for which you could get the death penalty which is 1st degree murder in Tennessee. (Yes, on offence – was written in 1870.) We have made some amendments but for the first 70 years there were no amendments made to our constitution. At one point, we were the longest non-amended constitution in the US.

**SECTION 16: TN CONSTITUTION**

Restrictions on bail, fines and punishment: That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments.

This is a repeat of the US Constitution 8th Amendment. Why would they write it in in 1870? Well, because we didn’t know if the 8th Amendment applied to the states yet.

So, we’ve got the right to bail under the Federal Constitution that says not excessive and we’ve got a State right to a bail **and** to one that is not excessive. You’ve got more rights under the State Constitution than under the Federal Constitution UNLESS the Supreme Court interprets the 8th Amendment to say everybody has the right to bail. And those of you who have done your reading that we will be discussing, already know the answer to some of that.

***Stack v. Boyle 1951***

***Who wrote the opinion?*** *First of all, this is not something you need to memorize for any test.*

*Chief Justice Vinson – appointed by Truman – the last chief justice to be appointed by a Democratic President.*

***What were the facts:*** *Ms. Jacoby talks about the case. Smith Act – pretty good law. Even Mr. Frogge would think this is a pretty good law to not overthrow the government. We can agree on a couple of things.*

***What was the bond set for the Ds?*** *Bond ranged from $2500, $7500, $75,000.00 and $100, 000 for one.* ***Why the discrepancy****? High bond said we want it lowered.* ***Hearing – what proof did the government put up****? 4 other people charged for this – not these people – other people – skipped bail and they ended up getting caught later on. That’s the proof.* ***What proof did the government put up for these individuals****? Nothing – no proof.*

***What were the rules if you could get a bond back in 1951 for a serious case like this?***

*In 1951 Rule 46(a)(1) says that a person arrested for non-capital offense SHALL be admitted to bail. That was the rule in Federal Court in the late 40s, 1950s.*

***What did the SC about what should happen to these D’s and their bail?***

*The bail was excessive.* ***What was the remedy? What did the Court order to be done?***

*I will just tell you: If the bond is greater than what would normally be set for an offense like that, there needed to be a hearing where the government demonstrated why the bond should be higher than normal relating to that particular D. Government’s proof is strong, relation to the community… You have to put on PROOF of why you need a high bond, otherwise it’s excessive.*

***United v. Salerno 1987 page 655***

***Who wrote it?*** *Chief Justice Rehnquist*

***Stated facts:*** *Salerno’s job was a mob boss. Cafaro was a captain – high up in management*

*What were these guys charged with? RICO 29 counts of Racketeer Influenced and Corrupt Organizations Act (RICO) violations- mail, and wire fraud, extortion, and various criminal gambling violations. 35 acts – murder, extortion, gambling, wire fraud (maybe you get a bond for wire fraud). Dangerous in a big family like this. Bunch of crime bosses planning murders.*

***Is it legal to hold somebody without even giving them a bond****? We know what the law was back in 1951 if it’s not a capital offense, and there is not a chance of the death penalty you could get a bond…****what had changed in Federal law between 1951 and 1987?***

***What did the Crime Act of 1984 say?***

*§ 3142 (e) - “no condition of release would assure the safety of the community or any person” if you are a danger you don’t even a right to a bond, forget whether or not we are going to execute or even if we aren’t going to execute you if you are a dangerous person you could be held without a bond. Which goes to the twin purposes of a bond*

1. *one of the purposes of bond is to make sure you are going to show up for court. Well, I posted 20, 000 in bond to the court – or my mom posted 20, 000 in court – if I don’t show up to court my mom loses the 20k or she loses her house . I don’t want my mom to be homeless so I am going to show up for court. Another thing is a bonding company might have put 100,000 up and my mom only put up 10k, guess what is going to happen if I don’t show up and I am hiding in Ok, well the bonding company is going to lose their 100k….you know what they are going to do, they are going to hire Dog the Bounty Hunter and he is going to come find me. Almost always in trailer. He is going to bring me back because he going to get this money back. He has an incentive to bring me back. That is why the bond system works.* ***Another reason****: let’s say Mr. Frogge gets caught burglarizing a house in the neighborhood he lives in.* ***If you live in that neighborhood, do you want him out on bond? Where is he going to be tomorrow night? What if a guy who had done a series of rapes? Do you want him out on bond? Murder, what if they committed another murder?***

*Except for – the Constitution says no excessive bail. And the Tennessee Constitution says “everybody has the right to bail”except if it is a capital offense.* ***But what if it is not a capital offense****? The TN Constitution says they have the right to a bail.* ***But here, we are in FEDERAL Court****. In Federal Court, whatever state you are in can’t help you in Federal Court. In Federal Court you are only protected by the federal Constitution. If you are in state court, you are protected by the state and federal constitutions.*

*They base it on the due process clause at the end of the 5th Amendment – no person shall be deprived of life, liberty or property without due process of law. If you are incarcerated you do not have your liberty.*

*I want to have due process, I want to have a trial before the State takes my liberty. They say, the 5th amendment says you have to give me some type of bond.*

***What ultimately did the ruling come down in this case?***

***What’s the ruling if they can deny the bail at all and its not a capital case.***

*They said the primary concern of government is the safety of the lives of their citizens. Therefore, it does not violate the due process clause regarding excessive bail provision of the 8th, to deny in some cases, IF the issue is public safety under the US Constitution. If it’s about whether or not a person is going to return to court, and not about having an excessive bail, if it’s about public safety then the judge doesn’t have to grant bail at all.*

***Normally, I don’t spend anytime about the dissents****. Sometimes it tells how the law is developed, maybe they talk about how they were wrong a few years ago and now we are going to talk about how we need to change it.*

*But, in this Dissent we talk about why elections matter, why the judicial appointment matters.* ***By Thurgood Marshall: a lion of jurisprudence. He almost always championed liberty over security****. If he had been the chief justice we would have a very different take on that balance of safety and liberty. Always in tension. Funk makes the scale with his hands and then puts his hand together as if they are fighting with each other.* ***Most SC decisions are 9-0 decisions****. Sometimes Scalia will be the absolute best for the D, but sometimes we seem some strange Scalia cases.*

*Judges can be passive aggressive in their dissents. Laughing****.***

***Justice Marshall said excessive bail means you can’t make a bail.*** *Excessive bail or no bail. No matter what, you are stuck in jail.*

*But 8th Amendment according to Justice Marshall says everybody gets a bail. That’s how he would interpret the 8th Amendment.*

***What do you mean it’s not punitive****? Of course, it is. The person is in jail.*

*He points to a phrase in the statute:* ***The Bail Reform Statute “nothing in this statute shall be construed as modifying the presumption of innocence.”*** *(Page 664) So, if someone is presumed innocent, then why are the already being punished.*

***That did not carry the day so the Bail Reform Act of 1984 is the law and in Federal Court you do not have a right to bail. Most folks charged with federal crimes do not get a bail****. His clients rarely ever got out of jail, didn’t matter if they were charged with narcotics, bank robbery, mortgage fraud, possession of weapons - starting in 1984****. Because there was no longer a constitutional right to a bail****. Government would drop a notice to intent to seek detention.*

***State v. Burgins (Tennessee 2105)***

***Facts****: she was charged with marijuana – misdemeanor in TN*

*TN – fine up to 2500.00 and up to 11 months and 29 days in jail. Max punishment is one day less than a year. Sometimes you might get probation, sometimes you might get a little bit of jail time.*

*While she is on bond, she ends up in an attempted car jacking and was indicted for various charges, ie attempted murder, use of a firearm in the commission of a felony, attempted esp. agg. Robbery and agg. Assault.*

*Facing lots of time in jail.*

***Under TN law does she have a right to a bail after she’s been charged with carjacking?*** *Yes, she does have the right. The reason is because the TN Constitution says so. Because it’s not a capital offense. So, they had to set a bail for that. But, the state doesn’t want her out because she might do another carjacking.* ***The state said they wanted to revoke her little misdemeanor marijuana bond because she was a threat to the community.***  *But I have a constitutional right to the misdemeanor bond.*

***Court: Do you have a right to the bond at a bond revocation hearing for picking up new charges? Do you still have a right to bond on the original case? Can the state revoke that bond? Does that right still exist if you pick new charges while you are on that bond?***

***SC of Tennessee said****: Yes, she can go to jail on the original charges while waiting for trial on the new charges. They will need to an evidentiary hearing and the proof will need to have some testimony that says she committed the new crime.*

***Then what’s the burden of proof in Tennessee?*** *In TN it’s just the preponderance of the evidence. 50% plus one.*

*NOT by clear and convincing, NOT by probable cause, not by proof beyond a reasonable doubt…*

*That the D committed a crime that was a condition of the release. You have to continue lawful conduct while on release.*

*Then if the judge finds you have a committed the new crime, then the judge has to consider the issue of public safety. Now they can keep you in jail with no bail.* ***What if just put a condition on it like put an ankle bracelet on, or start checking in with a probation officer, or take drug tests, that sort of thing****? If that’s not enough then maybe I should just raise the bond****…*If none of this can assure the safety of the public then the bail can just be revoked and they have forfeited their Constitutional right to bail while their case is pending.**

**We know in Federal Courts you can have a situation where there is no bail. In State courts, you can have a bail revocation based on committing a new offense while you are on bail. This can get you locked up with no bail.**

**But, we have a bunch of bail statutes that help interpret the Tennessee , Constitution**

**Article 1, section 15 and 16: as far as who should get a bail and with what conditions.**

**TN Code Annotated 40-11-101 to 118.**

**These are the TN state statutes.**

**You heard about 2 federal cases**

***Stack v*** *Boyle* said everybody gets bail, ***US v. Salerno*** – maybe not

**What is these statutes said in agg rape cases for the 2nd time or after no bail? What if one of these statutes says this?** No, you don’t get a bail if you are a super-dooper raper? **What do I tell them?** We may get you one. You have the right to a bail.

**What if in TN there is a statute that says you don’t get bail after your 2nd agg rape.**

**Does he get bail?** This would be an unconstitutional statute.

The laws and the statutes have to be constitutional.

**TN Framework:**

Any day in TN there are 30,000 people awaiting trial who have not been convicted who are in local jails.

**101 just the title**

**Sections 1 and 2** – echoes the constitution. “Before trial, all Ds shall be bailable by sufficient sureties. Except capital offenses where the proof is evident or the presumption great. After convictions you can get an appeal.

**Three ways to make bail:** Bail is a loose term and it gets used loosely around the courthouse.

1. **the judge will set a cash amount.** Once that bail is set, you can make your bail by paying that amount to the clerk’s office. Bail is set at 10k, here is 10k. Please let me out.
2. **By far the most common way, is to use a bail bondsmen.** A whole of this code talks about regulating them. We aren’t getting into that.

The bail bondsmen you pay a percentage of the fee and they stake their name for the rest of it. As much as 10%. It has gotten more competitive so it can be less than that.

1. **Post a piece of property.** Very uncommon. If you have a property that is worth 1 ½ times the amount of the bail, that can be posted. You have own 1 ½ times the equity. You can’t owe the bank the money. I mostly advise clients to use a bail bondsman. It takes the fees out of any bail you put down.

**105 –** don’t get confused about this one. Bail by clerk. It says maximum amounts of bail. If you get arrested in Nashville right now, the officer is going to take you in front of a night court commissioner where he is going to convince that night court commissioner there is probable cause for the arrest and the commissioner is going to set a bail. You get arrested in ??? county, which I know to be a less populated county, I don’t think there is a night court commissioner sitting on duty 24/7. In those jurisdictions, the clerk sets the bail. And this is the maximum amount for those clerks, not a magistrate.

**106 – you can get an appeal.**

**110 – you can be jailed in lieu of bail if you are a material witness.** In the Somali case the only person left in jail was a material witness. He said I’m a witness but I don’t want to testify. The government said you will sit in jail.

**112 – was touched on in the Bergins case. There can be an arrest warrant issued if you fail to comply with the conditions of bail.** Before this case, there was a lot of confusion and unclear about that the TN Constitution meant. “They have a right to a bail, judge.” A lot of judges felt like if you violate the conditions to your bond, I can jail you. Defense attorneys would challenge this.

**113 – you can get bail on appeal and it can continue if the judge grants it.**

**115 – TN is used here (Davidson) but not in a lot of other counties.** Released on your own recognizance for an unsecured bond. Any person charged with a bailable offense may be taken before a magistate be ordered released pending trial based on personal recognizance or with an unsecured appearance bond in an amount specified by the magistrate.

**Then it gives you factors: THESE ARE IMPORTANT HE SAID**

1. **D’s link to residents in the community**
2. **Employment status and history**
3. **Financial condition**
4. **Family ties and relationships**
5. **The D’s reputation, character and mental condition**
6. **Prior criminal record and prior releases on recognizance**
7. **the identity of responsible members of the community who will vouch**
8. **the nature of the offense and the probability of the conviction and the likely sentence**
9. **and the catchall – anything else you can think of that will indicate the D’s ties to the community or \_\_\_ that will rest on the risk of willful failure.**

**116 – if the D does not qualify, then the magistrate shall impose the least onerous condition reasonably likely assure the D**

Those 2 statutes when read together imply a default position.

You can release the D into the care of a qualified person. Grannies come in handy here. “responsible for supervising the D and assisting them to appear in court.”

**118 – which Prof Frogge says he emphasized on the syllabus**

“In determining the amount of bail necessary to reasonably assure the appearance of the D while at the same time protecting the safety of the public, the magistrate shall consider the following. The same thing is true in Federal Court. They actually have a presumption of detention in violent cases.

**Other than that what this is really about is:**

1. **Likelihood of appearance**
2. **And Public safety**

I agree there is a tension among them but that’s what it is about.

As far as if it is punishment or not, I think in the real world effect it certainly feels like punishment. As a defense lawyer, most of the time you are using these statutes to point out to the judge, “I admit he had a lot of drugs, but he’s never missed a court appearance. And look at him, he’s a hippie, he loves everyone, no guns, no risk to the community.

**Now what happens with bail bondsmen but basically what happens** – let’s say you get charged with drugs and your bail is 10k. You pay a bondsmen 1000.00 plus some kind of processing fee. They get you out and then you flee. What happens: the bonding company loses the entire 10k. They are on the hook. So, they go send some bounty hunter like Dog to find you b/c they want to bring you into court to get the 10k. The same can be true though if you are out on bond and you violate an condition of your bond. Like: don’t go to a hookah lounge where they smoke marijuana. If you are caught in the hookah lounge, that’s a violation of your bond and the bailbonds company forfeits the bond.

**121 – Whether you want to use a cash bond or use a bail bondsmen**. If I make a cash bail, that’s great. I’m going to get it all back. The problem here is that there is a statute that says they can take any fines and fees out of your cash bond. When there is a bail bondsmen that is not the case. Really a personal decision.

**40-11-122 - the real estate state statute that allows you to do that.**

**FOR 15, 16, 18 – KNOW THE FACTORS – WHAT IS THE COURT SUPPOSED TO CONSIDER?**

**WHAT ARE THE PURPOSES OF BAIL?**

**GOOD QUESTION: LOCAL RULES OF BOND THAT ARE PASSED BY JUDGES. IF YOUR BAIL IS OVER A CERTAIN AMOUNT, YOU HAVE TO PROVE TO THE COURT THAT THE SOURCE OF THE FUNDS ARE LEGITIMATE.**

**EXAMPLE – IF THE CHARGE IS ABOUT DRUGS OR EMBEZZLEMENT, IT IS ASSUMED THE BAIL MONEY MIGHT BE ILLEGAL**. No contraband for the bond.

In Davidson county if the bond is 75,000.00 or more, you cannot make bond until you demonstrate the funds are legitimate.

Another TN Statute says if you are charged with a 2nd or above DUI, you can’t get a bond without other certain conditions. Obviously a public safety concern.

What if someone does flee? I had a guy go to Belize. He emailed me and told me he had made it to Belize. He told him to come back. And he did. The bailbondsmen loose the money. Hold on. Give us more time. How long can it go? Long time.

**DUE PROCESS – BACK TO PROF FUNK**

The colonies bounded together to formalize an agreement – the first 10 Amendments which essentially were limits on the Federal Government (they didn’t trust them) to what they could do to the individual states. What could be made illegal, what could be made criminal, what were the rules about criminal prosecution? Nobody in SC wanted someone from another state to come tell them what they could do. Each state could handle their own problems and they didn’t want the Federal government to tell them about this most important state - LIBERTY state - FREEDOM – FREEDOM FROM INCARCERATION.

So, that’s what these are really about. We sailed along for about 90 years or so. Civil war happens. Maybe it’s not so great for us to be so autonomous. Let’s pass the 13th , 14th and 15th Amendments. And before those states who seceded you have to ratify the 13, 14 and 15th Amendments. **And the 14th Amendment has 5 sections but section 1 says**

**Fourteenth Amendment:**

**Section 1:** All persons born of naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Anyone reading this in 2020 would say the first 1 through 8 Amendments would say those apply to states and their citizens.**

**Our state constitution put these in nearly word for word. We went further with the 8th Amendment.**

**What happens to the 8 Amendments in state courts?**

**Chapter 2 and the cases discussed in Chapter 2 deal with these issues.**

The Supreme Court said that didn’t really mean the first 8 in the Bills of Rights applied to state laws. They originally said the due process clause referenced in the 14th Amendment only meant that the state had to follow principles that affected quote “fundamental rights”

In order to have “ordered liberty” (page 31). But where do we have a list of what are fundamental rights and at what level do the fundamental rights get treated?

**Common law would have to develop and the SC would have to consider this case by case.**

**After a while the SC got frustrated with this and decided to do what is called “selective incorporation.” Which means as they considered cases they would select “did the 5th Amendment actually apply in state courts?” Did the 6th Amendment apply in state courts?**

**Did the 2nd? Some justices were saying the 14th Amendment means that they all apply to state courts. Other justices were saying the opposite.**

**BUT NOW, in 2020 pretty much everything in the Bill of Rights is applied in state court procedure. EXCEPT for the part of the 5TH AMENDMENT THAT SAYS YOU HAVE TO BE INDICTED BY A GRAND JURY. This is the last thing the SC has not said.**

**REMEMBER – 95% of all crimes are prosecuted in state court.**

**The 2nd Amendment – in 2010 – the SC said the states can’t say you can’t have a gun in your home because of the 2nd Amendment.**

**Duncan v. Louisiana – 1968**

**Louisiana –** in LA a 2 year sentence is a misdemeanor. He wanted a jury trial. Everyone has a right to a jury trial in LA as long as it is a death penalty charge or bad enough they would have serve their time at hard labor. His case was not. Judge denied. Issue: Under the Constitution 6th Amendment it says all criminal prosecutions have the right to a speedy trial by an IMPARTIAL JURY. What about a speeding ticket? We have 210 jury trials every year in Davidson ticket. We have 3000 serious felonies every year. No time to have jury trial for speeding tickets. In the Federal Courts you have the right to have a jury trial in all criminal cases. In serious cases in 1968, how many states said you could get a jury trial? Every state. What the court held in serious cases in *Duncan* qualifies for protection under the Due Process clause in the 14th Amendment and must therefore be respected by the states. AND SECONDLY, it says we are not going to say where the line is between serious and not serious cases because the Supreme Court only wants to answer the question in front of them when they can. 2 years in person, clearly over the line. And it might be less. It made the 14th Amendment, applied the 6th Amendment to states and said 2 years is a serious offense and therefore it triggers. Also, a D can waive his right to a jury trial. And so judges hearing felony cases is still constitutional as long as the D waives his right to a jury. And the concurrence on this, it traced how we got to this place, 6th applies to the states.

***District Attorney’s Office v. Osborne* 2009 Chief Justice Roberts**

What did Osborne do? He was convicted of kidnapping and sexual assault. While he was being tried he tells his lawyer, the condom they found at the scene – have it tested for DNA. DNA Fairly new at that time. She said no b/c she thought he was guilty and didn’t want to get it tested. But he wanted it tested. He gets convicted and gets a ton of time. It gets to be 2007, and he gets out of jail and how does he get out of jail? He gets out of jail in 2007 b/c he said he did it. He violates his parole and so he gets re-arrested and now he is really motivated to get the DNA tested. He wanted the DNA test and he told them to do it so he could be proven innocent. The state says no. Now the defense attorneys can go get it tested on their own.

Issue: Does the due process clause of the 5th Amendment require the state to get the condom tested for DNA?

Chief Justice Roberts says no. SC said 46 states and the federal courts have taken legislative action that says you can get DNA testing in almost all situations. But the Alaska legislature had not addressed it. **Alaska courts had come up with a 3 prong test where you can get DNA testing if**

1. **the conviction is based solely on eye-witness testimony**
2. **there was real doubt if the D is the perpetrator**
3. **whether or not scientific testing would be conclusive**

You haven’t proven any of these they said to Osborne so he went to the federal court.

Justice Roberts said no shocking of the conscience and that the SC should not be a policy maker. The legislature should do this. Not the Supreme Court. The other justices thought Osborne was trying to game the system. Dissenters says yes it should be tested. If it proves an innocence then we should test it.

**Roberts said the 14th Amendments and 5th Amendments do not guarantee this.**

**UNITED STATES CONSTITUTION**

**Amendment I**. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

**Amendment II**. A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.

**Amendment III** .No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.

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

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

**Amendment VI*.***In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

**Amendment VII**. In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

**Amendment VIII**

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

**Amendment XIV**. Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

**Chapter 9 – Pretrial Release**

**Bai**l – temporary release of a prisoner in exchange for security given for a person’s promised appearance at a later hearing

**Eighth amendment** – Excessive bail shall not be required, excessive fines imposed, nor cruel and unusual punishments inflicted.

**TN Const Section 15** – all prisoners shall be bailable

***Stack v. Boyle*** – requires a hearing be held to set bail if State wants unusually high bail.

If defendant is being charged by a state, they are protected by both the state constitution and US Constitution.

***Preventive detention*** – the practice of incarcerating accused individuals before trial on the assumption that their release would not be in the best interest of society—specifically, that they would be likely to commit additional crimes if they were released.

**Twin Purposes of Bond** –

1. show up for court
2. ensure “the safety of any other person or the community”

***US v Salerno*** – primary concern of the government is the safety and lives of citizens, therefore, it does not violate the Due Process clause … if the issue is public safety, the judge does not have to grant bail at all.

p. 657 – **Substantive Due Process** – prevents government from engaging in conduct that “shock the conscience” or interferes with rights “implicit in the concept of ordered liberty”

p. 658 - **Procedural Due Process** – implemented in a fair manner

**Bail Reform Act of 1984** – if you are a danger, you can be held without bond.

**Three ways to make bail:**

1. Cash
2. Bail Bondsman
3. Property

**Release on Recognizance** – release on your promise that you will show up for court

# \*\*STACK V. BOYLE\*\*

#### United States Supreme Court 342 U.S. 1 (1951)

**Rule of Law**

**Bail set at an amount higher than that necessary to assure that the defendant will stand trial and submit to sentence if found guilty, is excessive under the Eighth Amendment.**

**Facts**

Stack and eleven others (defendants) were arrested for violating a federal statute. Bail was set anywhere between $2,500 and $100,000 dollars. The district court fixed bail at $50,000 for each defendant after the government moved to increase bail. The defendants moved to reduce bail, arguing the bail was excessive under the Eighth Amendment. The defendants presented evidence regarding their financial resources, family relationships, health, prior criminal records and other information. The government showed only that four others who had previously been convicted under the relevant federal statute had forfeited bail.

**Issue**

Is bail excessive where it is set for multiple defendants at a fixed amount significantly higher than that usually imposed for offenses with like penalties, and where the government has failed to establish the need for such a high bail?

**Holding and Reasoning (Vinson, C.J.)**

Yes. Bail is excessive and a violation of the Eighth Amendment when it is set at an amount greater than that necessary to ensure that the defendant will stand trial. In this case, the worst sentence the defendants could receive would be five years in jail and a $10,000 fine. The bail for offenses that carry a similar penalty is generally under $50,000. The government failed to show why such an excessive bail was necessary in this case to ensure that defendants appear for trial. The defendants can therefore move for a reduction of bail in the criminal proceeding.

**Concurrence (Jackson, J.)**

Each defendant is an individual in the eyes of the court. Therefore, when determining bail and the likelihood that the defendant will appear for trial, the court must consider the details of each defendant’s life, including his family relations, character, financial ability, and prior record.

In ***Stack v. Boyle*,** the Court held that a defendant’s bail amount had to be reasonably calculated on an individualized bases to assure the defendant’s court appearances.

**Key Terms:**

**Eighth Amendment -** Prohibits the imposition of excessive bail, excessive fines, or cruel and unusual punishments on criminal defendants.

# \*\*UNITED STATES v. SALERNO\*\*

#### United States Supreme Court 481 U.S. 739 (1987)

#### Rule of Law

**An arrestee may be detained prior to trial if the government’s regulatory interest in public safety is legitimate and compelling, provided there are procedural protections in place to safeguard the arrestee’s liberty interests.**

#### Facts

Congress passed the Bail Reform Act in 1984. The statute allowed a federal court to detain an arrestee before trial if the government could show by clear and convincing evidence that the safety of others would be jeopardized upon the arrestee's release. The statute required an adversary hearing, during which the arrestee had the right to have an attorney present and the right to testify and present his own witnesses, proffer evidence, and cross-examine the government’s witnesses. The decision whether to detain the arrestee was left to a judicial officer, but Congress outlined relevant factors to consider. Anthony Salerno (defendant) and another man were arrested after being charged on a 29-count indictment alleging violations of the Racketeer Influenced and Corrupt Organizations Act (RICO). At Salerno’s arraignment, the government moved to have him detained pursuant to the Bail Reform Act. At the hearing, the government proffered evidence that Salerno was the “boss” of a powerful crime family who had furthered the crime family's illegal enterprises through violent means and had personally participated in two murder conspiracies. The district court granted the government’s detention motion, concluding that the government had met its burden of showing that no conditions of Salerno's release would ensure the safety of others or the community. The court of appeals reversed, holding that the Bail Reform Act was unconstitutional on its face as a violation of due process. The United States Supreme Court granted certiorari.

#### Issue

May an arrestee be detained prior to trial if the government’s regulatory interest in public safety is legitimate and compelling, and there are procedural protections in place to safeguard the arrestee’s liberty interests?

#### Holding and Reasoning (Rehnquist, C.J.)

Yes. An arrestee may be detained prior to trial if the government’s regulatory interest in public safety is legitimate and compelling, provided there are procedural protections in place to safeguard the arrestee’s liberty interests. A statute that permits an arrestee to be detained prior to trial is not inconsistent with the Due Process Clause of the Fifth Amendment or with the Excessive Bail Clause of the Eighth Amendment. With respect to due process, if the government has a legitimate and compelling interest in preventing crime, the state's regulatory interest outweighs individual liberty. For example, in *Schall v. Martin*, 467 U.S. 253 (1984), a statute was upheld that permitted the pre-trial detention of a juvenile who was arrested for any crime provided the state could show he was likely to commit some other crime. With respect to the Eighth Amendment's Excessive Bail Clause, the right to release on bail is not absolute. Moreover, the Eighth Amendment allows the government to pursue other compelling interests besides simply preventing flight of arrestees. This was made clear in *Carlson v. Landon*, 342 U.S. 524 (1952). In *Carlson*, the arrestees were all facing deportation and were detained pending trial because there was concern that their release would “endanger the welfare and safety of the United States.” Therefore, although the Eighth Amendment prohibits excessive bail, it does not prohibit detention if Congress decides it is appropriate. In this case, although Salerno argues that the Bail Reform Act violates due process, this is not so. In enacting the statute, Congress intended to prevent crime by arrestees, which is a legitimate and compelling goal. The statute is a carefully crafted regulatory tool and does not impose punishment until the arrestee has a fair trial. Moreover, the statute has plenty of procedural safeguards in place to ensure that an arrestee is not needlessly deprived of his liberty. The prosecution has a high burden to satisfy, and the arrestee’s rights are protected throughout the adversary hearing, as he may confront his accusers and have the assistance of counsel. Accordingly, the Bail Reform Act is not facially invalid under the Due Process Clause. Salerno also argues that the Bail Reform Act violates the Excessive Bail Clause of the Eighth Amendment, but this is also not the case. Salerno asserts that he has the right to bail unless it is likely he will fail to appear for trial. However, preventing Salerno from fleeing before trial is not the government's only concern here. Rather, the government's compelling interest in ensuring public safety is sufficient to warrant Salerno's continued detention, and the Eighth Amendment does not require his release on bail. Accordingly, the appellate court's judgment is reversed.

#### Dissent (Stevens, J.)

Justice Marshall is correct that the Act is unconstitutional. A pending indictment can have no impact on deciding the future dangerousness of an individual and whether he should be immediately detained. However, there may be times when the government’s interest in public safety will trump individual liberties and justify the detention of a person who has not yet committed any crime.

#### Dissent (Marshall, J.)

The Court’s analysis creates a false dichotomy, distancing the due-process argument from the Eighth Amendment argument. Instead, both due process and the Eight Amendment protect the same fundamental right: the right to be presumed innocent until proven guilty. Under the Bail Reform Act, an indictment serves to act as evidence that the defendant is guilty of the crime with which he is charged or, if he is freed on bail, as evidence that he will be soon be guilty of another crime. This is impermissible. Furthermore, when a person has been arrested, the state has established probable cause that gives the government the power to try the arrestee. This includes the power to assure that the arrestee will not evade justice. Therefore, the state’s power to detain an arrestee for fear he may not appear at trial is tied to its power to try cases and is permissible under the Eight Amendment. However, the detention authorized by the Bail Reform Act bears no relation to the state’s power to try the charges on which the defendant has been arrested. Therefore, the state’s interests are outside the scope of those outlined by the Eighth Amendment. The Bail Reform Act is unconstitutional.

After ***United States v. Salerno*** upheld the Bail Reform Act, pretrial detention rates have soared in the United States.

**Key Terms:**

**Eighth Amendment -** Prohibits the imposition of excessive bail, excessive fines, or cruel and unusual punishments on criminal defendants.

**Fifth Amendment** - An amendment added to the U.S. Constitution as part of the Bill of Rights that provides important protections from government actions, including a guarantee that no person will be required to answer for a capital crime unless first indicted by a grand jury; no one will suffer double jeopardy; no one must testify against himself or herself; no one will be deprived of life, liberty, or property without due process of law; and no property will be taken for public use without just compensation.

**Gerstein v. Pugh**

United States Supreme Court  
420 U.S. 103 (1975)

**Rule of Law**

**A defendant charged with a crime by information may not be detained for an extended period of time without a judicial determination of probable cause.**

**Schall v. Martin**

104 S.Ct. 2403

Supreme Court of the United States

**Ellen SCHALL, Commissioner of New York City Department of Juvenile Justice**

**v.**

**Gregory MARTIN et al.**

[**Robert ABRAMS**](https://1.next.westlaw.com/Search/Results.html?query=advanced%3a+OAID(5030184892)&saveJuris=False&contentType=BUSINESS-INVESTIGATOR&startIndex=1&contextData=(sc.Default)&categoryPageUrl=Home%2fCompanyInvestigator&originationContext=document&transitionType=DocumentItem)**, Attorney General of New York**

**v.**

**Gregory MARTIN et al.**

Nos. 82-1248, 82-1278.

Argued Jan. 17, 1984.Decided June 4, 1984.

**Synopsis**

Juveniles who had been detained under a section of New York Family Court Act authorizing pretrial detention brought habeas corpus action seeking declaratory judgment that the statute in question violated, inter alia, the due process clause. [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic41e77a0556111d997e0acd5cbb90d3f&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Search))[The United States District Court for the Southern District of New York, 513 F.Supp. 691](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981117742&pubNum=0000345&originatingDoc=I64db52689c1d11d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), struck down the statute. On appeal, the United States Court of Appeals for the Second Circuit, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I18f7f9b2930e11d9bc61beebb95be672&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Search))[689 F.2d 365,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1982142098&pubNum=350&originatingDoc=I64db52689c1d11d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))affirmed, and probable jurisdiction was noted, [103 S.Ct. 1765.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1983215484&pubNum=708&originatingDoc=I64db52689c1d11d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) The Supreme Court, Justice Rehnquist, held that section of New York Family Court Act authorizing pretrial detention of accused juvenile delinquent based on finding that there was “serious risk” that juvenile “may before the return date commit an act which if committed by an adult would constitute a crime” did not violate due process clause.

Reversed.

Justice Marshall filed dissenting opinion in which Justices Brennan and Stevens joined.

**Stack v. Boyle**

#### United States Supreme Court 342 U.S. 1 (1951)

**Rule of Law**

**Bail set at an amount higher than that necessary to assure that the defendant will stand trial and submit to sentence if found guilty, is excessive under the Eighth Amendment.**

# Carlson v. Landon

72 S.Ct. 525

Supreme Court of the United States

**CARLSON et al.**

**v.**

**LANDON, District Director of Immigration & Naturalization, United States Department of Justice.**

**BUTTERFIELD, Director of Immigration & Naturalization Service, Detroit, Mich.**

**v.**

**ZYDOK.**

Nos. 35, 136.

Argued Nov. 26, 1951.Decided March 10, 1952.Rehearing Denied June 9, 1952.See [343 U.S. 988, 72 S.Ct. 1069](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1952201529&pubNum=708&originatingDoc=Id4d391599c1d11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

**Synopsis**

Habeas corpus proceedings by four aliens against Herman R. Landon, District Director of Immigration and Naturalization, United States Department of Justice, and a habeas corpus proceeding by another alien against James W. Butterfield, Director of the Immigration and Naturalization Service, Detroit, involving question of detention of aliens without bail in deportation proceedings. To review a judgment of the Court of Appeals in the first case, [187 F.2d 991,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1951116591&pubNum=350&originatingDoc=Id4d391599c1d11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) Stephens, Circuit Judge, affirming an order of the District Court, Ben Harrison, J., denying the writ and to review a judgment of the Court of Appeals in the second case, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Iecc004568e5d11d98e8fb00d6c6a02dd&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Search))[187 F.2d 802,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1951120446&pubNum=350&originatingDoc=Id4d391599c1d11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) Hicks, Chief Judge, reversing an order of the district court, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I58a0f51c54a911d997e0acd5cbb90d3f&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Search))[94 F.Supp. 338,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1951120447&pubNum=345&originatingDoc=Id4d391599c1d11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) Thomas P. Thornton, J., which denied the writ, the petitioners in the first case and defendant in the second case brought certiorari. The Supreme Court, Mr. Justice Reed, held that there was no abuse of discretion in denial of bail, that placing of discretion as to grant of bail in Attorney General was not an unconstitutional delegation of legislative authority, that denial of bail did not violate constitutional prohibition against excessive bail and that, on rearrest of an alien who had been released on bail, a new warrant should be obtained.

Judgment in the first case reaffirmed and in the second case vacated and cause remanded with directions.

Mr. Justice Black, Mr. Justice Frankfurter, Mr. Justice Douglas, and Mr. Justice Burton dissented.

**TCA 40-11-101 et seq. (especially 40-11-118)**

T. C. A. § 40-11-101

**§ 40-11-101. Short title**

[Currentness](https://1.next.westlaw.com/Document/N6267C820CCE411DB8F04FB3E68C8F4C5/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.Search)&userEnteredCitation=TCA+40-11-101#co_anchor_I9E2B57701F9911EB8358F9CDD67CFA07)

Sections 40-11-101 -- [40-11-144](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS40-11-144&originatingDoc=N6267C820CCE411DB8F04FB3E68C8F4C5&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) shall be known as and may be cited as the “Release from Custody and Bail Reform Act of 1978.”

**Effective: July 1, 2018**

T. C. A. § 40-11-118

**§ 40-11-118. Bail amount; determination; liability of surety**

[Currentness](https://1.next.westlaw.com/Document/NFB587850850511E89FCD996865FEF1B2/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.UserEnteredCitation)&userEnteredCitation=TCA+40-11-118#co_anchor_I6755A1801F9711EB8358F9CDD67CFA07)

(a) Any defendant for whom bail has been set may execute the bail bond and deposit with the clerk of the court before which the proceeding is pending a sum of money in cash equal to the amount of the bail. Upon depositing this sum, the defendant shall be released from custody subject to the conditions of the bail bond. Bail shall be set as low as the court determines is necessary to reasonably assure the appearance of the defendant as required.

(b) In determining the amount of bail necessary to reasonably assure the appearance of the defendant while at the same time protecting the safety of the public, the magistrate shall consider the following:

(1) The defendant's length of residence in the community;

(2) The defendant's employment status and history and financial condition;

(3) The defendant's family ties and relationships;

(4) The defendant's reputation, character and mental condition;

(5) The defendant's prior criminal record, record of appearance at court proceedings, record of flight to avoid prosecution or failure to appear at court proceedings;

(6) The nature of the offense and the apparent probability of conviction and the likely sentence;

(7) The defendant's prior criminal record and the likelihood that because of that record the defendant will pose a risk of danger to the community;

(8) The identity of responsible members of the community who will vouch for the defendant's reliability; however, no member of the community may vouch for more than two (2) defendants at any time while charges are still pending or a forfeiture is outstanding; and

(9) Any other factors indicating the defendant's ties to the community or bearing on the risk of the defendant's willful failure to appear.

(c)(1) Whenever a court's judgment includes the requirement that the defendant pay a fine or cost, the court may require that the payment of the fine or cost be secured by surety bond or other appropriate undertaking if such defendant has a history of past due fines and costs. A parent, guardian or other responsible party may be permitted to act as surety in order to guarantee the payment of the fine or cost.

(2) Notwithstanding any other provision of law to the contrary, unless the surety executes a bond or agreement which specifically makes the surety liable for the fine, cost, or restitution, no surety shall be held liable for the fine, cost or restitution without the surety's consent.

(d)(1) When the court is determining the amount and conditions of bail to be imposed upon a defendant, if the defendant is charged with a violation of [§ 55-10-401](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS55-10-401&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), and has one (1) or more prior convictions for the offense of driving under the influence of an intoxicant under [§ 55-10-401](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS55-10-401&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), vehicular assault under [§ 39-13-106](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-106&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), aggravated vehicular assault under [§ 39-13-115](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-115&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), vehicular homicide under [§ 39-13-213(a)(2)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-213&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=SP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_d86d0000be040), aggravated vehicular homicide under [§ 39-13-218](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-218&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), or a prior conviction in another state that qualifies under [§ 55-10-405(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS55-10-405&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=SP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_a83b000018c76), the court shall consider the use of special conditions for the defendant, including, but not limited to, the conditions set out in subdivision (d)(2).

(2) The special conditions the court shall consider pursuant to subdivision (d)(1) are:

(A) The use of ignition interlock devices;

(B) The use of transdermal monitoring devices or other alternative alcohol monitoring devices. However, if the court orders the use of a monitoring device on or after July 1, 2016, and determines the defendant is indigent, the court shall order the portion of the costs of the device that the defendant is unable to pay be paid by the electronic monitoring indigency fund, established in [§ 55-10-419](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS55-10-419&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation));

(C) The use of electronic monitoring with random alcohol or drug testing; or

(D) Pretrial residency in an in-patient alcohol or drug rehabilitation center.

(3) As used in this subsection (d), “court” includes any person authorized by [§ 40-11-106](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS40-11-106&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) to take bail.

(e) After an inquiry pursuant to [§ 40-7-123](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS40-7-123&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) into the citizenship status of a defendant who is arrested for causing a traffic accident resulting in either the death or serious bodily injury, as defined in [§ 55-50-502](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS55-50-502&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), of another while driving without a valid driver license and evidence of financial responsibility as required by [§ 55-12-139](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS55-12-139&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), if it is determined that the defendant is not lawfully present in the United States, when determining the amount of bail, the defendant may be deemed a risk of flight.

(f)(1) If the judge or magistrate determines that a person charged with vehicular assault under [§ 39-13-106](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-106&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), vehicular homicide under [§ 39-13-213(a)(2)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-213&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=SP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_d86d0000be040), or aggravated vehicular homicide under [§ 39-13-218](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-218&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) on or after July 1, 2015, has a prior alcohol-related conviction, the use of a transdermal monitoring device shall be a condition of the person's bail agreement.

(2) All expenses associated with a person being subject to a transdermal monitoring device as a condition of bail shall be paid by that person. If the person believes there are legitimate medical reasons why the person is unable to be subject to the order, those reasons may be presented at the person's first appearance before a general sessions court judge or judge of a court of record. After hearing from the person subject to monitoring, the judge may waive, modify, or affirm an order requiring that person to be subject to transdermal monitoring.

(3) The offender shall choose an entity from a list approved by the court to provide, administer, and monitor the transdermal device ordered as a condition of bail. However, any entity placed on the approved list must have the ability to monitor the person's device on a daily basis and report any violation to the court having jurisdiction over the person's case by no later than the business day next following the violation. The person on bail shall remain subject to transdermal monitoring for the duration of the time the person is released on bail, unless the judge or magistrate specifically provides otherwise.

(4) If the report from the transdermal monitoring entity to the judge indicates that the person being monitored violated the conditions of release, the judge may issue a capias for the person's arrest for violation of bond conditions.

(5) As used in this subsection (f):

(A) “Alcohol-related conviction” means the person has been convicted prior to the instant conviction of a violation of [§ 39-13-213(a)(2)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-213&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=SP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_d86d0000be040), [§ 39-13-106](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-106&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), [§ 39-13-218](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-218&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), or [§ 55-10-401](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS55-10-401&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)); and

(B) “Transdermal monitoring device” means any device or instrument that is attached to the person, designed to automatically test the alcohol or drug content in a person by contact with the person's skin at least once per one-half ( ½ ) hour regardless of the person's location, and which detects the presence of alcohol or drugs and tampering, obstructing, or removing the device.

(g)(1) If a person is required as a special bond condition to submit to monitoring pursuant to subdivisions (d)(2)(A)-(C), subsection (f), [§ 40-11-150](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS40-11-150&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), or [§ 40-11-152](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS40-11-152&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), it is a Class B misdemeanor:

(A) For that person to knowingly tamper with, remove, or vandalize the monitoring device; or

(B) For any person to knowingly aid, abet, or assist a person in tampering with, removing, or vandalizing a monitoring device.

(2) If an entity monitoring the device becomes aware that there has been an attempt to either tamper with, disable, remove, or otherwise make the device ineffective, or if the bonding agent becomes aware the person has violated any bond condition ordered by the court, then the entity monitoring the device shall promptly give notice of the violation to the court with jurisdiction over the person and the surety of the person's bail bond.

(3) The court shall take such action as the case may require, including, but not limited to, the revocation of bail. Additionally, the violation also constitutes a grounds for surrender under [§ 40-11-132](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS40-11-132&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)).

**State v. Burgins, 464 S.W.3d 298 (Tenn. 2015)**

**State v. Burgins**

464 S.W.3d 298

Supreme Court of Tennessee,

AT NASHVILLE.

**STATE of Tennessee**

**v.**

**Latickia Tashay BURGINS**

No. E2014–02110–SC–R8–CO

February 5, 2015 SessionFiled April 7, 2015

**Synopsis**

**Background:** State filed motion to revoke bail of defendant who was indicted on 19 counts for various offenses including attempted first-degree murder. The Criminal Court, Knox County, No. 101255, [Bobby R. McGee](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0142526101&originatingDoc=Ifba71850dd5811e481dde0b676a6191e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ifba71850dd5811e481dde0b676a6191e), J., granted motion. The Court of Appeals reversed, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I01744c807b8611e4a795ac035416da91&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Search))[2014 WL 6792690](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2034908135&pubNum=0000999&originatingDoc=Ifba71850dd5811e481dde0b676a6191e&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). State's application for review was granted.

[**Holding:**](https://1.next.westlaw.com/Document/Ifba71850dd5811e481dde0b676a6191e/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)#co_anchor_F132035768928) The Supreme Court, [Sharon G. Lee](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301682101&originatingDoc=Ifba71850dd5811e481dde0b676a6191e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ifba71850dd5811e481dde0b676a6191e), C.J., **held that right to pretrial bail was not absolute and defendant's alleged commission of criminal activity while released on bond could forfeit the right.**

Reversed and remanded.

Evidentiary Hearing with testimony that she created a new crime to revoke the bond by a preponderance of the evidence. If the Judge finds you created the new crime while on bail for the current crime, bail can be revoked (or forfeited by the defendant), new conditions implemented, or raising the bond if an issue of public safety.

**TCA and other sources cited in State v. Burgins**

**Effective: January 1, 2012**

T. C. A. § 40-11-141

**§ 40-11-141. Release; trial**

[Currentness](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS40-11-141&originatingDoc=Ifba71850dd5811e481dde0b676a6191e&refType=SP&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)#co_anchor_IDBFD73D01F9911EB8358F9CDD67CFA07)

(a) A defendant released before trial shall continue on release during trial or release pending trial under the same terms and conditions as were previously imposed, unless the court determines pursuant to [§ 40-11-137](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS40-11-137&originatingDoc=N3C223640CA7E11E0BB26849989A510DE&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)) or [§ 40-11-144](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS40-11-144&originatingDoc=N3C223640CA7E11E0BB26849989A510DE&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)) that other terms and conditions or termination of release are necessary to assure the defendant's presence during trial, or to assure that the defendant's conduct will not obstruct the orderly and expeditious progress of the trial.

(b) If after the defendant is released upon personal recognizance, an unsecured personal appearance bond, or any other bond approved by the court, the defendant violates a condition of release, is charged with an offense committed during the defendant's release, or engages in conduct which results in the obstruction of the orderly and expeditious progress of the trial or other proceedings, then the court may revoke and terminate the defendant's bond and order the defendant held without bail pending trial or without release during trial.

TN Const. Art. 1, § 15

**§ 15. Bail; habeas corpus**

[Currentness](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000305&cite=TNCNART1S15&originatingDoc=Ifba71850dd5811e481dde0b676a6191e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)#co_anchor_IBD5A63E0404911EB9C8ADFADB72B090E)

That all prisoners shall be bailable by sufficient sureties, unless for capital offences, when the proof is evident, or the presumption great. And the privilege of the writ of Habeas Corpus shall not be suspended, unless when in case of rebellion or invasion, the General Assembly shall declare the public safety requires it.

Tennessee Rules of Appellate Procedure, Rule 8

**Rule 8. Release in Criminal Cases**

[Currentness](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1008880&cite=TNRRAPR8&originatingDoc=Ifba71850dd5811e481dde0b676a6191e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)#co_anchor_IA50B4AA0E12D11EAB9E2CD0ACABD5002)

**(a) Review of Release Orders by Defendant.** Before or after conviction the prosecution or defendant may obtain review of an order entered by a trial court from which an appeal lies to the Supreme Court or Court of Criminal Appeals granting, denying, setting or altering conditions of defendant's release. Before conviction, as a prerequisite to review, a written motion for the relief sought on review shall first be presented to the trial court. After conviction and after the action is pending on appeal, a written motion may be made either in the trial court in which judgment was entered or in the appellate court to which the appeal has been taken. On entry of an order granting or denying a motion for a change in bail or other conditions of release, the trial court shall state in writing the reasons for the action taken.

Review may be had at any time before an appeal of any conviction by filing a motion for review in the Court of Criminal Appeals or, if an appeal is pending, by filing a motion for review in the appellate court to which the appeal has been taken. The motion for review shall be accompanied by a copy of the motion filed in the trial court, any answer in opposition thereto, and the trial court's written statement of reasons, and shall state: (1) the court that entered the order, (2) the date of the order, (3) the crime or crimes charged or of which defendant was convicted, (4) the amount of bail or other conditions of release, (5) the arguments supporting the motion, and (6) the relief sought. Review shall be had without briefs after reasonable notice to the other parties, who shall be served with a copy of the motion. The other parties may promptly file an answer. The court, on its own motion or on motion of any party, may order preparation of a transcript of all proceedings had in the trial court on the question of release. No oral argument shall be permitted except when ordered on the court's own motion. Review shall be completed promptly.

A party may appeal a Court of Criminal Appeals' decision on a motion for review by filing a motion for review in the Supreme Court within 15 days of the filing of the Court of Criminal Appeals order. The motion shall be accompanied by a copy of the trial court's order, the motion filed in the Court of Criminal Appeals, the order of the Court of Criminal Appeals, and all other documents (including transcripts) filed in the Court of Criminal Appeals on the issue of release. Review shall be had without briefs after reasonable notice to the other parties, who shall be served with a copy of the motion. The other parties may file an answer within 10 days of the filing of the motion in the Supreme Court. No oral argument shall be permitted except when ordered on the court's own motion. Review shall be completed promptly.

**(b) Release of Defendant Pending Appeal by the State.** A defendant shall not be held in jail or to bail during the pendency of an appeal by the state, or an application for permission to appeal by the state, unless there are compelling reasons for the defendant's continued detention or being held to bail.

**(c) Release of Defendant Pending Review in the Supreme Court.** Upon affirmance of the conviction of a defendant in the Court of Criminal Appeals, the defendant may be admitted to bail on bond pending the filing and disposition of an application for permission to appeal to the Supreme Court under [rule 11](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1008880&cite=TNRRAPR11&originatingDoc=NF78A37B003A511DCA094A3249C637898&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)) upon such terms and under such conditions as shall be fixed by the Court of Criminal Appeals.

**Effective: July 1, 2018**

T. C. A. § 40-11-118

**§ 40-11-118. Bail amount; determination; liability of surety**

[Currentness](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS40-11-118&originatingDoc=Ifba71850dd5811e481dde0b676a6191e&refType=SP&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)#co_anchor_I6755A1801F9711EB8358F9CDD67CFA07)

(a) Any defendant for whom bail has been set may execute the bail bond and deposit with the clerk of the court before which the proceeding is pending a sum of money in cash equal to the amount of the bail. Upon depositing this sum, the defendant shall be released from custody subject to the conditions of the bail bond. Bail shall be set as low as the court determines is necessary to reasonably assure the appearance of the defendant as required.

(b) In determining the amount of bail necessary to reasonably assure the appearance of the defendant while at the same time protecting the safety of the public, the magistrate shall consider the following:

(1) The defendant's length of residence in the community;

(2) The defendant's employment status and history and financial condition;

(3) The defendant's family ties and relationships;

(4) The defendant's reputation, character and mental condition;

(5) The defendant's prior criminal record, record of appearance at court proceedings, record of flight to avoid prosecution or failure to appear at court proceedings;

(6) The nature of the offense and the apparent probability of conviction and the likely sentence;

(7) The defendant's prior criminal record and the likelihood that because of that record the defendant will pose a risk of danger to the community;

(8) The identity of responsible members of the community who will vouch for the defendant's reliability; however, no member of the community may vouch for more than two (2) defendants at any time while charges are still pending or a forfeiture is outstanding; and

(9) Any other factors indicating the defendant's ties to the community or bearing on the risk of the defendant's willful failure to appear.

(c)(1) Whenever a court's judgment includes the requirement that the defendant pay a fine or cost, the court may require that the payment of the fine or cost be secured by surety bond or other appropriate undertaking if such defendant has a history of past due fines and costs. A parent, guardian or other responsible party may be permitted to act as surety in order to guarantee the payment of the fine or cost.

(2) Notwithstanding any other provision of law to the contrary, unless the surety executes a bond or agreement which specifically makes the surety liable for the fine, cost, or restitution, no surety shall be held liable for the fine, cost or restitution without the surety's consent.

(d)(1) When the court is determining the amount and conditions of bail to be imposed upon a defendant, if the defendant is charged with a violation of [§ 55-10-401](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS55-10-401&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)), and has one (1) or more prior convictions for the offense of driving under the influence of an intoxicant under [§ 55-10-401](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS55-10-401&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)), vehicular assault under [§ 39-13-106](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-106&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)), aggravated vehicular assault under [§ 39-13-115](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-115&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)), vehicular homicide under [§ 39-13-213(a)(2)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-213&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=SP&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)#co_pp_d86d0000be040), aggravated vehicular homicide under [§ 39-13-218](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-218&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)), or a prior conviction in another state that qualifies under [§ 55-10-405(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS55-10-405&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=SP&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)#co_pp_a83b000018c76), the court shall consider the use of special conditions for the defendant, including, but not limited to, the conditions set out in subdivision (d)(2).

(2) The special conditions the court shall consider pursuant to subdivision (d)(1) are:

(A) The use of ignition interlock devices;

(B) The use of transdermal monitoring devices or other alternative alcohol monitoring devices. However, if the court orders the use of a monitoring device on or after July 1, 2016, and determines the defendant is indigent, the court shall order the portion of the costs of the device that the defendant is unable to pay be paid by the electronic monitoring indigency fund, established in [§ 55-10-419](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS55-10-419&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink));

(C) The use of electronic monitoring with random alcohol or drug testing; or

(D) Pretrial residency in an in-patient alcohol or drug rehabilitation center.

(3) As used in this subsection (d), “court” includes any person authorized by [§ 40-11-106](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS40-11-106&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)) to take bail.

(e) After an inquiry pursuant to [§ 40-7-123](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS40-7-123&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)) into the citizenship status of a defendant who is arrested for causing a traffic accident resulting in either the death or serious bodily injury, as defined in [§ 55-50-502](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS55-50-502&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)), of another while driving without a valid driver license and evidence of financial responsibility as required by [§ 55-12-139](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS55-12-139&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)), if it is determined that the defendant is not lawfully present in the United States, when determining the amount of bail, the defendant may be deemed a risk of flight.

(f)(1) If the judge or magistrate determines that a person charged with vehicular assault under [§ 39-13-106](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-106&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)), vehicular homicide under [§ 39-13-213(a)(2)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-213&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=SP&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)#co_pp_d86d0000be040), or aggravated vehicular homicide under [§ 39-13-218](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-218&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)) on or after July 1, 2015, has a prior alcohol-related conviction, the use of a transdermal monitoring device shall be a condition of the person's bail agreement.

(2) All expenses associated with a person being subject to a transdermal monitoring device as a condition of bail shall be paid by that person. If the person believes there are legitimate medical reasons why the person is unable to be subject to the order, those reasons may be presented at the person's first appearance before a general sessions court judge or judge of a court of record. After hearing from the person subject to monitoring, the judge may waive, modify, or affirm an order requiring that person to be subject to transdermal monitoring.

(3) The offender shall choose an entity from a list approved by the court to provide, administer, and monitor the transdermal device ordered as a condition of bail. However, any entity placed on the approved list must have the ability to monitor the person's device on a daily basis and report any violation to the court having jurisdiction over the person's case by no later than the business day next following the violation. The person on bail shall remain subject to transdermal monitoring for the duration of the time the person is released on bail, unless the judge or magistrate specifically provides otherwise.

(4) If the report from the transdermal monitoring entity to the judge indicates that the person being monitored violated the conditions of release, the judge may issue a capias for the person's arrest for violation of bond conditions.

(5) As used in this subsection (f):

(A) “Alcohol-related conviction” means the person has been convicted prior to the instant conviction of a violation of [§ 39-13-213(a)(2)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-213&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=SP&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)#co_pp_d86d0000be040), [§ 39-13-106](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-106&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)), [§ 39-13-218](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-218&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)), or [§ 55-10-401](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS55-10-401&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)); and

(B) “Transdermal monitoring device” means any device or instrument that is attached to the person, designed to automatically test the alcohol or drug content in a person by contact with the person's skin at least once per one-half ( ½ ) hour regardless of the person's location, and which detects the presence of alcohol or drugs and tampering, obstructing, or removing the device.

(g)(1) If a person is required as a special bond condition to submit to monitoring pursuant to subdivisions (d)(2)(A)-(C), subsection (f), [§ 40-11-150](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS40-11-150&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)), or [§ 40-11-152](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS40-11-152&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)), it is a Class B misdemeanor:

(A) For that person to knowingly tamper with, remove, or vandalize the monitoring device; or

(B) For any person to knowingly aid, abet, or assist a person in tampering with, removing, or vandalizing a monitoring device.

(2) If an entity monitoring the device becomes aware that there has been an attempt to either tamper with, disable, remove, or otherwise make the device ineffective, or if the bonding agent becomes aware the person has violated any bond condition ordered by the court, then the entity monitoring the device shall promptly give notice of the violation to the court with jurisdiction over the person and the surety of the person's bail bond.

(3) The court shall take such action as the case may require, including, but not limited to, the revocation of bail. Additionally, the violation also constitutes a grounds for surrender under [§ 40-11-132](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS40-11-132&originatingDoc=NFB587850850511E89FCD996865FEF1B2&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)).

U.S.C.A. Const. Amend. VIII

**Amendment VIII. Excessive Bail, Fines, Punishments**

[Currentness](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOAMENDVIII&originatingDoc=Ifba71850dd5811e481dde0b676a6191e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.History*oc.Search)#co_anchor_I0AA520902DD511EBAF2FC37E037A0D49)

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

40-11-118 Bail amount; determination; liability of surety (Full Text below)

TCA 121 Cash Bail v Bail Bondsman

KNOW!: T. C. A. § 40-11-115 Release on Recognizance or unsecured bond Factors

(1) The defendant's length of residence in the community;

(2) The defendant's employment status and history, and financial condition;

(3) The defendant's family ties and relationships;

(4) The defendant's reputation, character and mental condition;

(5) The defendant's prior criminal record, including prior releases on recognizance or bail;

(6) The identity of responsible members of the community who will vouch for defendant's reliability;

(7) The nature of the offense and the apparent probability of conviction and the likely sentence, insofar as these factors are relevant to the risk of nonappearance; and

(8) Any other factors indicating the defendant's ties to the community or bearing on the risk of willful failure to appear.

KNOW **T. C. A. § 40-11-116** **Release; conditions**

If a defendant does not qualify for release under 115, then magistrate should impose the least onerous conditions that will insure the defendant likely to appear in court.

(1) Release the defendant into the care of some qualified person or organization responsible for supervising the defendant and assisting the defendant in appearing in court.

(2) Impose reasonable restrictions on the activities, movements, associations and residences of the defendant; and/or

(3) Impose any other reasonable restriction designed to assure the defendant's appearance, including, but not limited to, the deposit of bail pursuant to § 40-11-117

KNOW **T. C. A. § 40-11-118** Bail Amount; Determination Liability of Surety

(a) Any person charged with a bailable offense may, before a magistrate authorized to admit the person to bail, be ordered released pending trial on the person's personal recognizance or upon the execution of an unsecured appearance bond in an amount specified by the magistrate.

(b) In determining whether or not a person shall be released as provided in this section and that a release will reasonably assure the appearance of the person as required, the magistrate shall take into account:

(1) The defendant's length of residence in the community;

(2) The defendant's employment status and history, and financial condition;

(3) The defendant's family ties and relationships;

(4) The defendant's reputation, character and mental condition;

(5) The defendant's prior criminal record, including prior releases on recognizance or bail;

(6) The identity of responsible members of the community who will vouch for defendant's reliability;

(7) The nature of the offense and the apparent probability of conviction and the likely sentence, insofar as these factors are relevant to the risk of nonappearance; and

(8) Any other factors indicating the defendant's ties to the community or bearing on the risk of willful failure to appear.

Due Process – fair treatment through the normal judicial system, especially as a citizen's entitlement. (applicability of the Bill of Rights)

Shaw v. Martin – Supreme Court ruling pretrial detention of Juveniles is ok because they have lesser interest in liberty.

|  |  |
| --- | --- |
| **AMENDMENT VIII (1791)** Excessive bail shall not be required, excessive fines imposed, nor cruel and unusual punishments inflicted. | **Sec. 16**. Restrictions on bail, fines and punishment -- That excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted. |

**A. Bail:** The system of ***bail*** is the way courts have traditionally dealt with the problem of making sure that D shows up for trial. D is required to post an amount of money known as a "bail bond"; if he does not show up for trial, he forfeits this amount. [339 - 340]

**1. Right to non-excessive bail:** The [Eighth Amendment](http://www.lexis.com/research/xlink?searchtype=lxt&search=uscs+const+amend+8) (applicable in both state and federal proceedings) provides that ***"excessive bail shall not be required***.***"*** However, the Bail Clause does ***not*** give D a right to affordable bail in all situations — it merely means that when the court does set bail, it must not do so in an ***unduly high*** amount, judged on factors such as the seriousness of the offense, the weight of the evidence against D, D’s financial abilities and his character. (*Example:* If a judge were to set bail of $1 million for an indigent D accused of the non-violent crime of marijuana possession, this might be found to be "excessive" bail, in violation of the Eighth Amendment.) [340]

**a. Individualized consideration:** The guarantee against excessive bail means that the judge must consider D’s ***individual circumstances*** in fixing bail. The court may not consider the seriousness of the offense as the ***sole*** criterion (so that ability to pay, weight of the evidence, character of D, etc. must all be considered). [340]

**b. Defendant’s ability to pay:** The fact that the defendant ***cannot afford*** the bail set in the particular case does ***not*** automatically make the bail "excessive" — D’s financial resources are merely one factor to be considered. [340]

**B. Preventive detention:** A jurisdiction may decide that bail will simply ***not be allowed*** at all for certain types of offenses. That is, the state or federal government may set up a ***"preventive detention"*** scheme, whereby certain types of defendants are automatically held without bail until trial. But a preventive detention scheme will violate the [Eighth Amendment](http://www.lexis.com/research/xlink?searchtype=lxt&search=uscs+const+amend+8) if its procedures do not ensure that only those defendants who are genuinely dangerous or likely to flee are denied release. [341 - 342]

**1. Factors to be considered:** The jurisdiction may, of course, consider D’s likelihood of ***flight*** before trial as a factor in whether to deny bail entirely. But the jurisdiction may consider other factors as well, most notably the likelihood that D will, if released before trial, commit ***additional crimes***.

**2. Individualized circumstances of defendant:** A preventive detention scheme probably must give D the opportunity for a ***hearing***, at which D’s ***individual circumstances*** (e.g., his dangerous past tendencies, his community ties, his past convictions, etc.) may be considered. (*Example:* If a state were to provide that bail should automatically be denied without a hearing, and preventive detention ordered, for any defendant charged with any act of murder, this mandatory scheme would almost certainly violate the Bail Clause.) [341]

**Bail Reform Act 1984 (Complete)**

# 18 U.S. Code § 3142 - Release or detention of a defendant pending trial

**(a)In General.—**Upon the appearance before a [judicial officer](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1310131767-833647310&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) of a person charged with an[offense,](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1548815702-833648272&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) the [judicial officer](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1310131767-833647310&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) shall issue an order that, pending trial, the person be—

**(1)** released on personal recognizance or upon execution of an unsecured appearance bond, under subsection (b) of this section;

**(2)** released on a condition or combination of conditions under subsection (c) of this section;

**(3)** temporarily detained to permit revocation of conditional release, deportation, or exclusion under subsection (d) of this section; or

**(4)** detained under subsection (e) of this section.

**(b)Release on Personal Recognizance or Unsecured Appearance Bond.—**

The [judicial officer](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1310131767-833647310&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) shall order the pretrial release of the person on personal recognizance, or upon execution of an unsecured appearance bond in an amount specified by the court, subject to the condition that the person not commit a Federal,[State,](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-80204913-833647314&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) or local crime during the period of release and subject to the condition that the person cooperate in the collection of a DNA sample from the person if the collection of such a sample is authorized pursuant to section 3 of the [DNA Analysis Backlog Elimination Act of 2000](https://www.law.cornell.edu/topn/dna_analysis_backlog_elimination_act_of_2000) ([42 U.S.C. 14135a](https://www.law.cornell.edu/uscode/text/42/14135a)),[[1]](https://www.law.cornell.edu/uscode/text/18/3142" \l "fn002227) unless the[judicial officer](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1310131767-833647310&term_occur=999&term_src=)determines that such release will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community.

**(c)Release on Conditions.—**

**(1)**If the [judicial officer](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1310131767-833647310&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) determines that the release described in subsection (b) of this section will not reasonably assure the appearance of the person as required or will endanger the safety of any other person or the community, such [judicial officer](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1310131767-833647310&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) shall order the pretrial release of the person—

**(A)** subject to the condition that the person not commit a Federal, [State](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-80204913-833647314&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142), or local crime during the period of release and subject to the condition that the person cooperate in the collection of a DNA sample from the person if the collection of such a sample is authorized pursuant to section 3 of the [DNA Analysis Backlog Elimination Act of 2000](https://www.law.cornell.edu/topn/dna_analysis_backlog_elimination_act_of_2000) ([42 U.S.C. 14135a](https://www.law.cornell.edu/uscode/text/42/14135a)); 1 and

**(B)**subject to the least restrictive further condition, or combination of conditions, that such [judicial officer](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1310131767-833647310&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) determines will reasonably assure the appearance of the person as required and the safety of any other person and the community, which may include the condition that the person—

**(i)** remain in the custody of a designated person, who agrees to assume supervision and to report any violation of a release condition to the court, if the designated person is able reasonably to assure the [judicial officer](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1310131767-833647310&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) that the person will appear as required and will not pose a danger to the safety of any other person or the community;

**(ii)** maintain employment, or, if unemployed, actively seek employment;

**(iii)** maintain or commence an educational program;

**(iv)** abide by specified restrictions on personal associations, place of abode, or travel;

**(v)** avoid all contact with an alleged victim of the crime and with a potential witness who may testify concerning the [offense](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1548815702-833648272&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142);

**(vi)** report on a regular basis to a designated law enforcement agency, pretrial services agency, or other agency;

**(vii)** comply with a specified curfew;

**(viii)** refrain from possessing a firearm, destructive device, or other dangerous weapon;

**(ix)** refrain from excessive use of alcohol, or any use of a narcotic drug or other controlled substance, as defined in section 102 of the [Controlled Substances Act](https://www.law.cornell.edu/topn/controlled_substances_act) ([21 U.S.C. 802](https://www.law.cornell.edu/uscode/text/21/802)), without a prescription by a licensed medical practitioner;

**(x)** undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and remain in a specified institution if required for that purpose;

**(xi)** execute an agreement to forfeit upon failing to appear as required, property of a sufficient unencumbered value, including money, as is reasonably necessary to assure the appearance of the person as required, and shall provide the court with proof of ownership and the value of the property along with information regarding existing encumbrances as the judicial office may require;

**(xii)** execute a bail bond with solvent sureties; who will execute an agreement to forfeit in such amount as is reasonably necessary to assure appearance of the person as required and shall provide the court with information regarding the value of the assets and liabilities of the surety if other than an approved surety and the nature and extent of encumbrances against the surety’s property; such surety shall have a net worth which shall have sufficient unencumbered value to pay the amount of the bail bond;

**(xiii)** return to custody for specified hours following release for employment, schooling, or other limited purposes; and

**(xiv)** satisfy any other condition that is reasonably necessary to assure the appearance of the person as required and to assure the safety of any other person and the community.

In any case that involves a minor victim under section [1201](https://www.law.cornell.edu/uscode/text/18/1201), [1591](https://www.law.cornell.edu/uscode/text/18/1591), [2241](https://www.law.cornell.edu/uscode/text/18/2241), [2242](https://www.law.cornell.edu/uscode/text/18/2242), [2244(a)(1)](https://www.law.cornell.edu/uscode/text/18/2244#a_1), [2245](https://www.law.cornell.edu/uscode/text/18/2245), [2251](https://www.law.cornell.edu/uscode/text/18/2251), [2251A](https://www.law.cornell.edu/uscode/text/18/2251A), [2252(a)(1)](https://www.law.cornell.edu/uscode/text/18/2252#a_1), [2252(a)(2)](https://www.law.cornell.edu/uscode/text/18/2252#a_2), [2252(a)(3)](https://www.law.cornell.edu/uscode/text/18/2252#a_3), [2252A(a)(1)](https://www.law.cornell.edu/uscode/text/18/2252A#a_1), [2252A(a)(2)](https://www.law.cornell.edu/uscode/text/18/2252A#a_2), [2252A(a)(3)](https://www.law.cornell.edu/uscode/text/18/2252A#a_3), [2252A(a)(4)](https://www.law.cornell.edu/uscode/text/18/2252A#a_4), [2260](https://www.law.cornell.edu/uscode/text/18/2260), [2421](https://www.law.cornell.edu/uscode/text/18/2421), [2422](https://www.law.cornell.edu/uscode/text/18/2422), [2423](https://www.law.cornell.edu/uscode/text/18/2423), or [2425](https://www.law.cornell.edu/uscode/text/18/2425) of this title, or a failure to register[offense](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1548815702-833648272&term_occur=999&term_src=)under [section 2250 of this title](https://www.law.cornell.edu/uscode/text/18/2250), any release order shall contain, at a minimum, a condition of electronic monitoring and each of the conditions specified at subparagraphs (iv), (v), (vi), (vii), and (viii).

**(2)** The [judicial officer](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1310131767-833647310&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) may not impose a financial condition that results in the pretrial detention of the person.

**(3)** The [judicial officer](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1310131767-833647310&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) may at any time amend the order to impose additional or different conditions of release.

**(d)Temporary Detention To Permit Revocation of Conditional Release, Deportation, or Exclusion.—**If the [judicial officer](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1310131767-833647310&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) determines that—

**(1)**such person—

**(A)**is, and was at the time the [offense](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1548815702-833648272&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) was committed, on—

**(i)** release pending trial for a [felony](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1278190643-833647312&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) under Federal,[State,](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-80204913-833647314&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) or local law;

**(ii)** release pending imposition or execution of sentence, appeal of sentence or conviction, or completion of sentence, for any [offense](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1548815702-833648272&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) under Federal,[State,](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-80204913-833647314&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) or local law; or

**(iii)** probation or parole for any [offense](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1548815702-833648272&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) under Federal,[State,](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-80204913-833647314&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) or local law; or

**(B)** is not a citizen of the United [States](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-80204913-833647314&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) or lawfully admitted for permanent residence, as defined in section 101(a)(20) of the [Immigration and Nationality Act](https://www.law.cornell.edu/topn/immigration_and_nationality_act) ([8 U.S.C. 1101(a)(20)](https://www.law.cornell.edu/uscode/text/8/1101#a_20)); and

**(2)** such person may flee or pose a danger to any other person or the community;

such [judicial officer](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1310131767-833647310&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) shall order the detention of such person, for a period of not more than ten days, excluding Saturdays, Sundays, and holidays, and direct the attorney for the Government to notify the appropriate court, probation or parole official, or[State](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-80204913-833647314&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142)or local law enforcement official, or the appropriate official of the Immigration and Naturalization Service. If the official fails or declines to take such person into custody during that period, such person shall be treated in accordance with the other provisions of this section, notwithstanding the applicability of other provisions of law governing release pending trial or deportation or exclusion proceedings. If temporary detention is sought under paragraph (1)(B) of this subsection, such person has the burden of proving to the court such person’s United[States](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-80204913-833647314&term_occur=999&term_src=)citizenship or lawful admission for permanent residence.

**(e)Detention.—**

**(1)** If, after a hearing pursuant to the provisions of subsection (f) of this section, the [judicial officer](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1310131767-833647310&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) finds that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of any other person and the community, such [judicial officer](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1310131767-833647310&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) shall order the detention of the person before trial.

**(2)**In a case described in subsection (f)(1) of this section, a rebuttable presumption arises that no condition or combination of conditions will reasonably assure the safety of any other person and the community if such [judicial officer](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1310131767-833647310&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) finds that—

**(A)** the person has been convicted of a Federal [offense](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1548815702-833648272&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) that is described in subsection (f)(1) of this section, or of a[State](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-80204913-833647314&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142)or local [offense](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1548815702-833648272&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) that would have been an [offense](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1548815702-833648272&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) described in subsection (f)(1) of this section if a circumstance giving rise to Federal jurisdiction had existed;

**(B)** the [offense](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1548815702-833648272&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) described in subparagraph (A) was committed while the person was on release pending trial for a Federal,[State,](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-80204913-833647314&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) or local [offense](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1548815702-833648272&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142); and

**(C)** a period of not more than five years has elapsed since the date of conviction, or the release of the person from imprisonment, for the [offense](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1548815702-833648272&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) described in subparagraph (A), whichever is later.

**(3)**Subject to rebuttal by the person, it shall be presumed that no condition or combination of conditions will reasonably assure the appearance of the person as required and the safety of the community if the [judicial officer](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1310131767-833647310&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) finds that there is probable cause to believe that the person committed—

**(A)** an [offense](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1548815702-833648272&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) for which a maximum term of imprisonment of ten years or more is prescribed in the [Controlled Substances Act](https://www.law.cornell.edu/topn/controlled_substances_act) ([21 U.S.C. 801](https://www.law.cornell.edu/uscode/text/21/801) et seq.), the [Controlled Substances Import and Export Act](https://www.law.cornell.edu/topn/controlled_substances_import_and_export_act) ([21 U.S.C. 951](https://www.law.cornell.edu/uscode/text/21/951) et seq.), or chapter 705 of title 46;

**(B)** an [offense](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1548815702-833648272&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) under section [924(c)](https://www.law.cornell.edu/uscode/text/18/924#c), [956(a)](https://www.law.cornell.edu/uscode/text/18/956#a), or [2332b](https://www.law.cornell.edu/uscode/text/18/2332b) of this title;

**(C)** an [offense](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1548815702-833648272&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) listed in [section 2332b(g)(5)(B) of title 18](https://www.law.cornell.edu/uscode/text/18/2332b#g_5_B), United[States](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-80204913-833647314&term_occur=999&term_src=)Code, for which a maximum term of imprisonment of 10 years or more is prescribed;

**(D)** an [offense](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1548815702-833648272&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) under [chapter 77 of this title](https://www.law.cornell.edu/uscode/text/18/chapter-77) for which a maximum term of imprisonment of 20 years or more is prescribed; or

**(E)** an [offense](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1548815702-833648272&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) involving a minor victim under section [1201](https://www.law.cornell.edu/uscode/text/18/1201), [1591](https://www.law.cornell.edu/uscode/text/18/1591), [2241](https://www.law.cornell.edu/uscode/text/18/2241), [2242](https://www.law.cornell.edu/uscode/text/18/2242), [2244(a)(1)](https://www.law.cornell.edu/uscode/text/18/2244#a_1), [2245](https://www.law.cornell.edu/uscode/text/18/2245), [2251](https://www.law.cornell.edu/uscode/text/18/2251), [2251A](https://www.law.cornell.edu/uscode/text/18/2251A), [2252(a)(1)](https://www.law.cornell.edu/uscode/text/18/2252#a_1), [2252(a)(2)](https://www.law.cornell.edu/uscode/text/18/2252#a_2), [2252(a)(3)](https://www.law.cornell.edu/uscode/text/18/2252#a_3), [2252A(a)(1)](https://www.law.cornell.edu/uscode/text/18/2252A#a_1), [2252A(a)(2)](https://www.law.cornell.edu/uscode/text/18/2252A#a_2), [2252A(a)(3)](https://www.law.cornell.edu/uscode/text/18/2252A#a_3), [2252A(a)(4)](https://www.law.cornell.edu/uscode/text/18/2252A#a_4), [2260](https://www.law.cornell.edu/uscode/text/18/2260), [2421](https://www.law.cornell.edu/uscode/text/18/2421), [2422](https://www.law.cornell.edu/uscode/text/18/2422), [2423](https://www.law.cornell.edu/uscode/text/18/2423), or [2425](https://www.law.cornell.edu/uscode/text/18/2425) of this title.

**(f)Detention Hearing.—**The [judicial officer](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1310131767-833647310&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) shall hold a hearing to determine whether any condition or combination of conditions set forth in subsection (c) of this section will reasonably assure the appearance of such person as required and the safety of any other person and the community—

**(1)**upon motion of the attorney for the Government, in a case that involves—

**(A)** a [crime of violence](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-2142776470-833647313&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142), a violation of section 1591, or an[offense](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1548815702-833648272&term_occur=999&term_src=)listed in [section 2332b(g)(5)(B)](https://www.law.cornell.edu/uscode/text/18/2332b#g_5_B) for which a maximum term of imprisonment of 10 years or more is prescribed;

**(B)** an [offense](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1548815702-833648272&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) for which the maximum sentence is life imprisonment or death;

**(C)** an [offense](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1548815702-833648272&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) for which a maximum term of imprisonment of ten years or more is prescribed in the [Controlled Substances Act](https://www.law.cornell.edu/topn/controlled_substances_act) ([21 U.S.C. 801](https://www.law.cornell.edu/uscode/text/21/801) et seq.), the [Controlled Substances Import and Export Act](https://www.law.cornell.edu/topn/controlled_substances_import_and_export_act) ([21 U.S.C. 951](https://www.law.cornell.edu/uscode/text/21/951) et seq.), or chapter 705 of title 46;

**(D)** any [felony](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1278190643-833647312&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) if such person has been convicted of two or more [offenses](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1548815702-833648272&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) described in subparagraphs (A) through (C) of this paragraph, or two or more[State](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-80204913-833647314&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142)or local [offenses](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1548815702-833648272&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) that would have been [offenses](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1548815702-833648272&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) described in subparagraphs (A) through (C) of this paragraph if a circumstance giving rise to Federal jurisdiction had existed, or a combination of such [offenses](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1548815702-833648272&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142); or

**(E)** any [felony](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1278190643-833647312&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) that is not otherwise a [crime of violence](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-2142776470-833647313&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) that involves a minor victim or that involves the possession or use of a firearm or destructive device (as those terms are defined in [section 921](https://www.law.cornell.edu/uscode/text/18/921)), or any other dangerous weapon, or involves a failure to register under [section 2250 of title 18](https://www.law.cornell.edu/uscode/text/18/2250), United[States](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-80204913-833647314&term_occur=999&term_src=)Code; or

**(2)**upon motion of the attorney for the Government or upon the [judicial officer](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1310131767-833647310&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142)’s own motion in a case, that involves—

**(A)** a serious risk that such person will flee; or

**(B)** a serious risk that such person will obstruct or attempt to obstruct justice, or threaten, injure, or intimidate, or attempt to threaten, injure, or intimidate, a prospective witness or juror.

The hearing shall be held immediately upon the person’s first appearance before the [judicial officer](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1310131767-833647310&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) unless that person, or the attorney for the Government, seeks a continuance. Except for good cause, a continuance on motion of such person may not exceed five days (not including any intermediate Saturday, Sunday, or legal holiday), and a continuance on motion of the attorney for the Government may not exceed three days (not including any intermediate Saturday, Sunday, or legal holiday). During a continuance, such person shall be detained, and the [judicial officer](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1310131767-833647310&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142), on motion of the attorney for the Government or sua sponte, may order that, while in custody, a person who appears to be a narcotics addict receive a medical examination to determine whether such person is an addict. At the hearing, such person has the right to be represented by counsel, and, if financially unable to obtain adequate representation, to have counsel appointed. The person shall be afforded an opportunity to testify, to present witnesses, to cross-examine witnesses who appear at the hearing, and to present information by proffer or otherwise. The rules concerning admissibility of evidence in criminal trials do not apply to the presentation and consideration of information at the hearing. The facts the [judicial officer](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1310131767-833647310&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) uses to support a finding pursuant to subsection (e) that no condition or combination of conditions will reasonably assure the safety of any other person and the community shall be supported by clear and convincing evidence. The person may be detained pending completion of the hearing. The hearing may be reopened, before or after a determination by the [judicial officer](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1310131767-833647310&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142), at any time before trial if the [judicial officer](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1310131767-833647310&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) finds that information exists that was not known to the movant at the time of the hearing and that has a material bearing on the issue whether there are conditions of release that will reasonably assure the appearance of such person as required and the safety of any other person and the community.

**(g)Factors To Be Considered.—**The [judicial officer](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1310131767-833647310&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) shall, in determining whether there are conditions of release that will reasonably assure the appearance of the person as required and the safety of any other person and the community, take into account the available information concerning—

**(1)** the nature and circumstances of the [offense](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1548815702-833648272&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) charged, including whether the [offense](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1548815702-833648272&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) is a [crime of violence](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-2142776470-833647313&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142), a violation of section 1591, a Federal crime of terrorism, or involves a minor victim or a controlled substance, firearm, explosive, or destructive device;

**(2)** the weight of the evidence against the person;

**(3)**the history and characteristics of the person, including—

**(A)** the person’s character, physical and mental condition, family ties, employment, financial resources, length of residence in the community, community ties, past conduct, history relating to drug or alcohol abuse, criminal history, and record concerning appearance at court proceedings; and

**(B)** whether, at the time of the current [offense](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1548815702-833648272&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) or arrest, the person was on probation, on parole, or on other release pending trial, sentencing, appeal, or completion of sentence for an [offense](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1548815702-833648272&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) under Federal,[State,](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-80204913-833647314&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) or local law; and

**(4)** the nature and seriousness of the danger to any person or the community that would be posed by the person’s release. In considering the conditions of release described in subsection (c)(1)(B)(xi) or (c)(1)(B)(xii) of this section, the [judicial officer](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1310131767-833647310&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) may upon his own motion, or shall upon the motion of the Government, conduct an inquiry into the source of the property to be designated for potential forfeiture or offered as collateral to secure a bond, and shall decline to accept the designation, or the use as collateral, of property that, because of its source, will not reasonably assure the appearance of the person as required.

**(h)Contents of Release Order.—**In a release order issued under subsection (b) or (c) of this section, the [judicial officer](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1310131767-833647310&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) shall—

**(1)** include a written statement that sets forth all the conditions to which the release is subject, in a manner sufficiently clear and specific to serve as a guide for the person’s conduct; and

**(2)** advise the person of—

**(A)** the penalties for violating a condition of release, including the penalties for committing an [offense](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1548815702-833648272&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) while on pretrial release;

**(B)** the consequences of violating a condition of release, including the immediate issuance of a warrant for the person’s arrest; and

**(C)** [sections 1503 of this title](https://www.law.cornell.edu/uscode/text/18/1503) (relating to intimidation of witnesses, jurors, and officers of the court), 1510 (relating to obstruction of criminal investigations), 1512 (tampering with a witness, victim, or an informant), and 1513 (retaliating against a witness, victim, or an informant).

**(i)Contents of Detention Order.—**In a detention order issued under subsection (e) of this section, the [judicial officer](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1310131767-833647310&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) shall—

**(1)** include written findings of fact and a written statement of the reasons for the detention;

**(2)** direct that the person be committed to the custody of the Attorney General for confinement in a corrections facility separate, to the extent practicable, from persons awaiting or serving sentences or being held in custody pending appeal;

**(3)** direct that the person be afforded reasonable opportunity for private consultation with counsel; and

**(4)** direct that, on order of a court of the United [States](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-80204913-833647314&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) or on request of an attorney for the Government, the person in charge of the corrections facility in which the person is confined deliver the person to a United [States](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-80204913-833647314&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) marshal for the purpose of an appearance in connection with a court proceeding.

The [judicial officer](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1310131767-833647310&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) may, by subsequent order, permit the temporary release of the person, in the custody of a United[States](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-80204913-833647314&term_occur=999&term_src=)marshal or another appropriate person, to the extent that the [judicial officer](https://www.law.cornell.edu/definitions/uscode.php?width=840&height=800&iframe=true&def_id=18-USC-1310131767-833647310&term_occur=999&term_src=title:18:part:II:chapter:207:section:3142) determines such release to be necessary for preparation of the person’s defense or for another compelling reason.

**(j)Presumption of Innocence.—**

Nothing in this section shall be construed as modifying or limiting the presumption of innocence.

**Chapter 2 – The Nature and Scope of Due Process**

**Chapter Two**

**Due Process - pages 31-57**

**History (page 31)**

**Fourteenth Amendment:**

**Section 1: All persons born of naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without the due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**

The First 8 Amendments were enacted as limitations solely upon the federal government.

A series of rulings over the years rejected the “total incorporation” of the

The Court adopted what has been called the “Fundamental Rights” or “ordered liberty”

Interpretations of the 14th Amendment due process clause. This approach – which finds no necessary relationship between the content of the 14th Amendment and the guarantees of the Bill of Rights – prevailed until the 1960s. As applied to criminal procedure, this approach requires only that the state ***afford a defendant “that fundamental fairness essential to the very concept of justice.”***  A particular practice may “violate fundamental fairness” even though it is not specifically prohibited by the Bill of Rights. As recognized in rulings applying the 5th Amendment’s due process clause, the **due process clause of the 14th Amendment “has an independent potency.”**

**Chapter 2 – Section 1 – “Fundamental Rights” and “Incorporation”**

# Rochin v. California

#### United States Supreme Court 342 U.S. 165 (1952)

#### Rule of Law

**Law enforcement may not procure physical evidence by forcible extraction of a defendant’s stomach contents.**

#### Facts

During a search of Rochin’s (defendant) house, law enforcement forced their way into his bedroom and saw two capsules on his nightstand. When the officers asked Rochin about the capsules, he grabbed them and swallowed them. Rochin was arrested and taken to the hospital where the officers had Rochin’s stomach pumped against his will. As a result of the stomach pumping, Rochin vomited the two capsules, which were determined to contain morphine. The trial court convicted Rochin of possession of morphine. He appealed.

#### Issue

May law enforcement procure physical evidence through forcible extraction of a defendant’s stomach contents?

#### Holding and Reasoning (Frankfurter, J.)

No. Law enforcement may not procure physical evidence by forcible extraction of a defendant’s stomach contents. Such conduct shocks the conscience and violates the due process clause of the Fourteenth Amendment. In the case at bar, by pumping Rochin’s stomach without his consent, the police officers violated Rochin’s due process rights. The forced pumping of Rochin’s stomach was no different than a coerced confession. It would be improper to hold that law enforcement “cannot extract by force what is in [a defendant’s] mind but can extract what is in his stomach.” The procurement of the capsules was improper. The conviction is reversed.

#### Concurrence (Douglas, J.)

The Fifth Amendment right against self-incrimination applies not only to compelled testimony, but also to physical evidence taken from a defendant’s body without consent, such as blood taken from the defendant’s veins or, as is the case here, contents taken from the defendant’s stomach.

#### Concurrence (Black, J.)

The Fifth Amendment right against compelled self-incrimination applies where, as in this case, evidence is forcibly taken from the defendant “by a contrivance of modern science.”

**Key Terms:**

**Fourteenth Amendment Due Process Clause** - The provision set forth at Amendment XIV, Section 1 of the United States Constitution prohibiting states from depriving any person of life, liberty, or property by means that are arbitrary or fundamentally unfair.

# McDonald v. City of Chicago

#### United States Supreme Court 561 U.S. 742 (2010)

#### Rule of Law

**A Bill of Rights guarantee applies to the states if it is fundamental to the nation’s scheme of ordered liberty or deeply rooted in the nation’s history and tradition.**

#### Facts

Petitioners challenged a law enacted by the City of Chicago (respondent) that prohibited Chicago residents from possessing handguns, claiming that the law violated the Second and Fourteenth Amendments.

#### Issue

Does the Second Amendment apply to the states, thereby invalidating a local law prohibiting residents from possessing handguns?

#### Holding and Reasoning (Alito, J.)

Yes. The Second Amendment applies to the states, thereby invalidating Chicago’s law prohibiting residents from possessing handguns. Under the process of selective incorporation, a particular Bill of Rights guarantee will apply to the states if it is fundamental to the nation’s scheme of ordered liberty or deeply rooted in the nation’s history and tradition. In *District of Columbia v. Heller*, 554 U.S 570 (2008), this Court found that individual self defense is a basic right, which forms the central component of the Second Amendment’s right to keep and bear arms, and which is deeply rooted in the nation’s history and tradition. Following the Civil War, in response to the efforts of some states to disarm returning black soldiers and other black people, Congress enacted the Civil Rights Act of 1866, which protected the right of all citizens to keep and bear arms. When this was met with southern resistance and presidential vetoes, Congress responded by adopting the Fourteenth Amendment, thereby providing a constitutional basis for the rights included in the Civil Rights Act of 1866. The Second Amendment right to keep and bear arms is applicable to the states under the Fourteenth Amendment.

#### Concurrence (Alito, J.)

The Second Amendment right to keep and bear arms is applicable to the states under the Due Process Clause of the Fourteenth Amendment. The City argues that gun ownership is not a fundamental right because other countries have limited gun ownership. However, the standard to be applied in incorporation cases is not whether there is any civilized legal system that does not recognize a particular right, but whether a particular right is fundamental to this nation’s justice system. In addition, the Second Amendment does not differ from other rights simply because a right to a deadly instrument raises issues of public safety, as rights that restrict law enforcement activities and criminal prosecutions also implicate public safety. Finally, it is important to note that *Heller* does not invalidate laws that prohibit the possession of firearms by felons or the mentally ill or within government buildings and schools, or which place conditions on the sale of firearms.

#### Concurrence (Thomas, J.)

The Second Amendment right to keep and bear arms is applicable to the states, and is both fundamental to the nation’s scheme of ordered liberty and deeply rooted in the nation’s history and tradition. However, the Second Amendment is enforceable against the states, not through the Due Process Clause, but rather through the Fourteenth Amendment’s Privileges or Immunities Clause, because the right to keep and bear arms is guaranteed as a privilege of being an American citizen. The Due Process Clause only guarantees process before a deprivation of a right, and cannot define the substance of rights not expressly included in the Constitution. The doctrine of substantive due process is inconsistent with the understanding of the Due Process Clause at the time it was ratified.

#### Concurrence (Scalia, J.)

Justice Stevens argues that the right to keep and bear arms is not incorporated by the Fourteenth Amendment despite being deeply rooted in the nation’s history and tradition. In addition, Justice Stevens would have the Court defer to the democratic process when states are already giving close consideration to a right. However, under this approach, a right that has traditionally been recognized and regulated by the states would deserve less protection than a right that the political branches have traditionally withheld. Further, Justice Stevens’ assertion that firearms have an ambivalent relationship to liberty because they can injure others seems to require that to be incorporated under the Fourteenth Amendment a right must have no harmful effect on anyone, a requirement that no right can meet. Justice Stevens’ assertion that the right to bear arms is different from other fundamental rights because it is not critical to leading a life of autonomy, dignity, or political equality is an inappropriate political and moral judgment. Finally, Justice Stevens argues that even if there is a constitutional basis for incorporating the right to bear arms, the Court should not do so for prudential reasons. The Court does not have the authority to withhold rights protected under the Constitution, and Justice Stevens’ argument that states have a right to experiment with solutions to gun violence because the solution to the problem is unclear is equally applicable to any serious social problem. While the historical approach may not be the perfect means for limiting judicial lawmaking, it is the best and most objective means available.

#### Dissent (Breyer, J.)

Nothing in this country’s history supports *Heller*’s finding that a private right of self defense is incorporated under the Fourteenth Amendment against the states. Incorporating a private right of self defense against the states will not protect discrete and insular minorities from state regulation, help ensure equal respect for individuals, promote a necessary part of the democratic process, or protect individuals at risk of unfair treatment by a majority. In addition, the fact-intensive questions raised in analyzing state gun laws are better left to legislatures, not the courts.

#### Dissent (Stevens, J.)

In undertaking a substantive due process analysis, the Court must show respect for the democratic process. Judicial intervention may be improper where a liberty interest is already the subject of close consideration by the states. In addition, while some fundamental aspects of personhood and dignity require protection, in deciding to recognize a new liberty the Court must be sensitive to both intrinsic ideas of liberty and to the practical realities of contemporary society. Firearms can both assist in self defense and contribute to the murder of innocent people. The right to possess a particular type of firearm is also different from liberty interests previously identified under the Due Process Clause, because it is not necessary in order to live a life of autonomy, dignity, and political equality, and because of its risk to other people’s security. Moreover, state regulation on gun possession is just as deeply rooted in the nation’s history and tradition as the individual interest in possessing a firearm. Because conditions vary greatly from one locality to another, courts should allow state and local governments the right to experiment in finding solutions to gun problems. In addition, opponents of gun control are a powerful group not at risk of unfair treatment by the majority. Finally, when determining whether a right is fundamental, it makes little sense to treat history as dispositive, as Justice Scalia does. Historical views can be unclear and uninformative, and are sometimes wrong, and the historical approach gives judges unprecedented powers in an area in which they have no special qualifications.

**Key Terms:**

**Substantive Due Process -** Provides that the government may not deprive a person of certain fundamental liberties.

**Privileges or Immunities Clause -** Provision in the Fourteenth Amendment that prohibits states from making or enforcing laws that infringe on the privileges or immunities of U.S. citizens.

***McDonald v City of Chicago –* The Court overruled earlier decisions in which it had held that particular Bill of Rights guarantees or remedies did not apply to the States.**

**In McDonald, the Supreme Court offered a brief review of both the period in which this “fundamental fairness” approach prevailed and the eventual displacement of with the “**selective incorporation**” doctrine.**

The selective doctrine is seen in ***Duncan v. Louisiana*** *(*1968*).* In this case, Duncan requested a jury trial and was refused. He was convicted of simple battery [which under Louisiana law] is a misdemeanor, punishable by 2 years’ imprisonment and a $300 fine. He asked for a 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. He was convicted and sentenced to serve 60 days in the parish prison and pay a fine of $150.

# District of Columbia v. Heller

#### United States Supreme Court 554 U.S. 570 (2008)

#### Rule of Law

**Subject to certain safety limitations, the Second Amendment to the United States Constitution creates an individual right to keep and bear arms apart from any military purpose.**

#### Facts

Dick Heller (plaintiff), a Washington, D.C. special police officer, applied for a registration certificate from the city of Washington, D.C. for a handgun he wished to keep at home. A Washington, D.C. statute prohibited possessing a handgun in the home without a license, and it also required any lawful handgun kept in the home to be rendered inoperable through use of a trigger-lock. The District of Columbia (defendant) denied Heller’s application for a registration certificate based on its law. Heller then filed a lawsuit in federal district court for the District of Columbia arguing that the city’s bar on the registration of handguns, its prohibition on guns in the home without a license, and its requirement of trigger-locks for lawful guns in the home all violated the Second Amendment. The district court dismissed Heller’s complaint, but the Court of Appeals for the District of Columbia Circuit reversed on the grounds that the Second Amendment grants an individual the right to bear arms. The United States Supreme Court granted certiorari.

#### Issue

Does a law prohibiting the possession of usable handguns in the home violate the Second Amendment to the United States Constitution?

#### Holding and Reasoning (Scalia, J.)

Yes. Although the Second Amendment appears to have been created for the purpose of ensuring the creation of a future militia, this purpose ultimately does not change the fact that the Second Amendment was designed to create an individual right to keep and bear arms. Nothing suggests that the individual right to keep and bear arms is conditional on being for a strictly military purpose. However, states must be free to regulate who can possess firearms based on certain safety concerns (for example, states are free to deny handgun registration and possession to felons and the mentally ill). However, provided Heller does not fall within the categories of people prohibited from owning handguns due to safety concerns, the District of Columbia’s prohibition on handgun possession in the home, as well as its requirement that lawful handguns in the home be rendered inoperable for self-defense, is unconstitutional.

#### Dissent (Breyer, J.)

The District of Columbia’s law does not violate Heller’s Second Amendment rights. The Second Amendment’s protection of the right to bear arms is not absolute. The District’s law should only be overturned if it is an unreasonable or inappropriate regulation of Heller’s Second Amendment rights. Even if the Second Amendment could be interpreted as protecting a self-defense (and not militia-based) purpose for owning a handgun, the District of Columbia law does not unreasonably interfere with the right of self-defense because its purpose is to combat the presence of handguns in high-crime urban areas. In examining future similar laws designed to combat health and safety risks by limiting Second Amendment rights, courts should adopt a unique level of scrutiny. A better approach would be an “interest-balancing inquiry” whereby the court would seek to determine whether a particular statute burdens an interest protected by the Second Amendment in a way that is disproportionate to the statute’s effects on other important governmental interests. In applying this new level of scrutiny to the District of Columbia’s law, the law is a permissible, proportional legislative response to the serious problem of handguns and urban crime, and thus it furthers an important government interest in health and safety.

#### Dissent (Stevens, J.)

The majority does not adequately describe the scope of the individual right to keep and bear arms. The text of the Amendment itself, its history, and the Supreme Court’s prior decision in *United States v. Miller*, 307 U.S. 174 (1939), provide an ample discussion of the bounds of the right that differ from the majority’s conclusion. In *Miller*, the Supreme Court held that it was unlawful for two men to possess a sawed-off shotgun because their reasons for doing so bore no relationship to the purpose of preserving a well-regulated militia. The *Miller* holding, as well as the historical context and debate surrounding the adoption of the Second Amendment, means that the individual right to keep and bear arms was designed to be solely for the purpose of preserving a well-regulated militia. Heller seeks to own a handgun for self-defense and not a militia-related purpose, therefore, the majority’s holding that his right to do so is constitutionally protected is incorrect.

**Key Terms:**

**Second Amendment to the U.S. Constitution** - Protects the right of citizens to keep and bear arms as well as form militias.

# Betts v. Brady

#### United States Supreme Court 316 U.S. 455 (1942)

#### Rule of Law

**Under the Due Process Clause of the Fourteenth Amendment, states are not required to appoint counsel for a criminal defendant unable to secure her own in all cases, provided that the trial is fundamentally fair.**

#### Facts

Betts (defendant) was charged with robbery. Betts could not afford counsel and requested that the state of Maryland appoint him an attorney. This request was denied, because the state only appointed counsel in rape and murder cases. Betts elected to have a non-jury trial. At trial, Betts chose not to testify. Betts did, however, call witnesses who testified that he was somewhere else when the robbery occurred. The main issue at trial was the veracity of the witnesses for the defense. Betts was convicted and sentenced to eight years in prison. Betts twice petitioned for habeas corpus, alleging the denial of his right to counsel violated the Fourteenth Amendment. Each time, the writ was granted, but relief was denied. Betts petitioned the United States Supreme Court for a writ of certiorari, which was granted.

#### Issue

Must a state provide counsel for any indigent defendant, regardless of the crime charged?

#### Holding and Reasoning (Roberts, J.)

No. At the state level, due process does not necessarily require that the appointment of counsel for any defendant that cannot obtain counsel on her own, regardless of the crime charged and the nature of the trial. The Due Process Clause of the Fourteenth Amendment does not specifically incorporate every right in the Sixth Amendment against the states. Nevertheless, a state’s denial of one of the guarantees contained in the first eight amendments may constitute a violation of the Fourteenth Amendment. In any given case, the totality of the circumstances must be judged to determine whether due process was violated. In *Powell v. Alabam*a, 287 U.S. 45 (1932), the Court held that “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." That case, however, involved a state’s refusal to appoint counsel, which was required by its own statute, to “ignorant and friendless” black youths for a capital offense. In English common law, prisoners were denied the right to consult with counsel for certain offenses. American colonies did away with these restrictions, usually by statute rather than constitutional provision. Only later did some state legislatures begin affirmatively requiring the appointment of counsel for defendants unable to secure their own, and even then, typically only in certain cases. This suggests that the right to have court-appointed counsel has not attained the status of a fundamental right. Thus, the Fourteenth Amendment’s Due Process Clause does not incorporate the right to appointed counsel against the states. In this case, Betts asks for a hard-and-fast rule that a state’s refusal to appoint counsel in every case constitutes a denial of the right to due process. In Maryland, however, defendants typically waive the right to a jury, and bench trials are more informal, with more oversight by the judge. Betts waived a jury trial, and the only issue is whether his alibi witnesses were believable. Betts was an adult, of ordinary intelligence, and had previously been through the court system. It does not appear that Betts was at a serious disadvantage due to his lack of counsel or that his trial offended “fundamental ideas of fairness and right.” Accordingly, Betts was afforded due process, even without appointment of counsel. The conviction is affirmed.

#### Dissent (Black, J.)

Although the majority does not agree, the Fourteenth Amendment made the Sixth Amendment applicable to the states. The right to assistance of counsel in a serious criminal trial is “fundamental.” *Powell*, *supra*. Even smart, educated laymen are at a disadvantage without an attorney. *Id*. It is impossible to determine whether a person is innocent if she was unable to adequately present her defense. Denying the right to counsel on the basis of poverty “shock[s]…the universal sense of justice” and denies equal justice under the law. Further, it is not necessary to hold that states must always provide counsel to indigent defendants in every case to overturn Betts conviction. Betts was poor and uneducated and on trial for the serious offense of robbery. Under these circumstances, the state court’s denial of Betts’s right to counsel violated his due process.

**Key Terms:**

**Fourteenth Amendment** - Provides that all persons born or naturalized in the United States are U.S. citizens. Also provides that no state shall: (1) abridge the privileges or immunities of a U.S. citizen; (2) deprive any person of life, liberty, or property, without due process of law; or (3) deny equal protection of the laws to anyone within its jurisdiction.

**Fourteenth Amendment Due Process Clause** - The provision set forth at Amendment XIV, Section 1 of the United States Constitution prohibiting states from depriving any person of life, liberty, or property by means that are arbitrary or fundamentally unfair.

**Right to Counsel** - Sixth Amendment guarantee that a defendant is entitled to be represented by an attorney during a criminal prosecution.

# Wolf v. Colorado

#### United States Supreme Court 338 U.S. 25 (1949)

#### Rule of Law

**It is a violation of the Due Process Clause of the Fourteenth Amendment for state actors to gather evidence through unreasonable searches and seizures, but such evidence need not be excluded from state criminal proceedings.**

#### Facts

Julius Wolf (defendant) was convicted in Colorado state court for violating state law. The prosecution’s case rested in part on evidence that would have been inadmissible in federal court, because it was gathered through an unreasonable search and seizure. Wolf appealed to the Supreme Court of Colorado, which upheld the conviction. Wolf petitioned the United States Supreme Court for a writ of certiorari.

#### Issue

Is evidence obtained through unreasonable search and seizure admissible in state court?

#### Holding and Reasoning (Frankfurter, J.)

Yes. While evidence obtained through unreasonable searches and seizures, in violation of the Fourth Amendment, is inadmissible at federal trials, this exclusionary rule does not apply to state criminal proceedings. The Due Process Clause of the Fourteenth Amendment does not automatically incorporate the first eight amendments of the Bill of Rights against the states. *See Palko v. Connecticut*, 302 U.S. 319 (1937). Rather, the clause incorporates those rights that are “implicit in the concept of ordered liberty.” *Id*. Due process encompasses an evolving set of fundamental rights that changes with the advancing standards of a free society. Nevertheless, there is no question that the right to privacy and freedom from its arbitrary invasion by federal or state police is fundamental. Thus, the protections of the Fourth Amendment are incorporated against the states. An unreasonable search or seizure by a state officer violates the Due Process Clause, but that does not necessarily mandate exclusion of evidence. We held in *Weeks v. United States*, 232 U.S. 383 (1914), that evidence obtained in violation of the Fourth Amendment was inadmissible in federal proceedings, but the exclusionary rule was developed as a matter of judicial doctrine rather than constitutional requirement. Other common law countries and a majority of the states do not embrace the exclusionary rule. Further, there are other methods by which to enforce the Fourth Amendment right to privacy, such as through criminal prosecution or civil liability for violations. In fact, the weight of community opinion may be a far more effective method of ensuring police compliance with the amendment than exclusion. It is clear that the exclusion of evidence obtained illegally is not an essential element of the right against arbitrary state intrusion and the Fourth Amendment. Indeed, even federal courts might have to reconsider the exclusionary rule if Congress enacted legislation to the contrary. Therefore, the Due Process Clause of the Fourteenth Amendment, which only incorporates fundamental rights to the states, is not violated if state courts allow the admission of illegally obtained evidence. Accordingly, the judgment of the state court is affirmed. [Editor’s Note: this ruling was expressly overturned by the United States Supreme Court in *Mapp v. Ohio*, 367 U.S. 643 (1961).]

#### Concurrence (Black, J.)

The Fourteenth Amendment applies the Fourth Amendment’s prohibition of unreasonable searches and seizures to state courts, but the federal exclusionary rule is a judicially created rule, which Congress could overturn, and not part of the amendment. Nevertheless, there is just as much danger to the public from overzealous state officers as federal officials.

#### Dissent (Douglas, J.)

The Fourth Amendment applies to the states, and evidence obtained by an unreasonable search and seizure must be excluded from state as well as federal proceedings to give the amendment effect.

#### Dissent (Murphy, J.)

The majority gets so much right, but in the end refuses to give effect to the Fourth Amendment. The are only three ways to enforce the prohibition against unreasonable searches and seizures: (1) exclude illegally obtained evidence from legal proceedings, (2) impose criminal sanctions on violators, or (3) allow civil lawsuits against violators. Only exclusion is an effective remedy. If illegal evidence can be used against a person in legal proceedings, “the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and…might as well be stricken from the Constitution.” *Weeks v. United States*, 232 U. S. 383 (1914). It is unrealistic to expect the very state actors who violated the amendment to prosecute themselves for it. Further, civil lawsuits provide little deterrent effect, because the measure of damages is the actual injury to the property searched. Thus, damage awards would most likely be nominal, and punitive damages are unlikely. The efficacy of the exclusionary rule is apparent; generally, police in states that follow it are better trained to respect the Fourth Amendment. The majority opinion here sanctions “lawlessness by officers of the law.”

#### Dissent (Rutledge, J.)

The Court correctly holds that the Fourth Amendment applies to the states, but renders the amendment useless by refusing to impose the exclusionary rule on state proceedings. Further, Congress could not abrogate the exclusionary rule, because it is an implicit part of the Fourth Amendment. See *Boyd v. United States*, 116 U. S. 616 (1886); *Olmstead v. United States*, 277 U. S. 438 (1928). State actors have no more right to declare illegally obtained evidence admissible.

**Key Terms:**

**Fourteenth Amendment Due Process Clause** - The provision set forth at Amendment XIV, Section 1 of the United States Constitution prohibiting states from depriving any person of life, liberty, or property by means that are arbitrary or fundamentally unfair.

**Fundamental Principles of Rights** - Principles and rights that are so deeply rooted and ingrained in history and tradition as to be central to U.S. notions of liberty and justice.

**Fourth Amendment -** An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

# Gideon v. Wainwright

#### United States Supreme Court 372 U.S. 335 (1963)

#### Rule of Law

**The Fourteenth Amendment incorporates the Sixth Amendment right to counsel to the states.**

#### Facts

Gideon (defendant) was charged with a state felony. He asked the court to appoint him a lawyer but his request was denied. Under state law, the court could only appoint counsel in capital cases. Gideon represented himself at trial and was ultimately convicted by a jury. Gideon argues that he has a constitutional right to counsel in a state court. The United States Supreme Court granted certiorari.

#### Issue

Does the Fourteenth Amendment incorporate the Sixth Amendment right to counsel to the states?

#### Holding and Reasoning (Black, J.)

Yes. The Fourteenth Amendment incorporates the Sixth Amendment right to counsel to the states. The Fourteenth Amendment incorporates those provisions of the Bill of Rights that are “fundamental and essential to a fair trial.” The holding in *Betts v. Brady*, 316 U.S. 455 (1942), assumed that the state court’s refusal to appoint counsel did not violate such fundamental principles of fairness and that there was no due process violation. On reconsideration, however, it is clear that *Betts* should now be overruled. Not only is it not good law, but even when it was decided it was not consistent with precedent. *Powell v. Alabama*, 287 U.S. 45 (1932), held that the right to counsel is fundamental. At the time, the *Powell* holding was limited to its facts. However, what it said about the fundamental nature of the right to counsel must now be embraced. Defendants have the constitutional right to a fair trial and this requires having an advocate present who knows the intricacies of the legal system**. Accordingly, the decision in *Betts* is now overruled.**

#### Concurrence (Harlan, J.)

The Court properly overrules *Betts*. However, the Court is wrong when it criticizes the *Betts* decision as inconsistent with precedence. *Betts* held that courts may need to provide counsel in non-capital state cases but special circumstances had to be shown to demonstrate a denial of due process. This is the approach the Court took in *Powell*. The Court emphasized the reasons that due process was denied to the defendants (they were young, there was lots of public hostility, they could not read) and based on those facts the Court held that the state must provide counsel.

**Key Terms:**

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

**Fourteenth Amendment** - Provides that all persons born or naturalized in the United States are U.S. citizens. Also provides that no state shall: (1) abridge the privileges or immunities of a U.S. citizen; (2) deprive any person of life, liberty, or property, without due process of law; or (3) deny equal protection of the laws to anyone within its jurisdiction.

**Bill of Rights** - The first ten amendments to the U.S. Constitution.

# Malloy v. Hogan

#### United States Supreme Court 378 U.S. 1 (1964)

#### Rule of Law

**In state criminal trials, wherever a question arises as to whether a confession is involuntary, the self-incrimination clause of the Fifth Amendment controls the issue.**

#### Facts

[Information not provided in casebook excerpt]

#### Issue

Does the self-incrimination clause of the Fifth Amendment control the issue of whether a confession is involuntary in state criminal trials?

#### Holding and Reasoning (Brennan, J.)

Yes. In state criminal trials, wherever a question arises as to whether a confession is incompetent, the self-incrimination clause of the Fifth Amendment controls the issue. The clause has always applied to federal criminal prosecutions under *Bram v. United States*, 168 U.S. 532 (1897), and the Court in this case applies it to state criminal prosecutions as well.

**Key Terms:**

**Involuntary Confession** - An admission of guilt by a criminal suspect that would not have been offered in the absence of coercion, inducement, or deceit.

# Timbs v. Indiana

#### United States Supreme Court 139 S. Ct. 682 (2019)

#### Rule of Law

**The Fourteenth Amendment’s Due Process Clause incorporates to the states those constitutional protections fundamental to ordered liberty and deeply rooted in history and tradition.**

#### Facts

When Tyson Timbs (defendant) was charged with dealing drugs, police seized the $42,000 Land Rover he had recently purchased with life insurance proceeds from his father’s death, claiming it had been used to transport heroin. The trial court refused to order forfeiture of the vehicle to the state on the ground that it would be grossly disproportionate to the maximum $10,000 fine that Timbs’s drug conviction carried. The appellate court affirmed, but the Indiana Supreme Court reversed. Timbs appealed to the United States Supreme Court, arguing that the forfeiture violated the Eighth Amendment’s Excessive Fines Clause.

#### Issue

Does the Fourteenth Amendment’s Due Process Clause incorporate to the states those constitutional protections fundamental to ordered liberty and deeply rooted in history and tradition?

#### Holding and Reasoning (Ginsburg, J.)

Yes. The Fourteenth Amendment’s Due Process Clause incorporates to the states those constitutional protections fundamental to ordered liberty and deeply rooted in history and tradition. The Eighth Amendment’s Excessive Fines Clause provides that “excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.” Protecting against excessive fines is deeply rooted in Anglo-American law because it undermines other constitutional rights. The proscription traces back to the Magna Carta, which required economic sanctions to be proportionate to wrongful conduct and not so great as to deprive the wrongdoer of his or her livelihood. English Stuart kings imposed fines disproportionate to penal retributive and deterrent goals because fines provided revenue, while other punishments cost money. When England ousted the Stuart kings, the English Bill of Rights reiterated the Magna Carta’s prohibition of excessive bail, fines, and cruel and unusual punishments. Colonists reiterated the proscriptions in the Virginia Declaration of Rights’ Eighth Amendment, which Congress used almost verbatim in the constitutional Eighth Amendment. When the states ratified the Fourteenth Amendment in 1868, 35 of 37 states, accounting for over 90 percent of the American population, already had state laws prohibiting excessive fines. Today, all 50 state constitutions prohibit excessive fines either directly or proportionally. That makes the historical and rational argument that the Fourteenth Amendment’s Due Process Clause incorporated Eighth Amendment protections against the states overwhelming. In sum, protection against excessive fines is both fundamental to ordered liberty and deeply rooted in history and tradition. Therefore, the Eighth Amendment is incorporated and applies against the states. The court accordingly vacates the forfeiture of Timbs’s Land Rover as an excessive fine imposed by the state of Indiana and remands.

#### Concurrence (Thomas, J.)

The Fourteenth Amendment’s Due Process Clause does not incorporate substantive rights unrelated to due process. Instead, the Fourteenth Amendment’s Privileges and Immunities Clause incorporates Eighth Amendment protections against excessive fines because it is a privilege or immunity held by American citizens.

**Key Terms:**

**Fourteenth Amendment** - Provides that all persons born or naturalized in the United States are U.S. citizens. Also provides that no state shall: (1) abridge the privileges or immunities of a U.S. citizen; (2) deprive any person of life, liberty, or property, without due process of law; or (3) deny equal protection of the laws to anyone within its jurisdiction.

**Eighth Amendment** - Prohibits the imposition of excessive bail, excessive fines, or cruel and unusual punishments on criminal defendants.

**Incorporation** - A doctrine through which certain substantive protections of the Constitution are applicable to states.

**Chapter 2, Section 2 – the Shift to “Selective Incorporation”**

# \*\*DUNCAN v. LOUISIANA\*\*

#### United States Supreme Court 391 U.S. 145 (1968)

#### Rule of Law

**The Sixth Amendment right to a jury trial applies to state court proceedings through the Fourteenth Amendment.**

#### Facts

Gary Duncan (defendant) was convicted of simple battery by a judge in a Louisiana state court. Under Louisiana law, simple battery is a misdemeanor punishable by a maximum sentence of two years imprisonment and a $300 fine. Duncan sought trial by jury, but the Louisiana constitution granted jury trials only in cases in which capital punishment or imprisonment at hard labor could be imposed. Duncan's request was denied, and he was convicted and sentenced to sixty days in prison and a fine of $150. Duncan appealed and brought suit against the State of Louisiana, alleging an infringement of his constitutional right to a jury trial.

#### Issue

Whether the Sixth Amendment right to a jury trial applies to state court proceedings through the Fourteenth Amendment.

#### Holding and Reasoning (White, J.)

Yes. The Fourteenth Amendment guarantees a right to a jury trial in all state criminal cases that would be eligible for trial by jury under the Sixth Amendment if tried in federal court. Many of the first eight Amendments to the Constitution had already been applied to the states by the Fourteenth Amendment. By precedent, the test for holding an amendment applicable to the states through the Fourteenth Amendment is whether the right protected is among those “fundamental principles of liberty and justice that lie at the base of all our civil and political institutions." The right to trial by jury is necessary for criminal defendants to prevent oppression by the government and to provide safeguards against corrupt or overzealous prosecutors or "compliant, biased, or eccentric" judges. The nation, as a whole, has demonstrated a deep deference for the right to a jury trial. Thus, this right meets the standard of a “fundamental principle of liberty and justice" and should be protected by the Due Process Clause and respected by the states. The decision of the lower court is reversed.

#### Concurrence (Fortas, J.)

It is not the Court’s role to dictate the specific form of a jury trial to the states. The right to a jury trial is absolutely necessary for serious offenses, but states should be free to develop their own rules regarding the procedure of those jury trials without interference by federal or historical standards.

#### Concurrence (Black, J.)

The Fourteenth Amendment, as a whole, makes the Bill of Rights applicable to the states. Thus, although the majority bases its reasoning for extending the Sixth Amendment to the states on the Due Process Clause, the Privileges and Immunities Clause can also be used to grant jury trials in state-court proceedings. Additionally, although complete incorporation of the Bill of Rights and all Amendments to the states should be done at one time, the current process of selective incorporation is adequate. This process guards against Supreme Court justices making improper decisions about the scope of the Bill of Rights’ protections. Further, this method has already worked to make many of those Amendments applicable to the states.

#### Dissent (Harlan, J.)

States were historically responsible for governing all criminal proceedings within their borders according to procedures adapted to best suit their needs and populations. The Due Process Clause of the Constitution requires these proceedings to be “fundamentally fair” in all respects. However, the requirement of fundamental fairness does not mean that procedures need to be uniform among state and federal courts. Some procedural rules used in federal courts may be outdated or impractical for certain state-court settings, and the Court should only require uniformity of procedure if it is necessary for promoting basic fairness. The right to trial by jury should not be included in this category of rights, and the judgment of the district court should be affirmed.

***Duncan v. Louisiana*** was an important step in **incorporating the Bill or Rights** against the states.

**Key Terms:**

**Bill of Rights** - The first ten amendments to the U.S. Constitution.

**Right to a Jury Trial** - A constitutional right to a jury trial exists under the Sixth Amendment, in federal and state criminal trials where a defendant faces punishment of greater than six months’ imprisonment, and under the Seventh Amendment, in federal civil cases where a plaintiff seeks money damages.

**Simple Battery** - A battery includes any “offensive touching” without the requirement of pain or physical injury.

*Duncan v. Louisiana -–* In the 1960s, the Warren Court “selectively incorporated” or “absorbed” more and more of the specific provisions of the Bill of Rights under the 14th Amendment due process.

In determining whether an enumerated right is “fundamental”, the selective incorporation doctrine requires that the Court look at the total right guaranteed by the particular Bill of Rights Provision, not merely at a single aspect of that right nor the application of that aspect in the case before it. If a particular guarantee is determined to be “fundamental,” that provision is incorporated into the 14th Amendment and applied to the states ***to the*** *same extent that it applies to the federal government* **— “Jot-for-jot and case-for-case.”**

**The selective doctrine** is seen in ***Duncan v. Louisiana*** *(*1968*).* In this case, Duncan requested a jury trial and was refused. He was convicted of simple battery [which under Louisiana law] is a misdemeanor, punishable by 2 years’ imprisonment and a $300 fine. He asked for a 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. He was convicted and sentenced to serve 60 days in the parish prison and pay a fine of $150.

# Maxwell v. Dow

20 S.Ct. 448

Supreme Court of the United States

**CHARLES L. MAXWELL, *Plff. in Err.*,**

**v.**

**GEORGE N. DOW, as Warden of the Utah State Prison.**

No. 384.

Argued December 4, 1899.Decided February 26, 1900.

**Synopsis**

IN ERROR to the Supreme Court of the State of Utah to review a decision denying a writ of habeas corpus on the ground of the unconstitutionality of a statute. *Affirmed*.

The facts are stated in the opinion.

# Palko v. Connecticut

#### United States Supreme Court 302 U.S. 319 (1937)

#### Rule of Law

**A state law allowing the prosecution to appeal the results of a criminal conviction by jury trial does not violate the Due Process Clause of the Fourteenth Amendment.**

#### Facts

Palko (defendant) was indicted for first-degree murder and convicted of the lesser-included offense of second-degree murder. The law in the state of Connecticut (plaintiff) allowed the prosecution to appeal any errors of law in a criminal trial, and the prosecution appealed the judgment. The state court of appeals found errors of law with respect to the exclusion of evidence and flawed jury instructions. The state court of appeals ordered a new trial. Palko objected to a retrial on double-jeopardy grounds. Palko was convicted at the new trial and appealed the conviction through the state courts. Palko’s conviction was upheld by the state courts, and he petitioned the United States Supreme Court for review.

#### Issue

Does a state law allowing the prosecution to appeal the results of a criminal conviction by jury trial violate the Due Process Clause of the Fourteenth Amendment?

#### Holding and Reasoning (Cardozo, J.)

No. A state law allowing the prosecution to appeal the results of a criminal conviction by jury trial does not violate the Due Process Clause of the Fourteenth Amendment. Palko takes the position that the protections of the Fifth Amendment (*e.g.*, the protection against double jeopardy) are incorporated into the Fourteenth Amendment and expands that relationship to assert that any act of the federal government that would violate the Bill of Rights is also unconstitutional if performed by a state. There is no rule supporting Palko’s proposition. Retrial at the request of the state if an error of law has been identified does not shock our society’s fundamental notions of fairness and justice. The Court need not consider what the result would be if the state had requested retrial of an error-free conviction. The goal of the state is to achieve an error-free trial. Palko would be entitled to demand a retrial as often as necessary to achieve an error-free judgment. The Connecticut law simply affords the same privilege to the state. The judgment of conviction is affirmed.

**Key Terms:**

**Fourteenth Amendment** - Provides that all persons born or naturalized in the United States are U.S. citizens. Also provides that no state shall: (1) abridge the privileges or immunities of a U.S. citizen; (2) deprive any person of life, liberty, or property, without due process of law; or (3) deny equal protection of the laws to anyone within its jurisdiction.

**Fifth Amendment** - An amendment added to the U.S. Constitution as part of the Bill of Rights that provides important protections from government actions, including a guarantee that no person will be required to answer for a capital crime unless first indicted by a grand jury; no one will suffer double jeopardy; no one must testify against himself or herself; no one will be deprived of life, liberty, or property without due process of law; and no property will be taken for public use without just compensation.

**Double Jeopardy Clause** - A portion of the Fifth Amendment to the United States Constitution incorporated in the Bill of Rights that prohibits the government from trying a person more than once for the same offense.

# Snyder v. Commonwealth of Massachusetts

54 S.Ct. 330

Supreme Court of the United States

**SNYDER**

**v.**

**COMMONWEALTH OF MASSACHUSETTS.**

No. 241.

Argued Nov. 7, 1933.Decided Jan. 8, 1934.

**Synopsis**

Herman Snyder was convicted of murder in the first degree, and judgment of conviction was affirmed by the Supreme Judicial Court of [Massachusetts (185 N.E. 376),](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1933112944&pubNum=577&originatingDoc=Ice04cd709cc211d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and defendant brings certiorari.

Affirmed.

See, also, [187 N.E. 775](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1933113239&pubNum=577&originatingDoc=Ice04cd709cc211d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

Mr. Justice ROBERTS, Mr. Justice BRANDEIS, Mr. Justice SUTHERLAND, and Mr. Justice BUTLER, dissenting.

On Writ of Certiorari to the Superior Court in and for the County of Middlesex, Commonwealth of Massachusetts.

In **Snyder v. Massachusetts**, 291 U.S. 97, 78 L. Ed. 674, 54 S. Ct. 330 (1934), **the Supreme Court outlined the parameters of a defendant's due process right to be present during trial.**

The Court said "whenever the defendant's presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge" the defendant has a right to be present.

The "presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." Id. at 105-106, 108.

# Adamson v. California

#### United States Supreme Court 332 U.S. 46 (1947)

#### Rule of Law

**The Due Process Clause of the Fourteenth Amendment does not prevent a jury from drawing inferences regarding a defendant invoking the Fifth Amendment to refuse to testify at trial.**

#### Facts

Adamson (defendant) was on trial for first-degree murder in the Superior Court of the State of California. Adamson chose not to testify regarding the evidence admitted against him. The Superior Court instructed the jury that, under California law, it could infer Adamson’s guilt from the fact that he did not deny the evidence against him. The jury found Adamson guilty. Adamson challenged the California law as violating the Fourteenth Amendment. The California Supreme Court affirmed the trial court's judgment.

#### Issue

Does the Due Process Clause of the Fourteenth Amendment prevent a jury from drawing inferences regarding a defendant invoking the Fifth Amendment to refuse to testify at trial?

#### Holding and Reasoning (Reed, J.)

No. The Due Process Clause of the Fourteenth Amendment does not prevent a jury from drawing inferences regarding a defendant invoking the Fifth Amendment to refuse to testify at trial. Adamson argues that the privilege against self-incrimination is a component of the right to a fair trial, which is protected by the Due Process Clause of the Fourteenth Amendment. Although the Due Process Clause of the Fourteenth Amendment guarantees the right to a fair trial, it does not incorporate all the protections of the Bill of Rights as applicable to the states. Only those provisions of the Bill of Rights that are implicit in the concept of ordered liberty are covered by the Due Process Clause of the Fourteenth Amendment. While the Fourteenth Amendment protects against unfair convictions, it does not appear to be fundamentally unfair to allow a jury to draw inferences from a defendant’s failure to testify. The judgment of the lower court is affirmed.

#### Concurrence (Frankfurter, J.)

Historically, this Court has never accepted the idea that the Fourteenth Amendment incorporates all the rights of the first eight Amendments of the Bill of Rights. “Due process of law” is a historically significant concept independent of the Bill of Rights. Thus, the central issue in determining whether the Fourteenth Amendment incorporates a certain right is not whether it is a right protected by the Bill of Rights. Rather, the central issue is whether the proceedings in question are within accepted notions of justice.

#### Dissent (Murphy, J.)

The Bill of Rights should apply to the states under the Fourteenth Amendment. However, the scope of the Fourteenth Amendment’s protections is not limited to the Bill of Rights. There may be circumstances where a proceeding is so inadequate that it would violate due process, notwithstanding the fact that the violation is not addressed by the Bill of Rights.

#### Dissent (Black, J.)

It is clear from historical events that the purpose of the Fourteenth Amendment was to make the Bill of Rights applicable to the states. This Court should apply the Bill of Rights to the states, rather than substituting its own judgment to determine which provisions of the Bill of Rights should be incorporated.

**Key Terms:**

**Bill of Rights** - The first ten amendments to the U.S. Constitution.

**Fourteenth Amendment Due Process Clause** - The provision set forth at Amendment XIV, Section 1 of the United States Constitution prohibiting states from depriving any person of life, liberty, or property by means that are arbitrary or fundamentally unfair.

**Incorporation** - A doctrine through which certain substantive protections of the Constitution are applicable to states.

# Rochin v. California

#### United States Supreme Court 342 U.S. 165 (1952)

#### Rule of Law

**Law enforcement may not procure physical evidence by forcible extraction of a defendant’s stomach contents.**

# Williams v. Florida

#### United States Supreme Court 399 U.S. 78 (1970)

#### Rule of Law

**(1) Requiring a criminal defendant to give notice of an alibi defense and disclose his alibi witnesses to the state prior to trial does not violate the Fifth and Fourteenth Amendments.**

**(2) The Sixth Amendment does not require trial by a jury of exactly 12 people.**

#### Facts

The Florida Rules of Criminal Procedure required a criminal defendant to give pretrial notice to the prosecution if he planned on raising an alibi defense at trial, including information about the place the defendant claimed to have been and the names and addresses of any alibi witnesses the defendant intended to call at trial. In advance of his robbery trial, Williams (defendant) moved for a protective order to be excused from the rule's requirements, arguing that the rule violated his Fifth and Fourteenth Amendment rights by compelling him to be a witness against himself. However, Williams ultimately complied with the rule after his motion was denied. Williams also filed a pretrial motion for a 12-person jury instead of the six-person jury provided by Florida law in noncapital cases; this motion was denied. Williams identified Mary Scotty as his alibi witness. Prosecutors called Scotty for a pretrial deposition. Scotty then testified at trial that Williams was at her apartment during the time of the robbery. The prosecution impeached Scotty twice during cross-examination with her deposition testimony. The state also presented the rebuttal testimony of an officer who said that Scotty had asked him for directions during the time in which she claimed to be in her apartment with Williams. The jury ultimately convicted WIlliams, and he was sentenced to life in prison. The appellate court affirmed the conviction. The United States Supreme Court granted certiorari.

#### Issue

(1) Does requiring a criminal defendant to give notice of an alibi defense and disclose his alibi witnesses to the state prior to trial violate the Fifth and Fourteenth Amendments?

(2) Does the Sixth Amendment require trial by a jury of exactly 12 people?

#### Holding and Reasoning (White, J.)

(1) No. Requiring a criminal defendant to give notice of an alibi defense and disclose his alibi witnesses to the state prior to trial does not violate the Fifth and Fourteenth Amendments. Florida's alibi-notice rule requires a defendant to disclose the witnesses he intends to use in support of an alibi defense and requires the prosecution to provide the defendant with a list of rebuttal witnesses. This rule, and similar rules in other states, are based on legitimate state interests in avoiding a surprise, fabricated alibi defense at trial. These alibi-notice rules do not violate the privilege against self-incrimination. Although the state requires a defendant to disclose his alibi witness, the defendant maintains the ability to choose whether or not to present his alibi defense. Therefore, the defendant is not “compelled” to be a witness against himself in violation of the Fifth and Fourteenth Amendments. Furthermore, nothing in the Fifth Amendment gives a defendant the right to wait until the prosecution finishes its case before he presents the nature of his defense. Finally, as Williams concedes in this case, the prosecution would have the right to a continuance if the defendant presented a surprise alibi witness at trial. During the continuance, the prosecution could take the witness's deposition and find rebuttal evidence. If that sort of continuance is permissible, then it is equally permissible to allow the same type of discovery before the trial using the pretrial alibi-notice procedure. Therefore, states may maintain their requirements for pretrial notice of alibi disclosure, and complying with Florida's alibi-notice rule did not violate Williams's constitutional rights.

(2) No. The Sixth Amendment does not require trial by a jury of exactly 12 people. The concept of a trial by jury is of great historical importance, but the requirement of a 12-person jury appears to be nothing more than a historical accident. Although the Supreme Court has previously assumed or recognized in dicta that the Constitution requires a 12-person jury, the issue has never been fully considered or decided. There is no indication that the framers of the Constitution explicitly intended to carry over the common-law practice of a 12-person jury to the Constitution's trial-by-jury requirement. Moreover, the purpose of a jury is to serve as a safeguard against government oppression, and there is no reason to believe that a six-member jury is any less capable of fulfilling this purpose than a jury of 12. A jury must be large enough to serve as a deliberative group, to be free from external pressures or intimidation, and to provide a fair chance of a representative cross-section of the community. A group of six people is as likely to achieve these goals as a group of 12. Finally, there is no indication that the size of the jury has any impact on the jury's reliability as a factfinding body. In this case, Williams was provided a six-person jury under Florida law. Because the Sixth Amendment does not require a jury of 12 people, Williams's Sixth Amendment rights were not violated. The appellate court's decision is affirmed.

#### Concurrence (Burger, C.J.)

The alibi-notice rule has an added benefit in that it may dispose of some cases without trial, which will expedite the criminal-justice process. If a prosecutor investigates a defendant's alibi witness and finds the witness to be reliable and unimpeachable, the prosecutor may dismiss the charges against the defendant. On the other hand, if a prosecutor investigates a defendant's alibi witness and finds that the alibi defense has been fabricated, the defendant's counsel may need to reexamine the case and either withdraw from the case, if the defendant has proposed using false testimony, or try and persuade the defendant to plead guilty.

#### Concurrence/Dissent (Marshall, J.)

The Court correctly decided the alibi-notice issue. However, the Fourteenth Amendment guaranteed Williams a trial by a 12-person jury, so his conviction should be reversed. The Fourteenth Amendment guarantees a criminal defendant in a state case the same right to a trial by jury as the Sixth Amendment would provide in a federal case, and this Court has previously concluded that the Sixth Amendment requires trial by a 12-person jury.

#### Concurrence/Dissent (Black, J.)

Requiring a defendant to make a pretrial disclosure of his alibi defense and his alibi witnesses is a violation of the defendant's right against self-incrimination. The Court’s holding that this type of state procedural rule is constitutional wrongly assumes that a defendant who gives the proper alibi notice to the prosecution will not be harmed if he later decides not to present his alibi defense. However, a defendant could be harmed because the prosecution now knows someone else to question, who may be able to lead the prosecution to more incriminating evidence regarding the defendant. The plain language of the Constitution clearly prohibits such a rule. The Fifth Amendment protects a defendant from being compelled to give the prosecution any evidence that could be used to convict him. The burden is clearly placed on the state to find its own evidence and develop its own case without any help from the defendant. The holding today is not only unconstitutional, but it opens the door for states to compel further information from the defense prior to trial.

**Key Terms:**

**Fourteenth Amendment** - Provides that all persons born or naturalized in the United States are U.S. citizens. Also provides that no state shall: (1) abridge the privileges or immunities of a U.S. citizen; (2) deprive any person of life, liberty, or property, without due process of law; or (3) deny equal protection of the laws to anyone within its jurisdiction.

**Fifth Amendment** - An amendment added to the U.S. Constitution as part of the Bill of Rights that provides important protections from government actions, including a guarantee that no person will be required to answer for a capital crime unless first indicted by a grand jury; no one will suffer double jeopardy; no one must testify against himself or herself; no one will be deprived of life, liberty, or property without due process of law; and no property will be taken for public use without just compensation.

# Ramos v. Louisiana

140 S.Ct. 1390

Supreme Court of the United States.

**Evangelisto RAMOS, Petitioner**

**v.**

**LOUISIANA**

No. 18-5924

Argued October 7, 2019Decided April 20, 2020

**Synopsis**

**Background:** Defendant was convicted in the Louisiana Criminal District Court, Orleans Parish, No. 524–912, Section “F”, [Robin D. Pittman](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0385090501&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), J., of second-degree murder based on 10-to-2 jury verdict in favor of conviction, and was sentenced to life in prison without possibility of parole. Defendant appealed. The Louisiana Court of Appeal, [James F. McKay III](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0168993001&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), C.J., [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I5dca0a00c02e11e79c8f8bb0457c507d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Search))[231 So.3d 44](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2043062969&pubNum=0003926&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), affirmed. Certiorari was granted.

[**Holding:**](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)#co_anchor_F32050796536) The Supreme Court, Justice [Gorsuch](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), held that the Sixth Amendment right to jury trial, as incorporated against the States by way of the Fourteenth Amendment, requires a unanimous verdict to convict a defendant of a serious offense, abrogating [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca v. Oregon*, 406 U.S. 404, 92 S.Ct. 1628, 32 L.Ed.2d 184](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), and [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I8bb1f6ed9bf111d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Search))[*Johnson v. Louisiana*, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127121&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

Reversed.

Justices [Ginsburg](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), [Breyer](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), and [Sotomayor](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91) joined with respect to Parts II-B, IV-B-2, and V.

Justices [Ginsburg](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91) and [Breyer](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91) joined with respect to Part IV-A.

Justice [Sotomayor](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91) filed an opinion concurring as to all but Part IV-A.

Justice [Kavanaugh](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0364335801&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91) filed an opinion concurring in part.

Justice [Thomas](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91) filed an opinion concurring in the judgment.

Justice [Alito](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91) filed a dissenting opinion, in which Chief Justice [Roberts](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0258116001&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91) joined and in which Justice [Kagan](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91) joined as to all but Part III-D.

***Ramos v. Louisiana***, 590 U.S. \_\_\_ (2020), was a [U.S. Supreme Court](https://en.wikipedia.org/wiki/Supreme_Court_of_the_United_States) decision in which the Court ruled that the [Sixth Amendment to the U.S. Constitution](https://en.wikipedia.org/wiki/Sixth_Amendment_to_the_United_States_Constitution) requires that guilty verdicts for criminal trials be unanimous. Only cases in Oregon and Louisiana were affected by the ruling, because every other state already had this requirement. The decision [incorporated](https://en.wikipedia.org/wiki/Incorporation_of_the_Bill_of_Rights) the Sixth Amendment requirement for unanimous jury criminal convictions against the states, and thereby overturned the Court's previous decision from the 1972 case [*Apodaca v. Oregon*](https://en.wikipedia.org/wiki/Apodaca_v._Oregon).[[1]](https://en.wikipedia.org/wiki/Ramos_v._Louisiana#cite_note-1)[[2]](https://en.wikipedia.org/wiki/Ramos_v._Louisiana#cite_note-cnn_decision-2)

# Gideon v. Wainwright

#### United States Supreme Court 372 U.S. 335 (1963)

#### Rule of Law

**The Fourteenth Amendment incorporates the Sixth Amendment right to counsel to the states.**

# Malloy v. Hogan

#### United States Supreme Court 378 U.S. 1 (1964)

#### Rule of Law

**In state criminal trials, wherever a question arises as to whether a confession is involuntary, the self-incrimination clause of the Fifth Amendment controls the issue.**

# New State Ice Co. v. Liebmann

52 S.Ct. 371

Supreme Court of the United States.

**NEW STATE ICE CO.**

**v.**

**LIEBMANN.**

No. 463.

Argued Feb. 19, 1932.Decided March 21, 1932.

**Synopsis**

Mr. Justices BRANDEIS and STONE dissenting.

Appeal from the United States Circuit Court of Appeals for the Tenth Circuit.

Suit by the New State Ice Company against Ernest A. [Liebmann. Decree for defendant (42 F.(2d) 913)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1930125386&pubNum=350&originatingDoc=I2e2163979ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) was affirmed by the Circuit Court of Appeals ([52 F. (2d) 349),](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1931127251&pubNum=350&originatingDoc=I2e2163979ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and plaintiff appeals.

Affirmed.

The New State Ice Company, which was properly licensed in by the Corporation Commission of Oklahoma, brought suit against Liebman to prevent him from selling ice in Oklahoma City without a license.

**The lower courts had relied on *Frost v. Corporation Commission***[**278**](https://en.wikipedia.org/wiki/List_of_United_States_Supreme_Court_cases,_volume_278)[**U.S.**](https://en.wikipedia.org/wiki/United_States_Reports)[**515**](https://supreme.justia.com/cases/federal/us/278/515/)**(1929) to conclude that a license is not necessary if existing businesses are "sufficient to meet the public needs therein."**[**[1]**](https://en.wikipedia.org/wiki/New_State_Ice_Co._v._Liebmann#cite_note-1)

**The Supreme Court distinguished the case from *Frost*, which was concerned with businesses that grind grain. It found a public interest key to feeding the population that was not comparable to the ice market.**

[Justice Brandeis](https://en.wikipedia.org/wiki/Justice_Brandeis) dissented from the court's opinion and was joined by Justice Stone:

To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment.[[2]](https://en.wikipedia.org/wiki/New_State_Ice_Co._v._Liebmann#cite_note-2) We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious, or unreasonable. We have power to do this, because the due process clause has been held by the Court applicable to matters of substantive law as well as to matters of procedure. But, in the exercise of this high power, we must be ever on our guard lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

**Chapter 2, Section 3 – “Free Standing” Due Process**

**Free Standing Due Process page 45**

**The Supreme Court has continued to apply due process as a guarantee that has “independent content, “ standing apart from the selectively incorporated guarantees.**

**Free standing due process has emerged as**

1. **the dominant source of constitutional regulation of the pre-trial and post-trial stages of the process (most notably as to guilty please and sentencing)**
2. **a major source of constitutional regulation of the trial**
3. **a lesser, but still significant source of regulation of police practices.**

**District Attorney’s Office v. Osborne reflects the differing perspectives that have often divided the Court in its determination of the independent content of due process.**

# Dowling v. U.S.

110 S.Ct. 668

Supreme Court of the United States

**Reuben DOWLING, Petitioner**

**v.**

**UNITED STATES.**

No. 88–6025.

Argued Oct. 4, 1989.Decided Jan. 10, 1990.

**Synopsis**

After remand, [814 F.2d 134](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1987036048&pubNum=0000350&originatingDoc=Ieeec72f49c8f11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), defendant was again convicted in the United States District Court for the Virgin Islands, David V. O'Brien, Chief Judge, of federal and territorial offenses in connection with bank robbery, and defendant appealed. The Court of [Appeals for the Third Circuit, 855 F.2d 114](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988107197&pubNum=0000350&originatingDoc=Ieeec72f49c8f11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), affirmed, and certiorari was granted. The Supreme Court, Justice [White](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0257944001&originatingDoc=Ieeec72f49c8f11d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ieeec72f49c8f11d993e6d35cc61aab4a), held that introduction of evidence relating to crime that defendant had previously been acquitted of committing did not violate double jeopardy or due process.

Affirmed.

Justice [Brennan](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0164093901&originatingDoc=Ieeec72f49c8f11d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ieeec72f49c8f11d993e6d35cc61aab4a) filed dissenting opinion in which Justices [Marshall](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0336250901&originatingDoc=Ieeec72f49c8f11d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ieeec72f49c8f11d993e6d35cc61aab4a) and [Stevens](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0156277701&originatingDoc=Ieeec72f49c8f11d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ieeec72f49c8f11d993e6d35cc61aab4a) joined.

[*Dowling v. United States* (1990)](https://en.wikipedia.org/w/index.php?title=Dowling_v._United_States_(1990)&action=edit&redlink=1), 493 U.S. 342, a case regarding the [Double Jeopardy Clause](https://en.wikipedia.org/wiki/Double_Jeopardy_Clause) concerning the later admissibility of evidence from an earlier trial in which the defendant was acquitted.

**Key Terms:**

**Double Jeopardy Clause** - A portion of the Fifth Amendment to the United States Constitution incorporated in the Bill of Rights that prohibits the government from trying a person more than once for the same offense.

# Medina v. California

#### United States Supreme Court 505 U.S. 437 (1992)

#### Rule of Law

**Placing the burden of proof on the defendant in a competency hearing does not violate the Due Process Clause of the Fourteenth Amendment.**

#### Facts

Medina (plaintiff) stole a gun, robbed several places, and killed three people. The state of California (defendant) charged Medina with multiple offenses, including three counts of first-degree murder. Before trial began, Medina’s lawyer moved for a competency hearing. Under California law, a person cannot participate in criminal proceedings against him if he is mentally incompetent. The California statute defining mental incompetence states that the defendant is presumed competent and that the party claiming incompetence bears the burden of proving incompetence by a preponderance of the evidence. The trial court granted Medina’s motion for a competency hearing and the jury heard conflicting expert testimony regarding Medina’s mental state before finding him competent to stand trial. Medina was convicted of all three murder charges and sentenced to death. On appeal, Medina argued that placing the burden of proof on the defendant in a competency hearing violated due process. The state supreme court affirmed his conviction. The United States Supreme Court granted certiorari.

#### Issue

May a state statute require a defendant to bear the burden of proving he is incompetent to stand trial?

#### Holding and Reasoning (Kennedy, J.)

Yes. A state statute does not violate the Due Process Clause of the Fourteenth Amendment by placing the burden of proof in a competency hearing on the defendant. States are afforded great deference in the field of criminal procedure. Unless a state’s rule of criminal procedure offends some fundamental principle of justice, it will be upheld. No precedent suggests that allocating the burden of proof to the defendant in a competency hearing violates due process, and as long as the defendant is given access to procedures for requesting a competency hearing, no principles of fairness are violated. Medina argues that placing the burden of proof on the defendant in a competency hearing violates due process because it forces him to bear the risk of a false finding, especially since psychiatry is not an exact science. However, due process only requires that a defendant who claims to be incompetent be given a reasonable opportunity to prove his incompetency. Due process only requires that basic safeguards be in place to ensure that an incompetent criminal defendant is not forced to stand trial. The California statute that presumes a defendant is competent and places the burden of proving incompetency on the one claiming it does not violate due process. Medina’s claims are dismissed.

#### Concurrence (O’Connor, J.)

The judgment of the Court is correct. When evaluating due process in criminal cases, a balancing of the equities serves as a useful guide. Things to consider in determining if placing the burden of proof on the defendant is unfair are: whether the government has greater access to evidence; whether the defendant is able obtain evidence on the issue he must prove; and whether placing the burden on the government protects some other right.

**Key Terms:**

**Competence** - The mental ability of a person to stand trial such that he can understand the charges against him and aid his lawyer in forming a defense.

# \*\*DISTRICT ATTORNEY’S OFFICE v. OSBORNE\*\*

#### United States Supreme Court 557 U.S. 52 (2009)

#### Rule of Law

**The Due Process Clause of the Fourteenth Amendment does not provide a constitutional right to postconviction DNA testing.**

#### Facts

William Osborne (defendant) was convicted of kidnapping and sexual assault in Alaska in 1993. The parole board released Osborne from prison after 14 years, due in part to his confession to the crime at a parole hearing. Osborne was subsequently arrested for a new crime, and the District Attorney’s Office for the Third Judicial District (plaintiff) petitioned to revoke his parole. Osborne then requested that the Alaska Court of Appeals order deoxyribonucleic acid (DNA) testing on biological evidence found on a condom collected from the 1993 crime scene. Osborne claimed that he had made the same request of his lawyer, Sidney Billingslea, at the 1993 trial, but that she had failed to act on his request. Billingslea testified that she had not requested the testing for various reasons, including her belief that the results would confirm Osborne’s guilt. Osborne alleged that his confession had been a lie made in order to gain a quicker release. The court of appeals denied relief based on Osborne’s failure to make the request at the 1993 trial and his confession to the parole board. Osborne then brought a federal action under 42 U.S.C. § 1983, claiming that he was entitled to DNA testing under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. The federal district court agreed with Osborne and ordered the state to turn over the evidence for testing. The United States Court of Appeals for the Ninth Circuit affirmed, holding that the duty to disclose exculpatory evidence extends to postconviction proceedings. The United States Supreme Court granted certiorari to review the constitutional claim.

#### Issue

Does the Due Process Clause of the Fourteenth Amendment provide a constitutional right to postconviction DNA testing?

#### Holding and Reasoning (Roberts, C.J.)

No. Although a defendant has a postconviction right to demonstrate innocence with new evidence, federal courts will not interfere with adequate state-law procedures governing DNA testing. The Due Process Clause prohibits states from depriving individuals of certain rights without proper process. New DNA-testing technology can exonerate wrongfully convicted defendants. As a result, most states and the federal government have developed legislation that permits postconviction DNA testing under certain conditions. Although Alaska does not have a specific statute regarding DNA testing, the state has permitted testing under its postconviction-relief statute as a claim of newly discovered evidence establishing actual innocence. In addition, the state court of appeals has used a three-part test for a defendant seeking postconviction DNA testing. A defendant must show that (1) the conviction relied heavily on eyewitness-identification evidence, (2) there was real doubt regarding the identification of the defendant, and (3) the DNA testing available likely would be conclusive. Exoneration is granted upon a compelling showing of new evidence that establishes innocence. These requirements are similar to those of other states and to the law governing federal prisoners. This process is entirely adequate to protect substantive due-process rights. Here, the Alaska Court of Appeals denied Osborne’s request under these state procedures. The federal courts therefore erred by creating a federal due-process right when the state law provided adequate protection. Additionally, Osborne’s general claim of a constitutional right to prove his actual innocence, even if the right exists, must be brought as a habeas corpus claim, not under § 1983. Accordingly, the judgment of the federal court of appeals is reversed and remanded.

#### Concurrence (Alito, J.)

There are two reasons other than the constitutional claim to deny Osborne’s request: (1) a defendant must exhaust state remedies through a habeas corpus claim before filing a § 1983 claim, and (2) a defendant who refuses to request DNA testing at the time of trial for strategic reasons has no right to request testing after conviction.

#### Dissent (Souter, J.)

Although the state process is adequate, Alaska has failed to properly follow its process in enough instances that the state has violated Osborne’s due-process rights.

#### Dissent (Stevens, J.)

The state procedure does not provide adequate due process. The Alaska court denied Osborne relief under the postconviction statute because he did not request DNA testing at trial and therefore could not claim that the DNA testing was new evidence. The DNA testing would be new evidence, however, because the type of DNA testing requested was not available at the time of trial. The three-part test is not adequate, because identification testimony carries little weight compared to DNA testing, and the DNA test results would be conclusive. The state’s refusal to provide Osborne with access to evidence for DNA testing that could prove his innocence is so arbitrary that the refusal qualifies as a violation of due process.

**Key Terms:**

**Freestanding Due Process** - The concept that substantive due-process rights offer a guarantee that exists independent of the guarantees with which due-process rights are typically associated and that expands to other areas, including postconviction rights.

***District Attorney’s Office v. Osborne*** reflects the differing perspectives that have often divided the Court in its determination of the independent content of due process.

# Herrera v. Collins

#### United States Supreme Court 506 U.S. 390 (1993)

#### Rule of Law

**Federal habeas corpus relief for claims of actual innocence is unavailable if there was no constitutional violation in state criminal proceedings.**

#### Facts

Leonel Torres Herrera (defendant) was convicted of one murder and pled guilty to another. The Texas Court of Criminal Appeals upheld the conviction and death sentence, and the United States Supreme Court denied certiorari. Herrera’s state and federal habeas applications failed, and the Supreme Court denied certiorari. Ten years after conviction, Herrera petitioned for state relief claiming “actual innocence” based on evidence that Herrera’s brother committed the crimes. The state court denied the claim, and Herrera filed a federal habeas petition claiming the state failed to provide exculpatory evidence to the defense as required by *Brady v. Maryland*, 373 U.S. 83 (1963). The United States Supreme Court granted certiorari.

#### Issue

Is federal habeas corpus relief for claims of actual innocence available if no constitutional violation occurred during state criminal proceedings?

#### Holding and Reasoning (Rehnquist, C.J.)

No. There is no federal habeas relief for claims of actual innocence if there was no constitutional violation during state proceedings. A criminal defendant is presumed innocent only until proven guilty. Habeas relief remedies constitutional violations, not factual mistakes. Proof of innocence allows federal judges to grant relief under the “fundamental miscarriage of justice exception” for claims that would be barred by the rule against successive habeas petitions. Still, inmates must show an independent constitutional violation. The dissent’s “probable innocence” standard would burden state courts by requiring retrials for people who have shown only that a new jury might not convict. Herrera claims the Eighth and Fourteenth Amendments bar his execution. Herrera‘s claim of factual error is time barred in state court and does not fall into the miscarriage of justice exception. The fact that Herrera is facing a death sentence is irrelevant. States are entitled to deference in matters of criminal law, and Texas’s jurisdictional rule barring this claim is not unfair. Herrera can seek executive clemency. Federal habeas relief may be granted after a strong showing of innocence, but Herrera has not made one. Herrera’s petition is denied.

#### Concurrence (O’Connor, J.)

Executing an innocent person is unconstitutional, but Herrera is not innocent. The issue is whether a legally guilty person who suffered no constitutional violation is entitled to a retrial. Historically, clemency was the only remedy available in such cases. The Court indicates that federal habeas relief would be available to an innocent person if there were no other remedy, but the Court does not now and may never have to make that holding since clemency and other remedies are available.

#### Concurrence (Scalia, J.)

There is no legal basis for a constitutional right to a retrial based on new evidence. The dissent would invalidate the practice of courts based on personal beliefs. The Court may assume a right exists in order to make its finding, though it is hesitant to admit that the Constitution may not remedy every wrong, especially one as serious as a wrongful execution. This issue may never come up again, because evidence of innocence strong enough to satisfy the Court would almost certainly result in executive clemency.

#### Concurrence (White, J.)

Execution would be unconstitutional if there is proof of innocence such that no rational finder of fact could find the person guilty beyond a reasonable doubt, even if the claim is time barred in state court. Herrera has not met this standard.

#### Dissent (Blackmun, J.)

Executing an innocent person is “shocking to the conscience” and violates the Eighth and Fourteenth Amendments. Punishment that needlessly inflicts pain or is disproportionate is unconstitutional; executing an innocent person is both. There is no clear separation between guilt and punishment. It is irrelevant that a new trial would be less reliable; no state would retry a person who is probably innocent. This Court created an exception to the principle of finality for claims of actual innocence but now takes the illogical view that an innocent person must also show a constitutional violation. The Court gives no guidance for the states, and the existence of executive clemency does not satisfy the states’ constitutional obligations. State remedies must be exhausted. Texas provided Herrera no remedy, and Herrera was entitled to have his factual questions resolved by a federal court. Relief for actual innocence should be granted when the prisoner has proven probable innocence. This standard is high because retrial may be impossible and habeas relief may be the final disposition of a case. Thus, convictions must be given due respect. District courts must weigh all evidence to determine whether prisoners have met this burden in a given case. Execution of a prisoner who is probably innocent is unconstitutional.

# Medina v. California

#### United States Supreme Court 505 U.S. 437 (1992)

#### Rule of Law

**Placing the burden of proof on the defendant in a competency hearing does not violate the Due Process Clause of the Fourteenth Amendment.**

# House v. Bell

#### United States Supreme Court 547 U.S. 518 (2006)

#### Rule of Law

**A prisoner may seek federal habeas corpus relief for claims procedurally barred under state law in extraordinary cases by showing that based on new evidence, no reasonable juror could find guilt beyond a reasonable doubt.**

#### Facts

Paul Gregory House (defendant) was charged with capital murder. At trial, the prosecution presented evidence that blood, semen, and other physical evidence implicated House. The jury convicted. At sentencing, the state presented aggravating evidence of House’s prior conviction for sexual assault and that that the killing was committed in the course of a rape. House was sentenced to death. House petitioned for federal habeas corpus relief for claims procedurally barred in the state court on the basis of actual innocence. House offered new evidence that the victim’s husband committed the murder and the blood and semen evidence were faulty. The district court held a full evidentiary hearing and concluded that the witnesses were not credible and the blood evidence was not contaminated until after testing. The United States Supreme Court granted certiorari.

#### Issue

May a prisoner seek federal habeas corpus relief for claims procedurally barred under state law upon a compelling showing of actual innocence?

#### Holding and Reasoning (Kennedy, J.)

Yes. A prisoner may seek federal habeas relief for defaulted claims by making a compelling showing of actual innocence. Out of comity, federal courts generally refuse to hear claims that are procedurally barred under state law absent a showing of cause for the forfeiture and actual prejudice. The Court carved out a miscarriage of justice exception that allows federal review in cases of substantial injustice. Under *Schlup v. Delo*, 513 U.S. 298 (1995), prisoners may show actual innocence as a “gateway to defaulted claims.” This requires proof that based on new evidence it is probable that no reasonable juror could find guilt beyond a reasonable doubt. Thisensures that review will be limited to exceptional cases while adding a safeguard against an unfair result. Once a prisoner has satisfied *Schlup*, there is sufficient doubt as to culpability to justify full review of defaulted constitutional claims. Federal courts are not limited to consideration of new evidence, but must consider all evidence and determine what reasonable jurors would do. In this case, new evidence shows the semen did not belong to House, officials may have tainted the blood evidence, and the victim’s husband may have committed the crime. House has not made a sufficient showing to warrant relief based solely on his claim of innocence, and the Court does not address whether such a claim can be made or the burden that would be required. House has made the required showing under *Schlup*. The case is remanded for consideration of the defaulted claims.

#### Concurrence/Dissent (Roberts, C.J.)

House must prove probable innocence in order to have federal courts review constitutional claims that he allowed to default in the Tennessee court. Under *Schlup*, this requires presentation of “new reliable evidence” sufficient to prove that it is probable that “no reasonable juror would have convicted him in light of the new evidence.” In light of findings of reliability made by the district court, the evidence presented does not warrant a finding that no reasonable juror would have found House guilty. The majority correctly asserts that House has not met the higher burden required for the hypothetical freestanding claim of innocence alluded to in *Herrera v. Collins*, 506 U.S. 390 (1993). The district court held an evidentiary hearing and found House’s witnesses were not credible and the blood evidence was not contaminated until after testing, but offered no opinion as to House’s guilt. It is the duty of the district court, not this Court, to assess the weight and credibility of evidence and make findings of fact. There was no clear error in the district court’s findings. Therefore, it is probable that at least one juror would find House guilty.

**Key Terms:**

**Comity** - The principle of respect and recognition that one political entity, such as a nation or state, accords to another, such as with respect to the operation of an entity’s laws within its territory.

# Hamdi v. Rumsfeld

#### United States Supreme Court 542 U.S. 507 (2004)

#### Rule of Law

**Due process guarantees that United States citizens held in the United States as enemy combatants must be given a meaningful opportunity to contest the factual basis for that detention before a neutral decision-maker.**

#### Facts

In 2001, in response to attacks against the United States by the al Qaeda terrorist network on September 11, 2001, Congress passed the Authorization for Use of Military Force (AUMF), authorizing the President to use all appropriate and necessary force against persons suspected of engaging in terrorist activity against the United States. The President shortly thereafter ordered United States military forces into Afghanistan. This case arises out of the detention of Yaser Hamdi (defendant), a U.S. citizen, who was seized in Afghanistan on suspicion that he was actively working with the Taliban regime. He was turned over to the United States military. The United States interrogated Hamdi in Afghanistan before transferring him to the Guantanamo Bay Naval Base in 2002. After learning he was an American citizen, authorities transferred him to Norfolk, Virginia, and then Charleston, South Carolina. The Government contended that because Hamdi was an “enemy combatant” it could hold him indefinitely in the United States without formal charges or proceedings until it determined that access to counsel or further process was warranted. Hamdi’s father filed a writ of habeas corpus, alleging that Hamdi’s detainment violated the Fifth and Fourteenth Amendments, and demanding that Hamdi be appointed counsel and given a fair hearing. The government (plaintiff) filed a motion to dismiss, which included an outline of the evidence against Hamdi, called the Mobbs Report. The district court found that the Mobbs Report did not contain enough evidence to hold Hamdi without trial. The Fourth Circuit reversed, holding that the United States acted constitutionally in detaining Hamdi, and Hamdi petitioned for certiorari to the United States Supreme Court. The United States Supreme Court granted certiorari.

#### Issue

When a U.S. citizen is labeled as an enemy combatant, is he entitled to the constitutional protections of due process?

#### Holding and Reasoning (O’Connor, J.)

Yes. A U.S. citizen accused of being an enemy combatant must be afforded an opportunity to be heard by a neutral decision maker. The government must provide basic procedures for the citizen-detainee to challenge his detention. In passing the Authorization for Use of Military Force (AUMF) resolution, Congress authorized the President to exercise the “necessary and proper force” to combat terrorist activity. Hamdi was seized by the United States while engaged in terrorist activity in Afghanistan. Thus, Congress authorized Hamdi’s detention and his seizure is appropriate. However, the Fourteenth Amendment of the Constitution guarantees the right to due process under the law. Furthermore, absent suspension, all persons detained in the United States have the right to habeas corpus. This means that an individual accused of criminal activity cannot be detained indefinitely, with no trial, no counsel, and no ability to petition for freedom if he is wrongfully imprisoned. Both parties concede that Hamdi is entitled to the writ of habeas corpus as a United States citizen, and that Congress has not suspended the writ. The government argues that Hamdi’s writ of habeas corpus should be denied because the facts surrounding his seizure are still in dispute. In order to determine the due process issues in this case, the private interest affected by the official action must be weighed against the government’s asserted interest, including the function involved and the burdens the government would face in providing greater process. Hence, Hamdi’s interest in being free from involuntary detention must be weighed against the government’s interest in ensuring that those who have fought with the enemy in armed conflict do not return. These interests must be carefully balanced. The constitutional guarantees of liberty are best served if a citizen-detainee seeking to challenge his classification as an enemy combatant receives notice of the factual basis for his classification and a fair opportunity to rebut the government’s factual assertions before a neutral decision-maker. However, this holding is qualified. As long as the government provides these core elements, it can tailor other aspects of proceedings to help reduce the burden on the executive of conducting enemy combatant proceedings during times of military conflict. Under these criteria, Hamdi has been denied due process, and therefore is entitled to a hearing that contains the protections of the Constitution. The government is required to provide Hamdi with basic proceedings to challenge his classification as an enemy combatant. The ruling of the court of appeals is vacated and remanded.

#### Concurrence/Dissent (Souter, J.)

The AUMF does not authorize detention of classified enemy combatants in light of the Non-Detention Act, which strictly prohibits the detention of a United States citizen without an explicit act of Congress. Congress has not explicitly acted to permit the detention of Hamdi, but has instead granted general war powers to the President. The power to make determinations affecting citizen-detainees’ liberty interests is inappropriate for the President, since the President is entrusted with protecting national security interests. Liberty and security interests are necessarily at odds with each other, creating a conflict of interest. Since Hamdi’s detention is unlawful, the question of what procedure is due to challenge a classification as an enemy combatant is unnecessary.

#### Dissent (Scalia, J.)

The due process protections available to citizens are distinguishable from those available to non-citizens. Non-citizens accused of aiding the enemy and captured during times of war can be held until the end of the conflict. In contrast, citizens accused of aiding the enemy, like Hamdi, were regarded as traitors and processed through the criminal justice system. The plurality has ignored this tradition and formulated a new system for citizen enemy combatants to be processed. The Due Process Clause of the Fourteenth Amendment guarantees the right to a fair hearing, absent invocation of the Suspension Clause; the Constitution does not afford a third option. The executive branch cannot unilaterally relax constitutional due process protections unless Congress suspends those protections. Only Congress may suspend this criminal process for citizens, and the executive can only bring about this result by asking Congress to act. Because both parties agree that the Suspension Clause was not invoked here, Hamdi should be afforded his due process right to a fair hearing in front of a judge, like any other criminal citizen.

#### Dissent (Thomas, J.)

It is not the role of the courts to define the federal government’s war powers. Congress, not the courts, should have considered this issue. The plurality does not properly consider the Government’s compelling interests at stake and the judiciary’s limited role in balancing this and private interests. Forcing the government to gather additional evidence to prove that an enemy combatant is lawfully detained will be costly, time intensive, and may compromise confidential intelligence, which a detainee could then use against the United States. The interest of the government of protecting the country overrides Hamdi’s individual liberty interest, and therefore the judgment of the Fourth Circuit Court of Appeals should be affirmed.

**Key Terms:**

**Writ of Habeas Corpus** - Enables a detainee or prisoner to challenge the legality of his detention by the government.

**Fifth Amendment Due Process Clause** - Prohibits the federal government from depriving an individual of life, liberty, or property without due process of law. The purpose of this clause is to prevent abuse of government authority in legal proceedings. Due process also requires that the federal government use fair methods or procedures when its actions would deprive an individual of life, liberty, or property.

**Enemy Combatant** - A person who associates with forces that are engaged in hostilities against the United States or its allies. This includes any person who commits acts or provides aid to enemy forces.

**Suspension Clause** - A provision of Article I, Section 9 of the United States Constitution that states that the privilege of the writ of habeas corpus may not be suspended unless public safety requires it.

# Brady v. Maryland

#### United States Supreme Court 373 U.S. 83 (1963)

#### Rule of Law

**Under the Due Process Clause, the prosecution must turn over evidence favorable to the defense upon request if the evidence is material to either culpability or punishment.**

#### Facts

Brady (defendant) and Boblit were suspected of murder. Brady was tried first. Before trial, Brady’s attorney asked to review Boblit’s statements, but the prosecutor withheld the statement in which Boblit admitted to the actual killing. At trial, Brady confessed his involvement in the crime but claimed to have no role in killing the victim. Brady was found guilty of murder and given the death penalty. Brady did not learn of the prosecutor’s suppression of Boblit’s statement until after sentencing. The court of appeals held that the prosecutor’s suppression violated the Due Process Clause.

#### Issue

Under the Due Process Clause, must the prosecution turn over evidence favorable to the defense?

#### Holding and Reasoning (Douglas, J.)

Yes. Due process requires the prosecution turn over evidence that is favorable to the defense upon request if the evidence relates to the defendant’s guilt or innocence or to sentencing. Under *Mooney v. Holohan*, 294 U.S. 103 (1935), and*Napue v. Illinois*, 360 U.S. 264 (1959), prosecutors may not present false testimony or allow false testimony to go uncorrected. The ruling in this case builds on that foundation. It is a denial of due process for the prosecution to withhold favorable evidence material to culpability or sentencing after a request by the defense. The violation is in no way contingent upon whether the prosecutor acted in good or bad faith. The purpose of this rule is to safeguard the accused’s right to a fair trial. The good of the people is best served by fair process, not just punishing the guilty. It is unjust for a prosecutor to withhold exculpatory evidence requested by the defense. The ruling of the court of appeals is affirmed.

**Key Terms:**

**Due Process** - A constitutional guarantee that a law shall not be unreasonable, arbitrary, or capricious and that individuals will be given notice of legal proceedings conducted fairly with an opportunity for an individual to be heard before the government may impose sanctions on one’s life, liberty, or property.

# Powell v. Alabama (Scottsboro Boys Trial)

#### United States Supreme Court 287 U.S. 45 (1932)

#### Rule of Law

**Due process requires that criminal defendants have the right to counsel both at trial and in the time leading up to trial when consultation and preparation take place.**

#### Facts

Ozie Powell and eight other impoverished, illiterate African American teenagers (defendants), were charged with and found guilty of raping two white women. The trial judge neglected to give Powell and the others the chance to secure their own representation by withholding contact with their families who resided in neighboring states. Instead, the judge appointed “all members of the bar” to represent Powell and the others for their arraignment. Three separate trials commenced just six days later, and it was only on the morning of trial when an Alabama attorney and a Tennessee attorney volunteered to represent the nine defendants at trial. Each trial was completed within one day, and all three juries convicted the defendants, sentencing each of them to the death penalty. Powell and the others filed motions for a new trial, but the motions were overruled and the state supreme court affirmed the judgments on appeal. The cases were argued and submitted as one case.

#### Issue

Is the Due Process Clause of the Fourteenth Amendment violated when a trial judge in a capital case fails to appoint the defense counsel until the day of trial?

#### Holding and Reasoning (Sutherland, J.)

Yes. In capital cases, if a defendant is unable to employ his own counsel and cannot adequately represent himself, a trial judge must appoint counsel, whether requested or not by the defendant. The Due Process Clause of the Fourteenth Amendment guarantees criminal defendants the right to notice and a hearing. In capital cases, the right to a hearing includes the right to counsel because a layman is generally not familiar with legal proceedings and is therefore not adequately prepared to assert his own defense. This right to counsel includes the ability to consult with one’s attorney prior to trial in order to properly prepare a defense. In this case, the trial judge violated the Due Process Clause when he failed to give Powell and the other defendants the opportunity to employ their own counsel. Their youth, illiteracy, and the severity of the charges make it clear that Powell and the others could not have effectively represented themselves at trial. Furthermore, by merely appointing “all members of the bar” for the “purpose of arraigning the defendants,” the judge failed to assign proper counsel because no specific attorney was given clear responsibility of the case until the day of trial. There was therefore not enough time for Powell to prepare a proper defense in violation of the Due Process Clause of the Fourteenth Amendment. The judgments are therefore reversed and the case remanded back to the trial court.

#### Dissent (Butler, J.)

There was adequate time to prepare for trial, and therefore there was no due-process violation. The two attorneys who took responsibility of the case on the day of trial never requested a postponement and even now they do not support the claim that they were ill-prepared on the day of trial. In addition, at issue is only whether the trial court denied Powell due process of law when it failed to give him and the others the opportunity to secure their own representation. The Court exceeds its authority when it goes on to hold that the failure of the trial judge to appoint Powell counsel is a violation of the Due Process Clause of the Fourteenth Amendment.

**Key Terms:**

**Fourteenth Amendment Due Process Clause** - The provision set forth at Amendment XIV, Section 1 of the United States Constitution prohibiting states from depriving any person of life, liberty, or property by means that are arbitrary or fundamentally unfair.

# Gideon v. Wainwright

#### United States Supreme Court 372 U.S. 335 (1963)

#### Rule of Law

**The Fourteenth Amendment incorporates the Sixth Amendment right to counsel to the states.**

# Poe v. Ullman

#### United States Supreme Court 367 U.S. 497 (1961)

#### Rule of Law

**For a lawsuit to be ripe for adjudication, the injury threatened must be relatively immediate and certain to occur without court intervention.**

#### Facts

This lawsuit against Ullman (defendant), attorney for the State of Connecticut, combined three separate actions, each challenging the constitutionality of Connecticut state statutes that prevented the use of contraceptive devices, even by married couples, and the giving of medical advice in the use of such devices. The first suit was brought by Paul and Pauline Poe (plaintiffs), a married couple that had experienced three pregnancies resulting in children born with severe birth defects, which caused severe physical and emotional trauma to the plaintiffs. The Poes consulted with Dr. Buxton who suggested the use of contraceptive devices to prevent future pregnancies. The second suit was brought by Jane Doe (plaintiff), a married woman whose previous pregnancy had caused her extreme physical illness. She also consulted with Dr. Buxton, who recommended that she use contraception. The third suit was brought by Dr. Buxton (plaintiff), who sought declaratory relief on the grounds that the Connecticut statutes deprived him of his liberty and property. The Connecticut Court of Errors dismissed the case. Plaintiffs appealed to the United States Supreme Court seeking declaratory relief.

#### Issue

For a lawsuit to be ripe for adjudication, must the injury threatened be relatively immediate and certain to occur without court intervention?

#### Holding and Reasoning (Frankfurter, J.)

Yes. Although the plaintiffs possess legitimate concerns, no case has been reported of previous plaintiffs being prosecuted for using or distributing medical advice about contraceptive products. Contraceptive devices are routinely and openly sold to other persons in common drug stores, and there is no record of the Connecticut legal system prosecuting people for using or distributing advice about contraceptives. It is highly unlikely that these particular plaintiffs would be prosecuted for doing so. The plaintiffs’ case is not ripe for adjudication because there is no immediate or certain threat of prosecution. The lower court’s dismissal of the case is affirmed.

#### Concurrence (Brennan, J.)

The plaintiffs do not present an actual controversy based on threat of immediate prosecution. The real controversy to be decided is whether it is constitutional for Connecticut to prohibit the opening of birth control clinics on a large scale. However, until this issue is properly presented, it is appropriate to decline resolution of the plaintiffs’ case.

#### Dissent (Douglas, J.)

Without a decision in this matter, law-abiding citizens will be forced to either break the law and hope they will not be prosecuted or to undergo pregnancies resulting in serious health complications. This is a grim choice.

#### Dissent (Harlan, J.)

There is no reason not to decide these appeals. There is a real constitutional issue at stake: this statute, which makes it a criminal offense for married couples to use contraception, violates the Fourteenth Amendment. Due process protects citizens from arbitrary legislation and from limits on rights that would be considered fundamental. Here, the state is claiming the right to use criminal law to intrude on the most intimate marital relations. Appellants argue that the statute deprives them of liberty without any rational purpose. In this situation, the statute must pass a more rigorous constitutional test, i.e., strict scrutiny. The Court’s decisions under both the Fourth and Fourteenth Amendments show that the Constitution protects the privacy of the home from intrusion. While the state may forbid acts such as adultery or homosexuality, the marital relations of a husband and wife are fundamental, and the state has protected them. This statute intrudes into the heart of marital privacy, effectively invading the privacy of the home. The appellants have a claim for constitutional protection.

**Key Terms:**

**Case or Controversy Clause** - [US Constitution, Art. III, Sec. 2, cl. 1] States, in part, that federal courts are not permitted to hear cases where there is no actual dispute between adverse parties capable of judicial resolution.

**November 19, 2020**

Chapter 3, Section 1 – Exclusionary Rule

State v. Reynolds, 504 S.W.3d 283 (Tenn. 2016)

State v. Davidson, 509 S.W.3d 156 (Tenn. 2017)

State v. Lowe, 552 S.W.3d 842 (Tenn. 2018)

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**Class Notes 11/19/2020**

***Hudson v. Michigan (2006)***

Rule: The exclusionary rule does not apply to knock and announce. If police fail to properly follow the knock and announce rule, the evidence found may still be admitted at trial.

Police obtained a search warrant. They announced their presence but only waited 3-5 seconds before entering. US SC ruled the cost of evidence suppression was outweighed by the benefits. The purpose of the rule is to protect lives and prevent injury to people and property. The exclusionary rule is not the proper remedy if police fail to conduct the knock and announce correctly.

***Wilson v. Arkansas****-* something unreasonable does not necessarily trigger the exclusionary rule.

***Richards v. Wisconsin***- threat of violence, destruction of evidence, or if knocking it futile….the knock and announce rule is not needed.

***United States v. Banks***- said knock and announce reasonable time is how long it would take to destroy evidence…15-20 seconds wait time is reasonable before forcible entry.

**Chapter 3, Section 1 – Exclusionary Rule**

# \*\*Wolf v. Colorado\*\*

#### United States Supreme Court 338 U.S. 25 (1949)

#### Rule of Law

**It is a violation of the Due Process Clause of the Fourteenth Amendment for state actors to gather evidence through unreasonable searches and seizures, but such evidence need not be excluded from state criminal proceedings.**

#### Facts

Julius Wolf (defendant) was convicted in Colorado state court for violating state law. The prosecution’s case rested in part on evidence that would have been inadmissible in federal court, because it was gathered through an unreasonable search and seizure. Wolf appealed to the Supreme Court of Colorado, which upheld the conviction. Wolf petitioned the United States Supreme Court for a writ of certiorari.

#### Issue

Is evidence obtained through unreasonable search and seizure admissible in state court?

#### Holding and Reasoning (Frankfurter, J.)

Yes. While evidence obtained through unreasonable searches and seizures, in violation of the Fourth Amendment, is inadmissible at federal trials, this exclusionary rule does not apply to state criminal proceedings. The Due Process Clause of the Fourteenth Amendment does not automatically incorporate the first eight amendments of the Bill of Rights against the states. *See Palko v. Connecticut*, 302 U.S. 319 (1937). Rather, the clause incorporates those rights that are “implicit in the concept of ordered liberty.” *Id*. Due process encompasses an evolving set of fundamental rights that changes with the advancing standards of a free society. Nevertheless, there is no question that the right to privacy and freedom from its arbitrary invasion by federal or state police is fundamental. Thus, the protections of the Fourth Amendment are incorporated against the states. An unreasonable search or seizure by a state officer violates the Due Process Clause, but that does not necessarily mandate exclusion of evidence. We held in *Weeks v. United States*, 232 U.S. 383 (1914), that evidence obtained in violation of the Fourth Amendment was inadmissible in federal proceedings, but the exclusionary rule was developed as a matter of judicial doctrine rather than constitutional requirement. Other common law countries and a majority of the states do not embrace the exclusionary rule. Further, there are other methods by which to enforce the Fourth Amendment right to privacy, such as through criminal prosecution or civil liability for violations. In fact, the weight of community opinion may be a far more effective method of ensuring police compliance with the amendment than exclusion. It is clear that the exclusion of evidence obtained illegally is not an essential element of the right against arbitrary state intrusion and the Fourth Amendment. Indeed, even federal courts might have to reconsider the exclusionary rule if Congress enacted legislation to the contrary. Therefore, the Due Process Clause of the Fourteenth Amendment, which only incorporates fundamental rights to the states, is not violated if state courts allow the admission of illegally obtained evidence. Accordingly, the judgment of the state court is affirmed. [Editor’s Note: this ruling was expressly overturned by the United States Supreme Court in *Mapp v. Ohio*, 367 U.S. 643 (1961).]

#### Concurrence (Black, J.)

The Fourteenth Amendment applies the Fourth Amendment’s prohibition of unreasonable searches and seizures to state courts, but the federal exclusionary rule is a judicially created rule, which Congress could overturn, and not part of the amendment. Nevertheless, there is just as much danger to the public from overzealous state officers as federal officials.

#### Dissent (Douglas, J.)

The Fourth Amendment applies to the states, and evidence obtained by an unreasonable search and seizure must be excluded from state as well as federal proceedings to give the amendment effect.

#### Dissent (Murphy, J.)

The majority gets so much right, but in the end refuses to give effect to the Fourth Amendment. The are only three ways to enforce the prohibition against unreasonable searches and seizures: (1) exclude illegally obtained evidence from legal proceedings, (2) impose criminal sanctions on violators, or (3) allow civil lawsuits against violators. Only exclusion is an effective remedy. If illegal evidence can be used against a person in legal proceedings, “the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and…might as well be stricken from the Constitution.” *Weeks v. United States*, 232 U. S. 383 (1914). It is unrealistic to expect the very state actors who violated the amendment to prosecute themselves for it. Further, civil lawsuits provide little deterrent effect, because the measure of damages is the actual injury to the property searched. Thus, damage awards would most likely be nominal, and punitive damages are unlikely. The efficacy of the exclusionary rule is apparent; generally, police in states that follow it are better trained to respect the Fourth Amendment. The majority opinion here sanctions “lawlessness by officers of the law.”

#### Dissent (Rutledge, J.)

The Court correctly holds that the Fourth Amendment applies to the states, but renders the amendment useless by refusing to impose the exclusionary rule on state proceedings. Further, Congress could not abrogate the exclusionary rule, because it is an implicit part of the Fourth Amendment. See *Boyd v. United States*, 116 U. S. 616 (1886); *Olmstead v. United States*, 277 U. S. 438 (1928). State actors have no more right to declare illegally obtained evidence admissible.

***Wolf v. Colorado*** did **not** extend the **exclusionary rule** from federal cases to state criminal cases.

**Re: *Mapp v. Ohio* overruled** Wolf in that the **exclusionary rule and the substantive requirements of the Fourth Amendment apply to the states.**

**Key Terms:**

**Fourteenth Amendment Due Process Clause** - The provision set forth at Amendment XIV, Section 1 of the United States Constitution prohibiting states from depriving any person of life, liberty, or property by means that are arbitrary or fundamentally unfair.

**Fundamental Principles of Rights** - Principles and rights that are so deeply rooted and ingrained in history and tradition as to be central to U.S. notions of liberty and justice.

**Fourth Amendment -** An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

***Wolf v. Colorado* (1949)**

Rule: Evidence obtained through unreasonable searches and seizures is inadmissible in federal level **but admissible at state level.** The unreasonable search violates the due process clause but does not necessarily mean the evidence is excluded.

DA wrongfully searched ALL patient records in doctor’s office to locate patients who could lead them to Wolf ,who was supposedly performing abortions. Even though the federal system said this evidence would not be allowed, this was not a constitutional requirement for the states.

# Weeks v. United States

#### United States Supreme Court 232 U.S. 383 (1914)

#### Rule of Law

**The United States and federal officials are prohibited from executing unreasonable searches and seizures upon people.**

#### Facts

Weeks (defendant) was convicted of illegal use of the federal mail system for the purpose of gambling. Used as evidence against him were letters and envelops a U.S. Marshal had found and taken from Weeks’ home. The U.S. Marshal did not have a search warrant. Citing Fourth Amendment violations, Weeks petitioned the district court to return the paper-work but the motion was denied.

#### Issue

Should items taken from an individual’s home by a federal official without a warrant be used at trial?

#### Holding and Reasoning (Day, J.)

No. Items taken by a federal official from an individual’s home when no warrant has been issued are seized in violation of the Fourth Amendment and must be excluded from evidence. The Fourth Amendment’s protections against unreasonable searches and seizures would be unenforceable if evidence obtained in violation of the amendment were still permitted to be entered into evidence. Accordingly, prejudicial error was committed by including the unlawfully obtained evidence at trial and the lower court’s judgment is reversed.

**Key Terms:**

**Fourth Amendment -** An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

# \*\*MAPP v. OHIO\*\*

#### United States Supreme Court 367 U.S. 643 (1961)

#### Rule of Law

**Evidence obtained through an unreasonable search and seizure in violation of the Fourth Amendment is inadmissible in state criminal proceedings.**

#### Facts

Police got a tip that a suspect wanted for questioning related to a bombing was hiding in Dollree Mapp’s (defendant) home. Officers forcibly entered the home without Mapp’s consent. When Mapp demanded to see the warrant, police showed her a piece of paper purported to be a “warrant.” However, when Mapp took the “warrant,” police engaged in a physical altercation to retrieve it from her. After searching the home, the officers found and seized books and photos that were introduced as evidence in Mapp’s criminal trial for possessing lewd and obscene materials in violation of Ohio state law. Mapp was convicted, even though there was no evidence that the police ever obtained a warrant to search Mapp’s home. The Ohio Supreme Court sustained the conviction, even though it concluded there was a reasonable argument for reversal due to the unjust manner in which the evidence was obtained. Mapp appealed to the United States Supreme Court, claiming that her conviction was the product of an unreasonable search and seizure.

#### Issue

Is evidence obtained through unreasonable search and seizure admissible in state court for state offenses?

#### Holding and Reasoning (Clark, J.)

No. Evidence obtained illegally by state officials is inadmissible in state court. When the government invades a person’s privacy in violation of the Fourth and Fifth Amendments to the Constitution, any evidence obtained by that invasion is unconstitutional. *Boyd v. United States*, 116 U.S. 616 (1886). As a result, in *Weeks v. United States*, 232 U.S. 383 (1914), this court held that evidence derived from an unreasonable search and seizure was inadmissible in federal courts, because excluding such evidence was the only way to vindicate the rights guaranteed by the Fourth Amendment. Nevertheless, in *Wolf v. Colorado*, 338 U.S. 25 (1949), the Court concluded that despite the fact that the Fourth Amendment was incorporated against the states by the Due Process Clause of the Fourteenth Amendment, the exclusionary principle was “not an essential ingredient of the right.” Thus, states were not prohibited from admitting evidence derived from an unreasonable search and seizure. The factual underpinnings of that decision have changed. Since then, many states have adopted laws forbidding the introduction of illegally obtained evidence in criminal proceedings, and more than half have now adopted some form of the *Weeks* rule. This development is the result of the growing understanding that only the exclusion of illegally obtained evidence provides the necessary incentive to state officials to refrain from unreasonable searches and seizures; other remedies are simply ineffective at securing compliance. The Court was repeatedly asked to overturn *Wolf*, *supra*, but elected to wait until the states had the opportunity to decide for themselves. *Irvine v. California*, 347 U.S. 128 (1954). The time has now come to “close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right.” The right to privacy is just as important as any other fundamental right, and there is no reason it should be afforded less protection in state courts. Therefore, evidence obtained through unreasonable search and seizure is inadmissible in state courts. Accordingly, the conviction is reversed, and the case is remanded back to the trial court.

#### Concurrence (Douglas, J.)

The Ohio Supreme Court sustained Mapp's conviction even though it was based on evidence obtained in an unlawful search. The evidence would not have been admissible in a federal prosecution, but it was admissible in the state prosecution because it was not taken from Mapp's person through the use of brutal or offensive force. It is important to address the inconsistent application of the exclusionary rule between the state and federal courts.

#### Concurrence (Black, J.)

The Fourth Amendment prohibition of unreasonable searches and seizures does not specifically require exclusion of illegally obtained evidence. Nevertheless, when the Fourth Amendment’s requirements are “considered together with” the Fifth Amendment right against self-incrimination, a constitutional requirement barring the use of illegally seized evidence in criminal trials emerges.

#### Dissent (Harlan, J.)

The Court exceeds its authority and violates the doctrine of stare decisis when it holds that the Fourteenth Amendment incorporates the Fourth Amendment and the exclusionary rule to the states. The real issue in this case was whether Ohio’s obscenity law violated the guarantees of free expression contained in the First Amendment and incorporated against the states by the Fourteenth. It was inappropriate for the majority to “reach…out” and overturn *Wolf*, and the Court did not need to do so to do justice in this case.

The ***Mapp*** decision **extended** the exclusionary rule to state courts.

**Key Terms:**

**Fourteenth Amendment Due Process Clause** - The provision set forth at Amendment XIV, Section 1 of the United States Constitution prohibiting states from depriving any person of life, liberty, or property by means that are arbitrary or fundamentally unfair.

**Stare Decisis** - A legal principle under which legal precedents are adhered to and predictability is garnered.

**Fourth Amendment -** An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

***Mapp v. Ohio (1961)***

Rule: US SC overruled *Wolf.* Evidence obtained illegally by **state is inadmissible in state and federal court**. The right to privacy is just as important as any fundamental right, and there is no reason it should be afforded less protection in state courts. It is now a constitutional requirement.

State police suspected Mapp of having bomb related material in home. They forcibly entered her home without consent. Police handed her a piece of paper they claimed to be a “warrant” but it wasn’t. They recovered evidence, used it to convict her at trial. US SC ruled evidence was inadmissible because state did not have a warrant.

# Wolf v. Colorado

#### United States Supreme Court 338 U.S. 25 (1949)

#### Rule of Law

**It is a violation of the Due Process Clause of the Fourteenth Amendment for state actors to gather evidence through unreasonable searches and seizures, but such evidence need not be excluded from state criminal proceedings.**

# Elkins v. United States

80 S.Ct. 1437

Supreme Court of the United States

**James Butler ELKINS and Raymond Frederick Clark, Petitioners,**

**v.**

**UNITED STATES of America.**

No. 126.

Argued March 28 and 29, 1960.Decided June 27, 1960.

**Synopsis**

Defendants were convicted of intercepting and recording wire communications and divulging such communciations in violation of Communications Act and of conspiracy to violate Communications Act. The United States District Court for the District of Oregon rendered judgment, and defendants appealed. The United States Court of Appeals for the Ninth Circuit, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I8048d5a98efc11d98e8fb00d6c6a02dd&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Search))[266 F.2d 588,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1959110342&pubNum=350&originatingDoc=I222708679bf011d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed, and certiorari was granted. The Supreme Court, Mr. Justice Stewart, held that evidence obtained by state officers during a search which, if conducted by federal officers, would have violated defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's timely objection in a federal criminal trial.

Vacated and remanded.

Mr. Justice Frankfurter, Mr. Justice Clark, Mr. Justice Harlan and Mr. Justice Whittaker, dissented.

For dissenting opinion see [80 S.Ct. 1453](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1960208192&pubNum=708&originatingDoc=I222708679bf011d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

***Elkins v. United States***, 364 U.S. 206 (1960), was a [US Supreme Court](https://en.wikipedia.org/wiki/US_Supreme_Court) decision that **held the "silver platter doctrine", which allowed federal prosecutors to use evidence illegally gathered by state police, to be a violation of the**[**Fourth Amendment to the United States Constitution**](https://en.wikipedia.org/wiki/Fourth_Amendment_to_the_United_States_Constitution)**.**[**[1]**](https://en.wikipedia.org/wiki/Elkins_v._United_States#cite_note-Elkins-1)

Evidence of illegal wiretapping had been seized from the home of James Butler Elkins by [Portland, Oregon](https://en.wikipedia.org/wiki/Portland,_Oregon)police officers on an unrelated search warrant, and he was subsequently convicted in federal court. Elkins appealed, arguing that evidence found by the officers should have been [inadmissible](https://en.wikipedia.org/wiki/Admissible_evidence) under the [exclusionary rule](https://en.wikipedia.org/wiki/Exclusionary_rule), which forbids the introduction of most evidence gathered through Fourth Amendment violations in criminal court.

In a 5-4 decision, the Court overturned the silver platter doctrine and Elkins' conviction. Associate Justice [Potter Stewart](https://en.wikipedia.org/wiki/Potter_Stewart) wrote the majority opinion, while Associate Justices [Felix Frankfurter](https://en.wikipedia.org/wiki/Felix_Frankfurter) and [John M. Harlan II](https://en.wikipedia.org/wiki/John_M._Harlan_II)dissented. By giving a rationale for a broader interpretation of Fourth Amendment rights, the decision prepared the way for [*Mapp v. Ohio*](https://en.wikipedia.org/wiki/Mapp_v._Ohio) (1961), which applied the exclusionary rule to the states.

**Key Terms:**

**Silver Platter Doctrine** – Under the silver platter doctrine, evidence of a federal crime seized by state police in the course of an illegal search while investigating a state crime could be turned over to federal authorities and used in a federal prosecution so long as the federal agents had not participated in the illegal search but had simply received the evidence on a “silver platter.”

# Rea v. United States

76 S.Ct. 292

Supreme Court of the United States

**Dantan George REA, Petitioner,**

**v.**

**UNITED STATES of America.**

No. 30.

Argued Nov. 10, 1955.Decided Jan. 16, 1956.

**Synopsis**

Proceeding to enjoin federal narcotics agent from testifying in state court prosecution with respect to narcotics which were obtained by agent in course of illegal search and which were suppressed in federal prosecution. The United States District Court for the District of New Mexico denied relief sought, and movant appealed. The United States Court of Appeals for the Tenth Circuit, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I3a6c9fed8e9c11d9a707f4371c9c34f0&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Search))[218 F.2d 237,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1955120311&pubNum=350&originatingDoc=Id4d343419c1d11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed the order, and movant obtained certiorari. The Supreme Court, Mr. Justice Douglas, held **that agent was subject to injunction.**

Reversed.

Mr. Justice Harlan, Mr. Justice Reed, Mr. Justice Burton and Mr. Justice Minton dissented.

On the basis of evidence seized under an invalid federal search warrant, petitioner was indicted in a federal court for unlawful acquisition of marihuana. On his motion under Rule 41(e) of the Federal Rules of Criminal Procedure, this evidence was suppressed. Thereafter, he was charged in a state court with possession of marihuana in violation of state law. Alleging that the evidence suppressed in the federal court was the basis of the state charge, petitioner moved in a federal court for an order enjoining the federal agent who had seized the evidence from transferring it to state authorities or testifying with respect thereto in the state courts.

Held: the motion should have been granted.

# Wong Sun v. United States

#### United States Supreme Court 371 U.S. 471 (1963)

#### Rule of Law

**Although evidence obtained through illegal police conduct must be excluded at trial as it is “fruit of the poisonous tree,” the connection between the illegal police conduct and a relevant piece of evidence can become so attenuated as to dissipate the taint, and such evidence may then be admissible.**

#### Facts

Federal narcotics agents arrested Hom Way for drug possession. Hom Way told the police he got the drugs from “Blackie Toy” who owned a laundry business. The agents went to Toy's business, and James Wah Toy answered the door. When he realized it was the police, he ran back into the building. The police chased and arrested him. No drugs were found, but when the agents told him why they were there he said he never sold drugs but that “Johnny” sells drugs. The agents then had Toy take them to Johnny Yee’s home where they found Yee in the bedroom. Yee surrendered his drugs and drug paraphernalia. Yee and Toy were then taken to the Office of the Bureau of Narcotics where Yee told the agents he received the drugs from “Sea Dog,” whose real name, Toy said, was Wong Sun (defendant). Toy then took the agents to Wong Sun’s house where Wong Sun’s wife let them into the home. Wong Sun was arrested. No drugs were found. Toy, Yee and Wong Sun were all arraigned and released on their own recognizance. The men returned to the office several days later. The agents interrogated all three men separately and drafted statements for them to sign. Toy refused to sign his statement. Wong Sun would not sign his but admitted that it was accurate. The court of appeals found that there was no probable cause or reasonable grounds for Toy’s or Wong Sun’s arrest.

#### Issue

Is evidence obtained through illegal police conduct admissible if the evidence is far removed from the illegal police conduct?

#### Holding and Reasoning (Brennan, J.)

Yes. Evidence that has been acquired through illegal police conduct is admissible if it has been so far removed from the illegal action so as to dissipate the taint of illegality. In this case, the police violated Wong Sun’s constitutional rights when they arrested him. However, his subsequent unsigned confession is admissible because after his unlawful arrest, Wong Sun was released and returned voluntarily a few days later when he was interrogated by the agents. Therefore, the connection between his unlawful arrest and his statement had become so attenuated as to dissipate the taint of illegality. In addition, the drugs taken from Yee cannot be admitted into evidence against Toy. Toy’s statement to the police regarding Yee is inadmissible because the statement is a fruit of illegal police action; the police had no authority to chase Toy into his home. Therefore, the police only knew about Yee because of Toy’s statement, which derived from illegal police conduct. Therefore, the statement is still tainted by the illegality and must be excluded at trial.

#### Concurrence (Douglas, J.)

The Court correctly concluded that the agents lacked probable cause to arrest the defendants. However, the arrests were also unconstitutional because the agents did not obtain arrest warrants even though there was time to do so.

#### Dissent (Clark, J.)

There was probable cause supporting the arrests in this case, and there was sufficient evidence corroborating the confessions.

***Wong Sun*** was the first case which the Court **applied the exclusionary rule to a confession**, in addition to physical evidence, tainted by an unconstitutional arrest. The Court also recognized that a **confession given after sufficient attenuation from unconstitutional arrest is admissible.**

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

# Brown v. Illinois

#### United States Supreme Court 422 U.S. 590 (1975)

#### Rule of Law

**Incriminating statements made following an unlawful arrest are only admissible if the statements, in light of all relevant facts and circumstances, are “sufficiently an act of free will to purge the primary taint.”**

#### Facts

Police investigating the murder of Roger Corpus arrested Richard Brown (defendant) at gunpoint after breaking into and searching his apartment. The police did not have a warrant or probable cause. Brown was taken to the police station, given the warnings set forth under *Miranda v. Arizona*, 384 U.S. 436 (1966), and interrogated. Brown made incriminating statements during the interrogation. Brown and Jimmy Clagett (defendant) were indicted by a grand jury for murder. Brown moved to suppress the incriminating statements on the grounds that the arrest was unlawful. The trial court denied the motion. The jury convicted Brown and sentenced him to 15 to 30 years imprisonment. The Supreme Court of Illinois affirmed. The United States Supreme Court granted certiorari.

#### Issue

Are incriminating statements made following an unlawful arrest admissible in court if the suspect was given the *Miranda*warnings?

#### Holding and Reasoning (Blackmun, J.)

No. *Miranda* warnings alone do not guarantee admissibility for statements made following an unlawful arrest. The exclusionary rule protects Fourth Amendment rights by barring admission of all evidence derived from police error or misconduct as “fruit of the poisonous tree.” Under *Wong Sun v. United States*, 371 U.S. 471 (1963), statements made following an illegal arrest may be admissible if those statements are “sufficiently…act[s] of free will to purge the primary taint.” *Miranda*warnings are aimed at safeguarding Fifth Amendment rights against self-incrimination. The warnings are not designed to deter police misconduct and violations of Fourth Amendment rights. Therefore, a statement made after a *Miranda*warning would not violate the Fifth Amendment, but might still violate the Fourth Amendment. A blanket rule treating the *Miranda* warning as a universal cure for all constitutional violations would nullify the deterrent effect of the exclusionary rule. Thus, determinations of admissibility for statements made after an illegal arrest must be made on a case-by-case basis after assessing all relevant facts and circumstances including: *Miranda* warnings, the time elapsed between the arrest and the statement, and the egregiousness of the misconduct. The prosecution bears the burden of proving such statements were based on free will. In this case, Brown’s statements were made a short time after his arrest, and the officers’ constitutional violations were purposeful. The prosecution did not meet its burden, and Brown’s statements are inadmissible. The ruling of the lower court is reversed.

#### Concurrence (Powell, J.)

Any violation of the Fourth Amendment is unreasonable, and any admission of illegally obtained evidence in court must not defeat the deterrent effect of the exclusionary rule. Evidence obtained after a flagrantly abusive violation of the amendment should only be admitted if there was a break in the sequence of events sufficient to cure the taint, such as a meeting with an attorney or a hearing before a judge. In cases where there has only been a technical violation of the Fourth Amendment, however, the *Miranda* warnings are enough to cure the taint. These are factual questions to be evaluated on a case-by-case basis. The record in this case does not resolve these factual questions, and the case should be remanded to allow the lower court to make the factual determinations required.

**Key Terms:**

**Exclusionary Rule** - A rule that excludes or suppresses evidence in a criminal proceeding where that evidence was obtained in violation of an individual’s constitutional rights.

**Miranda Warnings** - The notices of constitutional rights set forth in the opinion of the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436(1966) that law enforcement authorities must provide to a suspect in a criminal investigation prior to initiation of a custodial interrogation. The suspect must be advised that the suspect has the right to remain silent, anything the suspect says may be used against the suspect, and the suspect has the right to an attorney.

**Fruit of the Poisonous Tree Doctrine** - Rule barring admission of any evidence found on the basis of illegally obtained evidence.

# United States v. Crews

100 S.Ct. 1244

Supreme Court of the United States

**UNITED STATES, Petitioner,**

**v.**

**Keith CREWS.**

No. 78–777.

Argued Oct. 31, 1979.Decided March 25, 1980.

**Synopsis**

Defendant was convicted before the Superior Court, District of Columbia, Robert H. Campbell, J., of armed robbery, and he appealed. The District of Columbia Court of Appeals, [369 A.2d 1063,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977101466&pubNum=162&originatingDoc=I6b46def09c2511d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed. On rehearing en banc, the District of Columbia Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic8e77822344911d9abe5ec754599669c&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Search))[389 A.2d 277,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1978115869&pubNum=162&originatingDoc=I6b46def09c2511d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) reversed, and certiorari was granted. The Supreme Court, Mr. Justice Brennan, held **that in-court identification of defendant by victim did not have to be suppressed as fruit of defendant's unlawful arrest where robbery victim's presence in courtroom was not product of any police misconduct and where illegal arrest did not infect her ability to give accurate identification testimony.**

Judgment of District of Columbia Court of Appeals reversed.

Mr. Justice Powell filed an opinion concurring in part in which Mr. Justice Blackmun joined.

Mr. Justice White filed an opinion concurring in the result in which Mr. Chief Justice Burger and Mr. Justice Rehnquist joined.

Immediately after being assaulted and robbed at gunpoint, the victim notified the police and gave them a full description of her assailant. Several days later, respondent, who matched the suspect's description, was seen by the police around the scene of the crime. After an attempt to photograph him proved unsuccessful, respondent was taken into custody, ostensibly as a suspected truant from school, and was detained at police headquarters, where he was briefly questioned, photographed, and then released. Thereafter, the victim identified respondent's photograph as that of her assailant. Respondent was again taken into custody and at a court-ordered lineup was identified by the victim. Respondent was then indicted for armed robbery and other offenses. On respondent's pretrial motion to suppress all identification testimony, the trial court found that respondent's initial detention at the police station constituted an arrest without probable cause, and accordingly ruled that the products of that arrest -- the photographic and lineup identifications -- could not be introduced at trial, but further held that the victim's ability to identify respondent in court was based upon independent recollection untainted by the intervening identifications, and that therefore such testimony was admissible. At trial, the victim once more identified respondent as her assailant, and respondent was convicted of armed robbery. The District of Columbia Court of Appeals reversed, holding that the in court identification testimony should have been excluded as a product of the violation of respondent's Fourth Amendment rights.

# Frisbie v. Collins

72 S.Ct. 509

Supreme Court of the United States

**FRISBIE**

**v.**

**COLLINS.**

No. 331.

Argued Jan. 28, 1952.Decided March 10, 1952.Rehearing Denied April 28, 1952.See [343 U.S. 937, 72 S.Ct. 768](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&pubNum=708&cite=72SCT768&originatingDoc=Id8df72079c1c11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

**Synopsis**

Habeas corpus proceeding to obtain release from imprisonment under state court sentence. A judgment of the United States District Court for the Eastern District of Michigan, Arthur A. Koscinski, J., denying the petition was reversed and the cause remanded by the Court of Appeals for the Sixth Circuit, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I551198398e4e11d9bc61beebb95be672&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[189 F.2d 464,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1951116760&pubNum=350&originatingDoc=Id8df72079c1c11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) and respondent brought certiorari. The Supreme Court, Mr. Justice Black, held that **forcible abduction from one state to another in violation of Federal Kidnaping Act**, [18 U.S.C.A. s 1201](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS1201&originatingDoc=Id8df72079c1c11d993e6d35cc61aab4a&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), **would not invalidate subsequent conviction and sentence in latter state of the person abducted on ground of denial of due process of law.**

Judgment of Court of Appeals reversed and judgment of District Court affirmed.

***Frisbie v. Collins***, 342 U.S. 519 (1952), was a decision by the [United States Supreme Court](https://en.wikipedia.org/wiki/United_States_Supreme_Court), which held that [kidnapping](https://en.wikipedia.org/wiki/Kidnapping) of suspects by State authorities is constitutional if done so to take the suspect from one jurisdiction to another for criminal trial.[[1]](https://en.wikipedia.org/wiki/Frisbie_v._Collins#cite_note-Frisbie-1) The defendant was tried in [Michigan](https://en.wikipedia.org/wiki/Michigan) after being abducted by Michigan authorities in [Chicago, Illinois](https://en.wikipedia.org/wiki/Chicago,_Illinois). The case was related to the previous case of [*Ker v. Illinois*](https://en.wikipedia.org/wiki/Ker_v._Illinois) (1886).[[2]](https://en.wikipedia.org/wiki/Frisbie_v._Collins#cite_note-Kerr-2)Both cases together created the [Ker-Frisbie Doctrine](https://en.wikipedia.org/wiki/Ker%E2%80%93Frisbie_doctrine), which is used to validate the reasoning behind seemingly illegal and unconstitutional extradition and abduction from other countries or from state to state, on the basis of a prosecution being brought against the individual.

# People v. Defore

242 N.Y. 13

Court of Appeals of New York.

**PEOPLE**

**v.**

**DEFORE**[**\***](https://1.next.westlaw.com/Document/I9a510875d78e11d9bf60c1d57ebc853e/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)#co_footnote_B0011926100408)

Jan. 12, 1926.

**Synopsis**

John Defore was convicted of possessing a weapon, in violation of Penal Law, § 1897, and from a judgment of affirmance by the Appellate Division ([211 N. Y. S. 134, 213 App. Div. 643),](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1925129518&pubNum=601&originatingDoc=I9a510875d78e11d9bf60c1d57ebc853e&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) he appeals.

Affirmed.

# Olmstead v. United States

#### United States Supreme Court 277 U.S. 438 (1928)

#### Rule of Law

**The Fourth Amendment does not extend to telephone wires and the telephone calls that travel over them.**

#### Facts

The government suspected Olmstead (defendant) of illegally importing alcohol during Prohibition. To prove this, the government tapped the phones in Olmstead’s house and office. They then listened to his conversations and from those conversations got enough evidence to convict Olmstead. Olmstead appealed and the United States granted certiorari.

#### Issue

Does the Fourth Amendment extend to telephone wires and the telephone calls that travel over them?

#### Holding and Reasoning (Taft, C.J.)

No. The Fourth Amendment does not extend to telephone wires and the telephone calls that travel over them. Telephone wires are distinguishable from paper letters at issue in *Ex Parte Jackson*, 96 U.S. 727 (1877). The United States government runs the post office, but does not have the same modicum of control over telephone calls. Listening in on telephone calls simply does not constitute a search or a seizure as contemplated by the Fourth Amendment. Telephones allow individuals to speak to each other from all corners of the country and, indeed, the world. It cannot be said that a person has a reasonable expectation of privacy from his home or office to each part of the world that telephone wires may take his conversation. In this case, therefore, the government’s tapping Olmstead’s phones and listening to his phone calls did not violate Olmstead’s Fourth Amendment rights. The conviction is affirmed.

#### Dissent (Brandeis, J.)

As time advances, technologies advance as well and the Fourth Amendment must adapt to the times to protect citizens’ privacy rights. There is essentially no difference between the letters at issue in *Jackson*and the phone calls at issue in this case. In actuality, the tapping of a telephone line is more intrusive than the opening of a letter because if you tap the line of one individual, you also inherently tap the line of every other individual that he calls.

**Key Terms:**

**Probable Cause** - A reasonable basis, amounting to more than mere suspicion, to believe that a person has committed a crime or is about to commit a crime, or that evidence relevant to a crime exists in a particular location.

# \*\*UNITED STATES v. LEON\*\*

#### United States Supreme Court 468 U.S. 897 (1984)

#### Rule of Law

**Evidence obtained in reasonable, good-faith reliance on a facially valid search warrant is not subject to the Fourth Amendment's exclusionary rule, even if the warrant is later deemed defective.**

#### Facts

The police received an anonymous tip that two individuals were selling drugs out of their apartment. Based on the information from the informant, the police started an investigation and eventually submitted an affidavit requesting a warrant to search three residences and automobiles. A facially valid search warrant was issued and pursuant to the warrant the police conducted their search. Leon (defendant) and the other defendants filed motions to suppress the evidence obtained pursuant to the search and the district court granted the motions, holding that the affidavit did not establish probable cause. The United States Supreme Court granted certiorari.

#### Issue

Is evidence obtained in reasonable, good-faith reliance on a facially valid search warrant subject to the Fourth Amendment's exclusionary rule if the warrant is later deemed defective?

#### Holding and Reasoning (White, J.)

No. Evidence obtained in reasonable, good-faith reliance on a facially valid search warrant is not subject to the Fourth Amendment's exclusionary rule, even if the warrant is later deemed defective. The exclusionary rule is not itself a constitutional right but is a judicial remedy intended to deter police from infringing on this constitutionally protected right by prohibiting the introduction of evidence that is obtained in violation of the Fourth Amendment. The rule developed because an individual’s constitutional rights are prioritized over efficient law enforcement. However, when the police reasonably rely on a facially valid search warrant, there is no improper police conduct to deter and therefore no Fourth Amendment interests are advanced by excluding the evidence. Therefore, the social cost of excluding the evidence outweighs any Fourth Amendment violation and the evidence must remain admissible at trial. Furthermore, while magistrates are given much deference in their probable cause determinations, their decisions are reviewable, as is the information the police provide them with. The exclusionary rule is not intended to deter judges from unconstitutional actions, but instead acts as a deterrence to the police. Finally, where an officer knows or should know that the magistrate issuing a warrant has been mislead, or where an affidavit is so lacking in probable cause that no reasonable officer could reasonably rely on it, or where a warrant is so vague that no reasonable officer could assume it to be valid, the evidence obtained must be excluded. In this case, the officers reasonably relied on a facially valid warrant and the evidence obtained pursuant to the warrant is admissible even though the warrant was later held to be invalid.

#### Concurrence (Blackmun, J.)

If the good-faith exception to the exclusionary rule that the Court here adopts leads police to contravene the Fourth Amendment, the Court’s decision will need to be reconsidered.

#### Dissent (Brennan, J.)

The Court’s decision today all but destroys the Fourth Amendment protections against unreasonable searches and seizures. The exclusionary rule is not simply a judicial remedy and deterrent against unlawful police conduct, but the Fourth Amendment itself prohibits the use of illegally obtained evidence at trial. When the Court talks about the “cost” of the exclusionary rule, it is in fact complaining that the Fourth Amendment makes it harder to catch and try criminals. Furthermore, even assuming that the exclusionary rule was intended simply to deter abusive police conduct, evidence obtained in reasonable reliance on a warrant that is later found to be invalid should still be excluded or else the institutional incentive—to carefully provide probable cause in an affidavit and to review the warrant when it is issued—will be lost.

#### Dissent (Stevens, J.)

The Fourth Amendment was created to protect people from the unreasonable issuance of warrants not grounded in probable cause. Therefore, the Court’s holding that the police’s reliance on a facially valid warrant is automatically appropriate, is unconstitutional.

***Leon*** created **the good-faith exception to the exclusionary rule**. The exception was later expanded to cover other circumstances.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

***United States v. Leon (1984)***

Rule: Good faith reliance by police on a flawed warrant does not violate the 4th amendment exclusionary rule and evidence does not have to be excluded. The warrant did not contain anything that was recklessly or noticeably false. Police in good faith believed it to be valid.

A warrant issues by police had several errors. On its face, the warrant appeared valid. There was no evidence that showed police should have known/knew the judge issuing the warrant had been mislead, lacking probable cause, or was so vague that no reasonable officer could assume it was valid. They in good faith believe it to be valid. Because there was no improper police conduct, the evidence recovered was admissible.

# Illinois v. Gates

#### United States Supreme Court 462 U.S. 213 (1983)

#### Rule of Law

**A warrant application satisfies the Fourth Amendment probable cause requirement so long as it establishes a substantial basis for concluding that a search will uncover evidence of wrongdoing.**

#### Facts

Police received an anonymous letter implicating Sue and Lance Gates (defendants) in an elaborate illegal drug scheme. The letter contained many details about the couple and their drug business, including how the Gateses would obtain their illegal marijuana to sell and when the next transaction would occur. Based on this information, the police department conducted its own investigation which revealed that parts of the informant’s tip were true, and only one discrepancy between what the informant said would happen and what did happen was uncovered. The police were able to secure a search warrant of the Gateses’ home and car where they found drugs, weapons and other contraband. The Illinois Supreme Court upheld the lower court’s ruling that the search was unlawful. The court held that the anonymous letter and the police detective’s affidavit outlining the police investigation did not support the necessary probable cause needed to obtain the search warrant.

#### Issue

Does a warrant application based on partially corroborated evidence from an unknown informant satisfy the probable cause requirement of the Fourth Amendment?

#### Holding and Reasoning (Rehnquist, J.)

Yes. Corroborated statements by an unknown informant can amount to probable cause. *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969), established a two pronged test to determine whether probable cause existed. Using this standard, the magistrate or judge must first look to the veracity or reliability of the informant, and then look to how the informant came to know the information. However, this approach is too technical, forcing judges to look at issues separately when it would be more reasonable to consider them together by applying a totality of the circumstances test. Such a test is preferable because a magistrate’s decision should be given great deference when reviewed by other courts (*Spinelli*). Furthermore, because affidavits are drafted by non-lawyers, such technical requirements as those needed by the two prong approach do not actually help magistrates in determining probable cause. Finally, if a warrant application is subject to severe scrutiny, police officers may be deterred from seeking warrants in the first place and the strict standards of the two prong test may interfere with the ability of police to protect and serve the public. Here, the totality of the circumstances adds up to probable cause and the warrant was properly issued. While the anonymous letter standing alone does not amount to probable cause, once it is coupled with the lead detective’s affidavit corroborating parts of the letter, particularly those parts predicting the Gateses’ future actions, probable cause is established. Since the informant was correct about the Gateses’ future plans, the magistrate issuing the warrant reasonably assumed the veracity of the informant in regards to the other allegations. Accordingly, the judgment of the Illinois Supreme Court is reversed.

#### Concurrence (White, J.)

Using the two pronged approach from *Aguilar* and *Spinelli*, the warrant was properly issued and the Court should not overturn its precedent in favor of a totality of the circumstances approach. The informant predicted the Gateses’ actions which were then corroborated by the police. From this it is clear that the informant is both reliable, satisfying the first prong, and that he must have obtained his information in a reliable way, satisfying the second.

#### Dissent (Brennan, J.)

The majority is wrong to replace the two pronged approach with a totality of the circumstances approach and its holding suggests that the Court is prioritizing efficiency over constitutional rights. Precedent suggests that the Court affirms findings of probable cause when it is certain that information was obtained in a reliable way by a trustworthy person. Replacing the two pronged approach takes away the structure magistrates have used to make this determination, risks limiting the magistrate’s role as an independent arbitrator, and thereby risks inaccuracy in probable cause determinations.

#### Dissent (Stevens, J.)

The warrant was issued improperly. When the warrant was issued there was no probable cause of criminal activity because the magistrate was aware that the informant had been mistaken regarding a material detail.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Probable Cause** - A reasonable basis, amounting to more than mere suspicion, to believe that a person has committed a crime or is about to commit a crime, or that evidence relevant to a crime exists in a particular location.

# Franks v. Delaware

#### United States Supreme Court 438 U.S. 154 (1978)

#### Rule of Law

**A search warrant must be voided and any evidence obtained by the warrant excluded from admission at trial when a defendant shows that an affidavit in support of the warrant contains an intentional or reckless false statement and when the affidavit does not support a finding of probable cause in the absence of the false statement.**

#### Facts

Franks (defendant) was charged with assault and made a statement to a police officer that led to him coming under suspicion for a second assault. An affidavit in support of a warrant to search Franks’ apartment contained a statement that a police officer had personally contacted Franks’ employers and that the employers had described his typical clothing. Franks filed a motion to suppress the evidence obtained through the warrant and requested that he be allowed to call for testimony his employers and the officer who issued the affidavit in support of the warrant. The prosecution argued that state statute limited court review to the sufficiency of the affidavit and afforded no right for the defendant to question the veracity of the affidavit. The trial court sustained the prosecution’s argument and the state supreme court affirmed on appeal. Franks petitioned the United States Supreme Court for review.

#### Issue

Must a search warrant be voided and any evidence obtained by the warrant excluded from admission at trial when a defendant shows that an affidavit in support of the warrant contains an intentional or reckless false statement and when the affidavit does not support a finding of probable cause in the absence of the false statement?

#### Holding and Reasoning (Blackmun, J.)

Yes. A search warrant must be voided and any evidence obtained by the warrant excluded from admission at trial when a defendant shows that an affidavit in support of the warrant contains an intentional or reckless false statement and when the affidavit does not support a finding of probable cause in the absence of the false statement. The Warrant Clause of the Fourth Amendment requires warrants to issue only upon a finding of probable cause supported by oath or affirmation. This requirement does not mean that every allegation of fact set forth in an affidavit must be correct, but it does require that the affiant actually believe the allegations to be correct. The state argues that applying the exclusionary rule to deter false swearing in affidavits is not justified for the same reasons that we have declined to apply the exclusionary rule in other cases. The exclusionary rule is not a personal constitutional right and it will not be applied when its deterrent effect upon unlawful police conduct is outweighed by the public interest in a fair determination of guilt or innocence. The state also notes that the truthfulness of allegations in an affidavit will often be beyond the control of the affiant, as they may come from hearsay or anonymous informants. These are important considerations, but they do not justify an outright ban against challenges to the veracity of an affidavit. Denying a challenge under any circumstances would render the oath or affirmation requirement of the Warrant Clause meaningless. The *ex parte*nature of a warrant application deprives the defendant of any adversarial proceedings to challenge the validity of a warrant and necessarily involves a less vigorous factual inquiry. A defendant’s right to be free from arrest under an invalid warrant is not likely to be vindicated by district attorneys prosecuting offending police officers for perjury. Our holding does not diminish the significance of the *ex parte*determination of probable cause, because it is limited only to cases in which an affiant has made a false statement intentionally or with reckless disregard for the truth. A veracity hearing would be conducted outside a jury, so there is no risk that it will confuse determinations of guilt or innocence. An affidavit in support of a warrant is presumed to be truthful. A defendant wishing to challenge an affidavit must make a substantial preliminary showing of a reckless or intentional false statement. No hearing will be required if an affidavit continues to sustain a finding of probable cause after false statements are removed. Only when the false statements are essential to support probable cause will a hearing be necessary. The establishment of a procedure for resolving challenges to the veracity of affidavits is a matter for the state to determine. We remand this case to the state for further proceedings in accordance with this opinion.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Probable Cause** - A reasonable basis, amounting to more than mere suspicion, to believe that a person has committed a crime or is about to commit a crime, or that evidence relevant to a crime exists in a particular location.

**Warrant Clause** - A portion of the Fourth Amendment to the United States Constitution, incorporated in the Bill of Rights, that prohibits the search of private property in the absence of a warrant supported by sworn statements and a finding of probable cause.

# Lo-Ji Sales, Inc. v. New York

#### United States Supreme Court 442 U.S. 319 (1979)

#### Rule of Law

**A warrant must be issued by a neutral and detached magistrate, based upon probable cause, supported by an oath or affirmation, and it must describe the place to be searched and the person or thing to be seized.**

#### Facts

An investigator purchased two adult films which, after viewing them, he believed violated state obscenity laws. He showed the films to the town justice who issued a warrant authorizing the search of Lo-Ji Sales, Inc.’s (defendant) inventory and the seizure of the other copies of the two films. The investigator’s affidavit also stated that the store had other “similar” items he believed to also violate state obscenity law. The justice agreed to accompany the investigator to the store to determine whether there was in fact probable cause to believe other items violated state law. The warrant then contained a section authorizing the seizure of “the following items” but no specific items were listed. During the search of the store, when the justice found something he believed to violate state obscenity law, he ordered it seized as well as all “similar” items. In all, hundreds of films, reels, books and magazines were seized. After the search of the store, the warrant was amended to include all the items that were seized and the town justice signed the amended warrant.

#### Issue

Does a warrant that is issued by a judge who participates in the search and seizure of items, lacks probable cause, and is later amended to include all of the items seized, violate the Fourth Amendment warrant requirement?

#### Holding and Reasoning (Burger, C.J.)

Yes. A warrant must specifically describe the things to be seized, it must be based on probable cause of criminal activity, and it must be issued by a detached magistrate. Here, the warrant contained an open-ended statement of what was to be seized and it was only after the search that it was amended to include the specific items confiscated. In addition, there must be probable cause of criminal activity before a warrant is issued. When this warrant was issued there was only probable cause that the original two films violated state obscenity law. The investigator’s statement that there were other “similar” illegal materials does not constitute probable cause. Finally, the town justice was not a neutral magistrate. He acted in a law-enforcement capacity when he accompanied the police to the store to execute the invalid warrant. Furthermore, it was his job to determine probable cause but after concluding that a particular item was “obscene” he instructed the police to confiscate “similar” material, leaving to the discretion of the police what “similar” meant. Therefore, the warrant is invalid and the search and seizure unconstitutional.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

# Massachusetts v. Sheppard

#### United States Supreme Court 468 U.S. 981 (1984)

#### Rule of Law

**The exclusionary rule does not apply if the officer conducting the allegedly unconstitutional search acted in objectively reasonable reliance on a warrant that is subsequently determined to be invalid.**

#### Facts

Osborne Sheppard (defendant) was a suspect in the murder of Sandra Boulware. Detective Peter O’Malley drafted an affidavit to support an arrest warrant for Sheppard and a search warrant for Sheppard’s home. The district attorney agreed that the affidavit set forth probable cause supporting the warrants. O’Malley could not locate a warrant application form, because it was Sunday and the court was closed. O’Malley found a previously used warrant application form. The form was for a different suspect in a different district and authorized a search for controlled substances, which was a more limited scope than called for in O’Malley’s affidavit. O’Malley used a typewriter to make various changes to the form and then presented the form and affidavit to a judge. The judge told O’Malley that he would make the changes necessary to validate the warrant and then sign the warrant. The judge then made certain changes to the form in O’Malley’s presence and signed the form. A reference to “controlled substances” was not removed from the portion of the form that would constitute the actual warrant when signed. O’Malley searched Sheppard’s residence pursuant to the signed warrant and found incriminating evidence. Sheppard was convicted. The Supreme Judicial Court of Massachusetts reversed the conviction, finding that the evidence obtained in the search should have been excluded because the search was broader than the warrant authorized. The United States Supreme Court granted certiorari.

#### Issue

Does the exclusionary rule apply if the officer conducting the allegedly unconstitutional search acted in objectively reasonable reliance on a warrant that is subsequently determined to be invalid?

#### Holding and Reasoning (White, J.)

No. The exclusionary rule does not apply if the officer conducting the allegedly unconstitutional search acted in objectively reasonable reliance on a warrant that is subsequently determined to be invalid. The exclusionary rule, which excludes evidence obtained in violation of an individual’s constitutional rights, is in place to deter law enforcement from conducting illegal searches. The rule should not be applied where law enforcement acts reasonably, in reliance on a magistrate or judge. In this case, the exclusionary rule does not apply to exclude the evidence obtained pursuant to O’Malley’s search warrant. There is no dispute that O’Malley believed the warrant was valid when he conducted his search. The question is whether that belief was objectively reasonable. The court concludes that it was. A district attorney approved O’Malley’s affidavit, and then a judge signed the warrant. Although the warrant referred to a search for controlled substances, the judge ensured O’Malley that he would make all necessary changes to the form. O’Malley then saw the judge make certain changes to the form and sign the warrant. O’Malley was not required to disregard assurances from a judge that the warrant was valid. The evidence obtained pursuant to O’Malley’s search is admissible. The judgment of the Supreme Judicial Court of Massachusetts is reversed, and the case is remanded.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Exclusionary Rule** - A rule that excludes or suppresses evidence in a criminal proceeding where that evidence was obtained in violation of an individual’s constitutional rights.

**Affidavit** - A written statement of fact voluntarily provided by one who is under oath.

# Illinois v. Krull

#### United States Supreme Court 480 U.S. 340 (1987)

#### Rule of Law

**The exclusionary rule does not apply to evidence obtained in a search carried out pursuant to a statute subsequently found to be unconstitutional.**

#### Facts

Police conducted a search of Krull’s (defendant) business pursuant to a state statute that allowed law enforcement to search licensed car and car parts sellers without a warrant. The statute was found later to be unconstitutional. The trial court admitted the evidence obtained pursuant to the search. Krull appealed and the United States Supreme Court granted certiorari.

#### Issue

Does the exclusionary rule apply to evidence obtained in a search carried out pursuant to a statute subsequently found to be unconstitutional?

#### Holding and Reasoning (Blackmun, J.)

No. Similar to the holding in *United States v. Leon*, 468 U.S. 897 (1984), the exclusionary rule does not apply to evidence obtained in a search carried out pursuant to a statute subsequently found to be unconstitutional. As an initial matter, the exclusionary rule is in place to deter law enforcement misconduct, not to deter lawmakers conduct. Law enforcement cannot be expected to analyze the constitutional implications of enacted laws unless a law is clearly unconstitutional; rather, their job is to follow the laws that the legislature passed. Moreover, even if the legislature was the focus of the exclusionary rule, there is no evidence that applying the exclusionary rule to evidence obtained in a search carried out pursuant to a statute subsequently found to be unconstitutional would deter lawmakers from enacting such statutes. It is simply not a common issue that legislatures enact wildly unconstitutional search and seizure laws—they do not enact laws for the purpose of illegally obtaining evidence in criminal prosecutions. As a result of the foregoing, the Court determines that the exclusionary rule does not apply in this case because when the search of Krull’s business was conducted, it was done so under an existing statute that was only later found to be unconstitutional. Accordingly, the evidence obtained from the search is admissible.

#### Dissent (O’Connor, J.)

This case is distinguishable from *Leon*. *Leon* dealt with a magistrate issuing a search warrant, not the legislature enacting a statute; this is a critical difference. First, a legislature’s mistake “may affect thousands or millions” of people whereas a magistrate’s mistake would affect only one defendant. Second, legislatures are more subject to political pressure than magistrates. Additionally, the majority’s holding will create an incentive for legislatures to enact unconstitutional statutes. Finally, the majority’s holding causes uncertainty for the future. It may force courts to “inquire into [an] officer’s probable understanding of the state of the law except in the extreme instance of a search warrant upon which no reasonable officer would rely.”

**Key Terms:**

**Exclusionary Rule** - A rule that excludes or suppresses evidence in a criminal proceeding where that evidence was obtained in violation of an individual’s constitutional rights.

# Davis v. United States

#### United States Supreme Court 564 U.S. 229 (2011)

#### Rule of Law

**A search conducted in objectively reasonable reliance upon binding appellate precedent that has since been overruled is not subject to the exclusionary rule.**

#### Facts

In April 2007, police officers in Alabama pulled over Stella Owens and Willie Davis (defendant), her passenger. Owens was arrested for driving while intoxicated and Davis was arrested for giving a false name to the police. Owens and Davis were handcuffed and placed in patrol cars. The police proceeded to search the passenger compartment of Owens’ car and found a gun in the pocket of Davis’ jacket. Davis was convicted and he subsequently appealed. At the time of Davis’ arrest, *New York v. Belton*, 453 U.S. 454 (1981) allowed police to search the passenger compartment of a vehicle incident to a lawful arrest. While Davis’ appeal was pending, *Belton* was overruled by *Arizona v. Gant*, 556 U.S. 332 (2009). In considering Davis’ appeal, the Court of Appeals for the Eleventh Circuit applied the *Gant* rule and found that the search violated Davis’ Fourth Amendment rights. The Eleventh Circuit also found that applying the exclusionary rule to this case would not serve to deter future Fourth Amendment violations, and consequently did not exclude the evidence uncovered in the search. Davis’ conviction was therefore affirmed.

#### Issue

Is a search conducted in objectively reasonable reliance upon binding appellate precedent that has since been overruled subject to the exclusionary rule?

#### Holding and Reasoning (Alito, J.)

No. The Fourth Amendment prohibits unreasonable searches and seizures. To deter deliberate disregard of Fourth Amendment rights, this Court has developed the exclusionary rule, which precludes prosecutors from introducing evidence obtained in violation of the Fourth Amendment. Because this is a court-created remedy, courts should only apply the exclusionary rule where the deterrent effect of the rule outweighs the social cost of suppressing potentially reliable evidence. At the time of Davis’ arrest, *Belton*allowed police to search the passenger compartment of a vehicle incident to a lawful arrest. In *Gant*, this Court overruled *Belton*by allowing such searches only if the arrestee was within reaching distance of the car during the search or the police reasonably believed the car contained evidence related to the crime of arrest. Under the *Gant* rule, search of the passenger compartment of Owens’ car violated Davis’ Fourth Amendment rights. However, applying the exclusionary rule here will have no deterrent effect. The police in this case did not deliberately disregard Davis’ Fourth Amendment rights. To the contrary, they were specifically authorized by Fourth Amendment law in effect at that time to search the car. Consequently, the judgment of the Eleventh Circuit is affirmed.

#### Concurrence (Sotomayor, J.)

Because judicial precedent specifically authorizes certain police conduct, applying the exclusionary rule retroactively in cases where precedent is overturned at a later date will not serve as a deterrent. However, this case does not concern instances where Fourth Amendment jurisprudence is unsettled.

#### Dissent (Breyer, J.)

The majority essentially applies a good faith exception to the exclusionary rule. However, the good faith exception threatens to swallow the exclusionary rule, as evidence would only be excluded where the search or seizure is egregiously unreasonable.

**Key Terms:**

**Exclusionary Rule** - A rule that excludes or suppresses evidence in a criminal proceeding where that evidence was obtained in violation of an individual’s constitutional rights.

# Mapp v. Ohio

#### United States Supreme Court 367 U.S. 643 (1961)

#### Rule of Law

**Evidence obtained through an unreasonable search and seizure in violation of the Fourth Amendment is inadmissible in state criminal proceedings.**

# \*\*HUDSON v. MICHIGAN\*\*

#### United States Supreme Court 547 U.S. 586 (2006)

#### Rule of Law

**The exclusionary rule does not apply to violations of the knock and announce rule.**

#### Facts

The police obtained a warrant to search Hudson’s (defendant) home. The police arrived at Hudson’s home, announced their presence, but only waited three to five seconds before entering the house. Upon searching Hudson’s home, the police found drugs and firearms which Hudson moved to suppress at trial, arguing that the police did not wait long enough before entering his home in violation of his Fourth Amendment rights. The state trial court granted his motion and the court of appeals reversed. The United States Supreme Court granted certiorari.

#### Issue

Does a violation of the knock and announce rule mean that the evidence found pursuant to the subsequent search must be excluded at trial?

#### Holding and Reasoning (Scalia, J.)

No. If the police fail to properly follow the knock and announce rule, the evidence they find may still be admitted at trial. The purpose of the knock and announce rule is to protect lives and prevent injury to people and property. However, once a warrant has been issued, an individual has no more privacy in the evidence described in the warrant. Therefore, the exclusionary rule is not a proper remedy if the police fail to properly knock and announce their presence because the individual’s interests that have been violated have nothing to do with the search and seizure of evidence. In addition, the exclusionary rule only applies where its ability to deter police misconduct outweighs the cost to society of letting criminals go. Excluding evidence found in violation of the knock and announce rule provides little deterrence to police and has a significant detrimental effect on society. Such a policy could lead the police to wait too long before they enter a home, increasing the chance that officers will be harmed; and what constitutes a reasonable time in specific situations would be hard for a trial court to determine. Furthermore, there is little incentive for the police to violate the knock and announce rule since it is designed for everyone’s safety, the suspect and police alike, and the police may lawfully abandon the requirement if exigent circumstances are present making delay more dangerous. Furthermore, as with most rules, the police are deterred from violating the knock and announce rule by the possibility of a civil suit against them sometime in the future and by the possibility of professional reprimands within an officer’s unit that could taint his career. Therefore, the evidence found by the police in Hudson’s home is admissible because the social cost of excluding it outweighs any deterrent effect the knock and announce rule may have. The judgment of the state appeals court is affirmed.

#### Concurrence (Kennedy, J.)

The Court’s holding leaves intact prior precedence concerning the exclusionary rule and it is not intended to minimize the importance of the knock and announce requirement. Instead, the Court’s holding simply stands for the proposition that exclusion of evidence is not the proper remedy when the police fail to properly knock and announce their presence because failure to follow this rule is too attenuated from the subsequent search that eventually leads to the discovery of incriminating evidence.

#### Dissent (Breyer, J.)

The exclusionary rule should apply when the police fail to properly follow the knock and announce rule because the Court’s precedence prohibits the admission of evidence found through illegal search or seizure. Also, violations of the knock and announce rule are widespread. There is no evidence to support the majority’s position that other means of deterrence have become effective and therefore, only by making evidence inadmissible, will the police be properly deterred from violating the rule. In addition, the majority holds that the police held a valid warrant and therefore were entitled to the evidence they found. However, the warrant was valid only so long as its execution complied with the constitution. Furthermore, the Court’s argument that strict compliance with the knock and announce rule may be dangerous for police officers is more an argument against the rule itself than it is against enforcement of the rule. Finally, the majority’s opinion is full of misunderstandings of the Court’s own precedence. For example, the majority misunderstands the doctrine of inevitable discovery and redefines “attenuation” in a way completely inconsistent with precedent.

***Hudson*** showed that sometimes the social costs of excluding evidence outweigh the benefits.

**Key Terms:**

**Exclusionary Rule** - A rule that excludes or suppresses evidence in a criminal proceeding where that evidence was obtained in violation of an individual’s constitutional rights.

**Knock and Announce Rule** - When executing a warrant, and absent exigent circumstances, the police must knock, announce their presence, and wait a reasonable amount of time before they enter a home, giving the occupant of the home the opportunity to let the police enter without the use of force.

***Hudson v. Michigan (2006)***

Rule: The exclusionary rule does not apply to knock and announce. If police fail to properly follow the knock and announce rule, the evidence found may still be admitted at trial.

Police obtained a search warrant. They announced their presence but only waited 3-5 seconds before entering. US SC ruled the cost of evidence suppression was outweighed by the benefits. The purpose of the rule is to protect lives and prevent injury to people and property. The exclusionary rule is not the proper remedy if police fail to conduct the knock and announce correctly.

# Wilson v. Arkansas

#### United States Supreme Court 514 U.S. 927 (1995)

#### Rule of Law

**The knock and announce rule is part of the reasonableness test required to assess whether a search was valid under the Fourth Amendment.**

#### Facts

Sharlene Wilson (defendant) sold drugs to an informant for the Arkansas State Police in November and December of 1992. Wilson later threatened the informant with a gun. Police secured a warrant to search the home Wilson shared with Bryson Jacobs (defendant), who had convictions for arson and firebombing. Police announced themselves as they entered the unlocked screen door and passed through the open main door to the home. Wilson was in the bathroom flushing drugs down the toilet. Police found drugs, drug paraphernalia, and a gun. Wilson and Jacobs were arrested on various drug charges. Wilson filed a pretrial motion to suppress the evidence found during the search claiming, among other things, that the search violated the Fourth Amendment since police did not “knock and announce” before entering the property. The trial court denied the motion, and Wilson was convicted by a jury and sentenced to 32 years imprisonment. The Arkansas Supreme Court affirmed. The United States Supreme Court granted certiorari to determine whether the knock and announce rule is part of the reasonableness test required by the Fourth Amendment.

#### Issue

Must courts consider whether police knocked and announced themselves before entering a home to execute a search warrant when determining whether the search was reasonable under the Fourth Amendment?

#### Holding and Reasoning (Thomas, J.)

Yes. The common-law principle requiring police to knock and announce themselves before entering a home is part of the reasonableness test required by the Fourth Amendment. The Fourth Amendment prohibition of unreasonable searches and seizures must be interpreted in light of the intent of the Framers. While the common law at that time permitted law enforcement to break into a home, it urged giving the owner an opportunity to comply before breaking in or damaging the property. The English common law had been widely incorporated by the states adopting the amendment. This was the practice at the time, and the Framers no doubt considered it part of the reasonableness inquiry. Despite this long history, the case law up to now has not made the rule plain. The knock and announce principle must be factored into the reasonableness inquiry under the Fourth Amendment. This is not a fixed requirement in every search, but an important factor in determining reasonableness. Announcement is not required in every case and may be omitted, for example, in cases involving physical danger or the probable destruction of evidence. Thus, the failure to knock and announce before a search could constitute a violation of the Fourth Amendment, unless the omission is reasonable in light of the government interests in the case. The decision of the Arkansas Supreme Court is reversed, and the case is remanded.

**Key Terms:**

**Knock and Announce Principle** - The requirement that law enforcement officers knock and announce their identity and authority before entering a home to execute a warrant.

# Richards v. Wisconsin

#### United States Supreme Court 520 U.S. 385 (1997)

#### Rule of Law

**The Fourth Amendment’s reasonableness requirement incorporates the common law rule that police entering a home must knock and announce their identity and purpose before attempting forcible entry, unless exigent circumstances exist and to do so would undermine law enforcement interest.**

#### Facts

The police obtained a search warrant to search Richards’s (defendant) hotel room for drugs. When the police went to the hotel to execute the warrant, they hid their true identity, with one officer identifying himself as the maintenance man. However, when Richards cracked the door open with the chain still on, he could tell it was the police so the police resorted to kicking down the door to gain entry. Once inside, they found cash, cocaine, and Richards as he was trying to escape out a window. On account of the police failing to knock and announce their presence, Richards moved to have the evidence found in the hotel suppressed. The trial court denied the motion. The state supreme court affirmed the decision and held that when executing a search warrant in a felony drug case, the police need never knock and announce their presence because such investigations frequently involve dangerous situations and the possibility that evidence can quickly and easily be destroyed.

#### Issue

Is it permissible to have a per se rule that police need never knock and announce their presence when executing a search warrant for a felony drug investigation since exigent circumstances are frequently present?

#### Holding and Reasoning (Stevens, J.)

No. While the general rule is that the police must knock and announce their presence before a warrant can be executed, whether or not this rule should in fact be followed in a specific instance must be determined on a case-by-case basis at the time the warrant is being executed. The state supreme court’s blanket rule exempting the police from such a determination is misguided because it makes assumptions about the culture of a specific category of criminal behavior. While the assumption that felony drug investigations often involve violence and the potential for evidence to be destroyed, this is not always the case and therefore the blanket exclusion is based on an overgeneralization. Furthermore, creating a per-se rule based on the culture of a certain type of criminal activity is a dangerous precedent to set since such reasoning can easily be applied to other categories of criminal behavior. If this happens, the knock and announce rule of the Fourth Amendment’s reasonableness requirement would become meaningless. Therefore, the knock and announce requirement, coupled with the exigent circumstances exception, is the proper rule to balance people’s Fourth Amendment rights with the interest of law enforcement, and the per-se exclusion is therefore unconstitutional. This being said, the Court agrees with the judgment of the state supreme court. The Court holds that under the circumstances, the officers acted reasonably by choosing not to knock and announce their presence. Once Richards knew who they were, the police reasonably assumed they needed to act quickly to successfully execute the warrant. Accordingly, the judgment is affirmed.

**Key Terms:**

**Per Se Rule** - A rule that is applied uniformly without consideration of the specific situation or circumstance.

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

# United States v. Banks

#### United States Supreme Court 540 U.S. 31 (2003)

#### Rule of Law

**Exigent circumstances exist for forced entry after enough time has passed to make it reasonable to suspect imminent loss of evidence.**

#### Facts

Law enforcement obtained a search warrant for Banks’s (defendant) apartment based on probable cause of the presence of cocaine. In executing the warrant, they announced their presence at the apartment, waited 15-20 seconds without a response, and then knocked down the door and entered. Banks moved to suppress evidence obtained in the search because he was in fact in the shower at the time of the execution of the warrant and had not heard the officers knock and announce their presence. The United States Supreme Court granted certiorari

#### Issue

Do exigent circumstances exist for forced entry if enough time has passed to make it reasonable to suspect imminent loss of evidence?

#### Holding and Reasoning (Souter, J.)

Yes. In the absence of exigent circumstances, after announcing their presence in the execution of a search warrant, law enforcement must wait until such time as the occupant’s failure to let them in suggests a refusal to let them in at all. That is to say, law enforcement must wait until the occupant has had a reasonable amount of time to get to the door. However, exigent circumstances may exist for forced entry after a given amount of time. The specific amount of time depends on the exigency claimed. Here, in the case of a search warrant issued for drugs, law enforcement must wait only until it becomes reasonable to suspect imminent loss of the evidence sought to be obtained by the search. Drugs such as cocaine are easily disposable and the Court determines that the 15-20 second wait at Banks’s apartment was sufficient given that this amount of time would be enough for Banks to have gotten to the bathroom or kitchen to flush the cocaine down the drain. Importantly, in knock and announce cases, judgment on the reasonableness of the time passed must be made based on the perspective of law enforcement at the scene and what they knew at the time. Thus, in this case, the fact that Banks was actually in the shower at the time has no bearing on the constitutionality of the officers breaking down the door because they had no reason to know that he was in the shower. The Court determines that the officers breaking down Banks’s door did not violate his Fourth Amendment rights.

**Key Terms:**

**Knock and Announce Principle** - The requirement that law enforcement officers knock and announce their identity and authority before entering a home to execute a warrant.

# United States v. Leon

#### United States Supreme Court 468 U.S. 897 (1984)

#### Rule of Law

**Evidence obtained in reasonable, good-faith reliance on a facially valid search warrant is not subject to the Fourth Amendment's exclusionary rule, even if the warrant is later deemed defective.**

#### Facts

The police received an anonymous tip that two individuals were selling drugs out of their apartment. Based on the information from the informant, the police started an investigation and eventually submitted an affidavit requesting a warrant to search three residences and automobiles. A facially valid search warrant was issued and pursuant to the warrant the police conducted their search. Leon (defendant) and the other defendants filed motions to suppress the evidence obtained pursuant to the search and the district court granted the motions, holding that the affidavit did not establish probable cause. The United States Supreme Court granted certiorari.

#### Issue

Is evidence obtained in reasonable, good-faith reliance on a facially valid search warrant subject to the Fourth Amendment's exclusionary rule if the warrant is later deemed defective?

#### Holding and Reasoning (White, J.)

No. Evidence obtained in reasonable, good-faith reliance on a facially valid search warrant is not subject to the Fourth Amendment's exclusionary rule, even if the warrant is later deemed defective. The exclusionary rule is not itself a constitutional right but is a judicial remedy intended to deter police from infringing on this constitutionally protected right by prohibiting the introduction of evidence that is obtained in violation of the Fourth Amendment. The rule developed because an individual’s constitutional rights are prioritized over efficient law enforcement. However, when the police reasonably rely on a facially valid search warrant, there is no improper police conduct to deter and therefore no Fourth Amendment interests are advanced by excluding the evidence. Therefore, the social cost of excluding the evidence outweighs any Fourth Amendment violation and the evidence must remain admissible at trial. Furthermore, while magistrates are given much deference in their probable cause determinations, their decisions are reviewable, as is the information the police provide them with. The exclusionary rule is not intended to deter judges from unconstitutional actions, but instead acts as a deterrence to the police. Finally, where an officer knows or should know that the magistrate issuing a warrant has been mislead, or where an affidavit is so lacking in probable cause that no reasonable officer could reasonably rely on it, or where a warrant is so vague that no reasonable officer could assume it to be valid, the evidence obtained must be excluded. In this case, the officers reasonably relied on a facially valid warrant and the evidence obtained pursuant to the warrant is admissible even though the warrant was later held to be invalid.

#### Concurrence (Blackmun, J.)

If the good-faith exception to the exclusionary rule that the Court here adopts leads police to contravene the Fourth Amendment, the Court’s decision will need to be reconsidered.

#### Dissent (Brennan, J.)

The Court’s decision today all but destroys the Fourth Amendment protections against unreasonable searches and seizures. The exclusionary rule is not simply a judicial remedy and deterrent against unlawful police conduct, but the Fourth Amendment itself prohibits the use of illegally obtained evidence at trial. When the Court talks about the “cost” of the exclusionary rule, it is in fact complaining that the Fourth Amendment makes it harder to catch and try criminals. Furthermore, even assuming that the exclusionary rule was intended simply to deter abusive police conduct, evidence obtained in reasonable reliance on a warrant that is later found to be invalid should still be excluded or else the institutional incentive—to carefully provide probable cause in an affidavit and to review the warrant when it is issued—will be lost.

#### Dissent (Stevens, J.)

The Fourth Amendment was created to protect people from the unreasonable issuance of warrants not grounded in probable cause. Therefore, the Court’s holding that the police’s reliance on a facially valid warrant is automatically appropriate, is unconstitutional.

***Leon*** created **the good-faith exception to the exclusionary rule**. The exception was later expanded to cover other circumstances.

**Key Terms:**

**Per Se Rule** - A rule that is applied uniformly without consideration of the specific situation or circumstance.

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

# Pennsylvania Bd. of Probation and Parole v. Scott

118 S.Ct. 2014

Supreme Court of the United States

[**PENNSYLVANIA BOARD OF PROBATION AND PAROLE**](https://1.next.westlaw.com/Search/Results.html?query=advanced%3a+WCAID(I58DEF67041EB11DDAD6B0014224D2780)&saveJuris=False&contentType=BUSINESS-INVESTIGATOR&startIndex=1&contextData=(sc.Default)&categoryPageUrl=Home%2fCompanyInvestigator&originationContext=document&transitionType=DocumentItem)**, Petitioner,**

**v.**

[**Keith M. SCOTT.**](https://1.next.westlaw.com/Search/Results.html?query=advanced%3a+OAID(5056887459)&saveJuris=False&contentType=BUSINESS-INVESTIGATOR&startIndex=1&contextData=(sc.Default)&categoryPageUrl=Home%2fCompanyInvestigator&originationContext=document&transitionType=DocumentItem)

No. 97–581.

Argued March 30, 1998.Decided June 22, 1998.

**Synopsis**

Parolee sought review of an administrative order of the Pennsylvania Board of Probation and Parole, Parole No. 4488–X, denying his request for administrative relief from the [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Iae2ae3f835a611d98b61a35269fc5f88&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[Board's revocation decision. The Commonwealth Court, No. 3093 C.D. 1994, 668 A.2d 590](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995235721&pubNum=0000162&originatingDoc=I6b1e6f6c9c2511d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), reversed and remanded. The Commonwealth's petition for allowance of appeal was granted. [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Idb7b50b9369111d9abe5ec754599669c&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[The Pennsylvania Supreme Court, No. 66 M.D. 1996, 548 Pa. 418, 698 A.2d 32](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997140937&pubNum=0000162&originatingDoc=I6b1e6f6c9c2511d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), **held that the exclusionary rule will apply in a parole revocation hearing if the officer conducting a search is aware or has reason to be aware of a suspect's parole or probationary status, and lacks reasonable suspicion of a parole violation justifying the search**. Certiorari was granted. The Supreme Court, Justice Thomas, held **that parole boards are not required by federal law to exclude evidence obtained in violation of the Fourth Amendment.**

Reversed and remanded.

Justice Stevens filed a dissenting opinion.

Justice Souter filed a dissenting opinion, in which Justices Ginsburg and Breyer joined.

# Mapp v. Ohio

#### United States Supreme Court 367 U.S. 643 (1961)

#### Rule of Law

**Evidence obtained through an unreasonable search and seizure in violation of the Fourth Amendment is inadmissible in state criminal proceedings.**

# Miranda v. Arizona

#### United States Supreme Court 384 U.S. 436 (1966)

#### Rule of Law

**Without certain hallmark warnings regarding the right to remain silent and the right to counsel, statements made during custodial interrogation are inadmissible at trial.**

#### Facts

Ernesto Miranda (defendant) confessed after questioning by Arizona police while he was in custody at a police station. Before confessing, the police did not advise Miranda of his right to counsel. Miranda suffered from a mental illness. The State of Arizona (plaintiff) charged Miranda with kidnapping and rape. At trial, the court admitted his confession, and a jury convicted him. The Supreme Court of Arizona affirmed Miranda’s conviction. Like Miranda, Michael Vignera and Carl Westover (defendants) confessed to crimes after extensive custodial interrogations without being notified of their rights. Their convictions were affirmed. However, the Supreme Court of California reversed Roy Allen Stewart’s (defendant) conviction because the record was silent on whether he had been advised of his rights. Stewart had dropped out of school in the sixth grade. The United States Supreme Court accepted these four cases to determine what kinds of custodial-interrogation procedures were required to adequately safeguard the Fifth Amendment right against self-incrimination. The Court held that without certain hallmark warnings regarding the right to remain silent and the right to counsel, statements made during custodial interrogation were inadmissible at trial.

#### Issue

Without certain hallmark warnings regarding the right to remain silent and the right to counsel, are statements made during custodial interrogation inadmissible at trial?

#### Holding and Reasoning (Warren, C.J.)

Yes. Without certain hallmark warnings regarding the right to remain silent and the right to counsel, statements made during custodial interrogation are inadmissible at trial. Custodial interrogation occurs if law-enforcement officers question a person who has been arrested and taken into custody, or otherwise deprived of freedom of action in any significant way. Custodial interrogation is inherently coercive. Cutting suspects off from contact with the outside world creates an environment ripe for intimidation. Acting within a closed, hostile environment, police officers can prey upon individual weaknesses at the expense of individual liberties. In each of the four cases, the risk of psychological intimidation was plain. Miranda suffered from mental illness and Stewart had dropped out of school in the sixth grade. Due to these concerns, the Constitution requires a number of procedural safeguards that relieve some of the pressure put upon people in custodial interrogation. Prior to any questioning while in custody, a person must be informed of the right to remain silent, and that anything said can be used as evidence of guilt. The arrestee must also be notified of the right to an attorney, and that if the arrestee can’t pay for an attorney, one will be provided for free. Any waiver of these rights must be voluntary. If a person refuses to be questioned at any point, law enforcement cannot continue the questioning. The fact that a person answers some questions doesn’t mean the person waives the right to consult with an attorney or to stop the interrogation at a later point. The statements of all four men were inadmissible because they were not informed of their rights. The convictions of Miranda, Vignera, and Westover are reversed, and the California Supreme Court’s reversal of Stewart’s conviction is affirmed.

#### Dissent (White, J.)

No Fifth Amendment jurisprudence supports the majority’s procedures. While it frequently falls to the Court to make new law, there is no logical basis for assuming that custodial interrogations are inherently coercive, or that the majority’s procedures would render the statements voluntary. Moreover, the majority’s procedures could weaken criminal-law enforcement.

#### Dissent (Harlan, J.)

The Court’s ruling redefines voluntariness in a way that is inconsistent with history and precedent. While interrogation may be unpleasant, the constitution does not prohibit government intrusion if probable cause or a warrant is present. The majority’s procedures discourage any kind of confession. Even if the Fifth Amendment applied to pretrial custodial interrogations, it hardly supported the majority’s strict procedures. Legislative reform could craft a better solution and would be supported by empirical data on the effect of any new procedures on law-enforcement practice.

**Key Terms:**

**Custodial Interrogation** - Questioning by law enforcement authorities of a suspect in a criminal investigation under circumstances in which the suspect is not free to terminate the questioning and leave at will or under circumstances that lead the suspect to believe that he is not free to leave at will.

**Fifth Amendment** - An amendment added to the U.S. Constitution as part of the Bill of Rights that provides important protections from government actions, including a guarantee that no person will be required to answer for a capital crime unless first indicted by a grand jury; no one will suffer double jeopardy; no one must testify against himself or herself; no one will be deprived of life, liberty, or property without due process of law; and no property will be taken for public use without just compensation.

# Monroe v. Pape

#### United States Supreme Court 365 U.S. 167 (1961)

#### Rule of Law

**42 U.S.C. § 1983 affords a civil cause of action to redress violations of individual constitutional rights by a governmental official.**

#### Facts

Monroe (plaintiff) filed suit under 42 U.S.C. § 1983 against the city of Chicago and other defendants on allegations that city police officers violated Monroe’s constitutional rights. Monroe alleged that police officers placed him under arrest and searched his home without a warrant. Monroe claimed that the police subsequently detained and interrogated him without access to the court or to the representation of counsel. No formal charges were issued. The city moved the district court to dismiss Monroe’s complaints on the theory that Section 1983 did not provide a civil cause of action for relief from acts performed in the ambit of governmental functions. The district court dismissed Monroe’s complaint. Monroe appealed and the appellate court affirmed the dismissal. Monroe petitioned the Supreme Court for review.

#### Issue

Does 42 U.S.C. § 1983 afford a civil cause of action to redress violations of individual constitutional rights by a governmental official?

#### Holding and Reasoning (Douglas, J.)

Yes. 42 U.S.C. § 1983 affords a civil cause of action to redress violations of individual constitutional rights by a governmental official. Section 1983 imposes liability upon any person acting under color of the law, custom, or usage of any state or territory in a manner that violates an individual’s constitutional rights. The Due Process Clause of the Fourteenth Amendment makes the Fourth Amendment protections against unreasonable search and seizure applicable to state governments. Suits against state governments are authorized by Section 1983. The question presented here is whether Section 1983 also authorizes a cause of action against a governmental official. The phrase “under color of law” does not apply only to actions authorized by law. It also applies to unlawful activities committed by individuals vested with state authority and acting under the apparent authority of the state. We conclude that Section 1983 affords a civil cause of action to redress constitutional harms inflicted by a public official acting under the authority of a governmental position.

#### Dissent (Frankfurter, J.)

The historical evidence indicates that the purpose of Section 1983 was to provide a cause of action in federal courts for constitutional violations that could not be heard in state courts due to the operation of state law. Article III of the Constitution presumed that state courts would serve as the primary forum for addressing individual grievances. The adoption of the Fourteenth Amendment did not alter the fundamental structure of the judiciary system established by the Constitution.

**Key Terms:**

**Apparent Authority** - A theory of assigning vicarious liability which states that a principal will be bound not only by the authority that it actually gives to another, but also by the authority it appears to give. An innocent third party who justifiably relies on this appearance of authority may still recover on a theory of vicarious liability even though no actual authority exists.

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

# 42 U.S.C. § 1983 - Federal law that allows individuals to sue state officials for violating their constitutional rights while acting under “color” of state law.

# Monell v. Department of Social Services

#### United States Supreme Court 436 U.S. 658 (1978)

#### Rule of Law

**A local government may be held liable under 42 U.S.C. § 1983 for constitutional rights violations that arise out of matters of official policy.**

#### Facts

In 1971, Monell was part of a class of female employees of the Department of Social Services and the Board of Education of New York City who brought a § 1983 action against the department, the board, the city and individual officials of each entity. The complaint alleged that the department and the board, as a matter of official policy, forced pregnant employees to take unpaid leaves of absences prior to any necessary medical leave. The complaint sought injunctive relief and back pay. On cross summary judgment motions, the District Court for the Southern District of New York ruled the practice unconstitutional, but held the claim for injunction moot, because the entities corrected their policies prior to the court decision. The trial court denied back pay, however, because it concluded the pay would come from the city, which enjoys sovereign immunity pursuant to *Monroe v. Pape*, 365 U.S. 167 (1961). The court of appeals affirmed, and the United States Supreme Court granted certiorari.

#### Issue

May a local government be held liable under 42 U.S.C. § 1983 for constitutional rights violations that arise out of matters of official policy?

#### Holding and Reasoning (Brennan, J.)

Yes. Although a local government may not be sued under § 1983 for injuries caused solely by the acts of its employees, it may be sued if the official policy of the entity is at the root of the constitutional rights violation. Although *Monroe v. Pape*, 365 U.S. 167 (1961), held that Congress did not intend to subject municipalities to § 1983 claims, this Court now finds that holding was incorrect, even considering the rule of stare decisis. The predecessor of § 1983 was § 1 of the Civil Rights Act of 1871. As Congress considered the Act, it specifically rejected the “Sherman Amendment” to the bill, which would have held municipalities liable for certain civil rights violations by individuals. However, the legislative history of the Act demonstrates that Congress rejected the Sherman Amendment, because it would place improper obligations on municipalities, not because it might allow a municipality to be held civilly liable. Opponents of the Sherman Amendment cited *Collector v. Day*, 78 U.S. 113 (1871) (holding that the federal government could not tax the salary of a state officer), and *Kentucky v. Dennison*, 65 U.S. 66 (1861) (holding that the federal government may not impose duties on state officers that impede upon their state duties), to show that Congress should not overload municipalities with federal mandates. The intent of Congress was not to shield municipalities from all civil rights liabilities. Just as Congress did not intend to hold municipalities immune from actions under § 1 of the Act, it likewise did not intend the term “any person” to be limited to natural persons. Since Congress intended § 1 to be broadly construed, and because municipalities through official acts can cause harm as much as individuals, “any person” includes legal, as well as natural, persons. However, the language of § 1983 shows that Congress intended that municipalities could only be held liable for injuries resulting from official policies, not from the tortious acts of their employees. Respondeat superior liability does not apply to municipalities under § 1983. Because this case involves official policy as the basis for the violation of constitutional rights as found by the trial court, the court of appeals judgment is reversed.

#### Concurrence (Stevens, J.)

The majority’s discussion of respondeat superior should have been excluded, because it is merely advisory and not necessary to explain the decision.

#### Concurrence (Powell, J.)

This decision correctly interprets relevant legislative history, refutes *Monroe*, and properly rejects absolute municipal immunity under § 1983.

#### Dissent (Rehnquist, J.)

This Court has improperly abandoned *Monroe* and three subsequent cases by reviewing the same legislative history before the Court in *Monroe*. The established principle of stare decisis prevents this Court from overruling *Monroe*, because it is not clear beyond doubt that the opinion misinterpreted the legislative history. Nothing in the legislative history of § 1 expresses an intent to include municipalities as defendants. Likewise, comparisons to other constitutional provisions suggest that Congress intended the word “person” in § 1983 to be more limited than to include municipalities. The majority’s decision to remove sovereign immunity should come only from Congress.

**Key Terms:**

**Respondeat Superior** - Latin for “let the superior answer,” the doctrine that an employer is responsible for an employee’s tortious acts committed within the scope of employment.

**Stare Decisis** - A legal principle under which legal precedents are adhered to and predictability is garnered.

# Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics

#### United States Supreme Court 403 U.S. 388 (1971)

#### Rule of Law

**Violation of the Fourth Amendment by a federal agent gives rise to a cause of action for damages resulting from the violation.**

#### Facts

Agents of the Federal Bureau of Narcotics (defendant) entered Bivens’s (plaintiff) apartment, searched it, and arrested him without a warrant. The search and arrest were conducted in front of Bivens’s wife and children and the agents threatened to arrest his whole family. Bivens brought suit against the agents for violation of his Fourth Amendment rights. The agents argued that Bivens’s right to privacy is based in state law and thus a claim should be brought in state court. The district court dismissed the complaint for failure to state a cause of action and the court of appeals affirmed. Bivens appealed.

#### Issue

Does violation of the Fourth Amendment by a federal agent give rise to a cause of action for damages resulting from the violation?

#### Holding and Reasoning (Brennan, J.)

Yes. Violation of the Fourth Amendment by a federal agent gives rise to a cause of action for damages resulting from the violation. The agents, by arguing that the violation in question is based in state law, improperly equate interactions between a federal agent and a private individual with that of two private individuals. A federal agent acting with the power of the government behind him “possesses a far greater capacity for harm” than a private trespasser. The Fourth Amendment thus provides greater protection against privacy rights violations by federal agents than state laws do for similar offenses committed by private individuals. Bivens’s personal liberties have been violated and damages should be the remedy. The lower courts are reversed and the case is remanded.

#### Concurrence (Harlan, J.)

As the majority states, Bivens’s federally protected interest in privacy from unreasonable searches has been violated. Although the legislature has not specifically provided for a remedy in this situation, it is the place of the Court to step in and provide a remedy where it is necessary and appropriate to do so according to the intent behind the constitutional interest at stake. Here, the Court properly determines that Bivens’s Fourth Amendment interests were violated and damages are necessary and appropriate to vindicate those interests. Because the government is immune to suit as a whole, liability properly falls on the agents. Additionally, in response to the dissent, the chance of frivolous claims coming about due to this holding is a necessary byproduct of justice and there are other ways to guard against such claims. It is not appropriate for the Court to arbitrarily determine that because of scarce judicial resources one interest is less important than another and thus should not warrant recovery for its violation.

#### Dissent (Burger, J.)

The remedy the majority allows for today is not provided for in the Constitution or by Congress and is therefore inappropriate.

#### Dissent (Black, J.)

Congress has never created the cause of action that the majority creates for Bivens in its holding. It is therefore inappropriate for the Court to do so. In addition, even if the Court did have the power to create a cause of action in this case, it should not do so because of the potentially severe increase in frivolous lawsuits against law enforcement officials that will surely arise as a result of the majority’s holding.

**Key Terms:**

**Sovereign Immunity** - The principle that a government may not be sued in its own courts without its consent.

# Elkins v. United States

80 S.Ct. 1437

Supreme Court of the United States

**James Butler ELKINS and Raymond Frederick Clark, Petitioners,**

**v.**

**UNITED STATES of America.**

No. 126.

Argued March 28 and 29, 1960.Decided June 27, 1960.

**Synopsis**

Defendants were convicted of intercepting and recording wire communications and divulging such communciations in violation of Communications Act and of conspiracy to violate Communications Act. The United States District Court for the District of Oregon rendered judgment, and defendants appealed. The United States Court of Appeals for the Ninth Circuit, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I8048d5a98efc11d98e8fb00d6c6a02dd&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Search))[266 F.2d 588,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1959110342&pubNum=350&originatingDoc=I222708679bf011d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed, and certiorari was granted. The Supreme Court, Mr. Justice Stewart, held that **evidence obtained by state officers during a search which, if conducted by federal officers, would have violated defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over the defendant's timely objection in a federal criminal trial.**

Vacated and remanded.

Mr. Justice Frankfurter, Mr. Justice Clark, Mr. Justice Harlan and Mr. Justice Whittaker, dissented.

For dissenting opinion see [80 S.Ct. 1453](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1960208192&pubNum=708&originatingDoc=I222708679bf011d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

# United States v. Janis

#### United States Supreme Court 428 U.S. 433 (1976)

#### Rule of Law

**The Fourth Amendment may serve as the basis for excluding from a federal criminal trial evidence seized by a federal officer in violation of the Amendment.**

#### Facts

Los Angeles police officers searched an apartment pursuant to a warrant. Based on the search, the officers arrested the occupants (plaintiffs) for conducting a bookmaking operation. After seizing the occupants’ bookmaking records, the officers turned the information over to the Internal Revenue Service (IRS). Relying on these records, the IRS assessed the occupants’ back taxes. A judge ruled that the police search of the apartment was illegal due to defects in the warrant. The occupants took the position that the United States’ (defendant) IRS claim should be dismissed because the evidence upon which it was based had been obtained illegally. The case came before the United States Supreme Court.

#### Issue

Is evidence seized by a state criminal law enforcement officer admissible in a civil proceeding by or against the United States where the officer seized the evidence in good faith, but in a manner that was nonetheless unconstitutional?

#### Holding and Reasoning (Blackmun, J.)

Yes. The Fourth Amendment may serve as the basis for excluding from a federal criminal trial evidence seized by a federal officer in violation of the Amendment. The main purpose of this rule is to deter future police misconduct. To determine whether the exclusionary rule applies to other judicial proceedings, courts balance the possible deterrent effect of an extension of the exclusionary rule against the social costs of not applying the rule in such proceedings. Here, the exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal law enforcement officer does not have a sufficient likelihood of deterring future misconduct by the state police to outweigh the societal costs that exclusion of the evidence would impose. Accordingly, the Court may not extend the exclusionary rule to the federal civil proceedings at issue in this case.

#### Dissent (Brennan, J.)

The exclusionary rule is a necessary and inherent component of the protections extended by the Fourth Amendment.

#### Dissent (Stewart, J.)

Allowing the unconstitutionally seized evidence in this case to be used in the IRS proceedings frustrates the deterrent purpose of the exclusionary rule.

**Key Terms:**

**Exclusionary Rule** - A rule that excludes or suppresses evidence in a criminal proceeding where that evidence was obtained in violation of an individual’s constitutional rights.

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

# Arizona v. Evans

#### United States Supreme Court 514 U.S. 1 (1995)

#### Rule of Law

**The exclusionary rule does not apply to evidence obtained in a search carried out as a result of a clerical mistake of a court employee.**

#### Facts

Evans (defendant) was pulled over by a police officer. The officer’s computer informed him that Evans had an outstanding arrest warrant. The officer therefore arrested Evans and conducted a search incident to arrest, which uncovered marijuana in Evan’s possession. However, unbeknownst to the officer, the arrest warrant had been quashed, but not removed from the computer records. The Arizona Supreme Court found that Evans’s Fourth Amendment rights had been violated and suppressed the marijuana evidence. The United States Supreme Court granted certiorari.

#### Issue

Does the exclusionary rule apply to evidence obtained in a search carried out as a result of a clerical mistake of a court employee?

#### Holding and Reasoning (Rehnquist, C.J.)

No. The Court applies the holdings in *United States v. Leon*, 468 U.S. 897 (1984), and *Illinois v. Krull*, 480 U.S. 340 (1987), and finds that the exclusionary rule does not apply to evidence obtained in a search carried out as a result of a clerical mistake of a court employee. The exclusionary rule was implemented to deter police misconduct, not the misconduct of court employees. Regardless, applying the exclusionary rule in cases of a court employee’s clerical error would not deter either police misconduct or future clerical errors by court employees. Court employees have no incentive to make such clerical errors and in this case, evidence suggests that such mistakes are rare. Accordingly, in this case, the exclusionary rule does not apply to Evans’s marijuana and that evidence is admissible. The Arizona Supreme Court is reversed.

#### Concurrence (O’Connor, J.)

While the majority’s holding is correct in this case, it would not be reasonable for the police to use a computer system that is frequently inaccurate.

#### Dissent (Ginsburg, J.)

The distinction that the majority draws between police officers and court employees is an artificial one, given that both parties work together to maintain criminal records.

**Key Terms:**

**Exclusionary Rule** - A rule that excludes or suppresses evidence in a criminal proceeding where that evidence was obtained in violation of an individual’s constitutional rights.

# Walder v. United States

74 S.Ct. 354

Supreme Court of the United States

**WALDER**

**v.**

**UNITED STATES.**

No. 121.

Argued Nov. 30, 1953.Decided Feb. 1, 1954.

**Synopsis**

Prosecution for unlawful sale of narcotics. The United States District Court for the Western District of Missouri entered judgment of conviction, and defendant appealed. The United States Court of Appeals for the Eighth Circuit, [201 F.2d 715,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1953120573&pubNum=350&originatingDoc=Ic83bcaf09be811d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) entered judgment affirming the conviction. On writ of certiorari, the United States Supreme Court, Mr. Justice Frankfurter, held that **defendant's assertion on direct examination that he had never possessed any narcotics opened the door, solely for purpose of attacking his credibility, to evidence that heroin had been unlawfully seized from him in connection with earlier prosecution.**

Affirmed.

Mr. Justice Black and Mr. Justice Douglas dissented.

# INS v. Lopez-Mendoza

#### United States Supreme Court 468 U.S. 1032 (1984)

#### Rule of Law

**The exclusionary rule does not bar the admission of illegally obtained evidence in a civil deportation proceeding.**

#### Facts

Adan Lopez-Mendoza and Elias Sandoval-Sanchez (defendants) were Mexican citizens who were illegally present in the United States. Both Lopez-Mendoza and Sandoval-Sanchez claimed that they had been unlawfully arrested by Immigration and Naturalization Service (INS) (plaintiff) agents at their places of employment. After his arrest, Lopez-Mendoza signed an affidavit stating that he was a Mexican citizen who had entered the United States illegally. INS initiated deportation proceedings, but Lopez-Mendoza moved to terminate the proceedings on the ground that his arrest was illegal. The immigration judge held that the legality of Lopez-Mendoza's arrest was irrelevant to the deportation proceeding, admitted Lopez-Mendoza's affidavit into evidence, and found Lopez-Mendoza to be deportable. Lopez-Mendoza never specifically objected to the admission of the affidavit. Lopez-Mendoza appealed, but the Board of Immigration Appeals (BIA) dismissed his appeal. After Sandoval-Sanchez's arrest, he exercised his right to a deportation hearing and eventually admitted to INS agents that he was illegally present in the United States. At his immigration hearing, he moved to suppress the INS's evidence against him as the fruit of an illegal arrest. The immigration judge denied the motion and found Sandoval-Sanchez deportable, and the BIA dismissed Sandoval-Sanchez's appeal. The United States Court of Appeals for the Ninth Circuit reversed Sandoval-Sanchez's deportation order because his detention violated the Fourth Amendment, and his statements to INS agents were the product of that detention. The Ninth Circuit also vacated Lopez-Mendoza's deportation order and remanded for a determination of whether his Fourth Amendment rights had been violated. The United States Supreme Court granted certiorari.

#### Issue

Does the exclusionary rule bar the admission of illegally obtained evidence in a civil deportation proceeding?

#### Holding and Reasoning (O’Connor, J.)

No. Because deportation is a civil matter, not all protections available in criminal trials are available in deportation proceedings. For instance, evidence obtained in violation of the Fourth Amendment may be excluded from a federal criminal trial. The main purpose of this rule in the criminal context is to deter future police misconduct. To determine whether the exclusionary rule should be extended to non-criminal proceedings, courts balance the deterrent effects of the extension against the social costs of applying the rule in the proceedings. In this case, as an initial matter, the appellate court's judgment regarding Lopez-Mendoza must be reversed because Lopez-Mendoza never objected to the admission of his affidavit into evidence. With respect to Sandoval-Sanchez, the appellate court's conclusion must also be reversed. It is difficult to measure the deterrent value of extending the exclusionary rule to civil deportation proceedings. A civil deportation proceeding could be a complement to a criminal prosecution, but this is a relatively rare occurrence. Accordingly, an arresting officer's main goal will be to use evidence in the deportation action. Furthermore, the INS officials who make the arrest are part of the same agency that brings a deportation action, and the exclusionary rule is most effective when applied to this type of intra-agency relationship. However, on the whole, there is little deterrent value in extending the exclusionary rule. First, a person will still be deported if evidence not obtained directly from the arrest is sufficient to support the deportation. Second, the overwhelming majority of undocumented individuals arrested by INS agree to voluntary deportation without a formal hearing, and those who do request a hearing rarely challenge the legality of their arrests. Thus, as a practical matter, the arresting officer is unlikely to alter his conduct based on the possible exclusion of evidence at a formal deportation hearing. Third, INS already has its own comprehensive scheme for deterring its officers from violating the Fourth Amendment, including rules regulating agents' use of stop, interrogation, and arrest practices. Fourth, the availability of alternate remedies for INS practices that might violate the Fourth Amendment undermines the deterrent value of the exclusionary rule in the context of deportation proceedings. On the other side of the equation, the social cost of applying the exclusionary rule in deportation proceedings is high, as application of the rule would require courts to ignore ongoing violations of immigration laws. Additionally, as the BIA has recognized, applying the exclusionary rule in deportation proceedings would change and complicate proceedings that INS has designed to operate smoothly and simply. The agency's own concerns about the likely cost of applying the exclusionary rule cannot be taken lightly. Another cost associated with extending the exclusionary rule to this context is that application of the rule could result in the suppression of large amounts of information that INS obtained lawfully. INS arrests usually occur in crowded and confused circumstances, and it may be impossible to account for exactly what occurred in each arrest. Accordingly, the balance of factors weighs against applying the exclusionary rule in civil deportation hearings held by INS. The Ninth Circuit's judgment is reversed.

#### Dissent (Brennan, J.)

The basis for the exclusionary rule is found in the Fourth Amendment. The Fourth Amendment rights of Lopez-Mendoza and Sandoval-Sanchez were violated by their illegal arrests, and the admission of any of the fruits of those illegal arrests is a further Fourth Amendment violation. The government has an obligation to obey the Fourth Amendment, and this obligation extends to INS agents obtaining evidence for use in a civil deportation proceeding.

#### Dissent (White, J.)

The court's holding is based on an incorrect assessment of the costs and benefits of extending the exclusionary rule to civil deportation proceedings. An INS agent gathering evidence for use at a civil deportation proceeding is analogous to a law-enforcement officer gathering evidence for use in a criminal trial. Given the similarities in the officers' missions, the court has underestimated the deterrent effect of the exclusionary rule in the civil-deportation context. The court's other conclusions are similarly lacking. Although the court says that deportation will still be possible even if evidence is excluded, this is equally true in the criminal context if a defendant is convicted after the suppression of some evidence. Similarly, the court's focus on the small number of individuals who proceed to formal immigration proceedings instead of electing for voluntary removal can be likened to the relatively small number of criminal defendants who proceed to trial instead of taking a plea agreement. Furthermore, the court focuses on INS's scheme for deterring Fourth Amendment violations but points to no examples of that scheme being utilized. If anything, the existence of the scheme suggests that INS recognizes the importance of the exclusionary rule and ensuring that its agents comply with the Constitution's requirements. Additionally, although the court mentions the existence of alternate remedies being available for INS practices, these remedies are impractical for undocumented immigrants who are likely poor, uneducated, and unable to speak English. On the other side of the balance, the court has overstated the costs of extending the exclusionary rule. An undocumented individual's mere unregistered presence in the United States, without a showing of willfulness, is not a crime. Moreover, the court seems content to suggest that an ILJ should defer to an INS agent's understanding of the Fourth Amendment to preserve the streamlined nature of deportation proceedings. The exclusionary rule has previously been applied to civil deportation proceedings, and there is no evidence that this hindered INS's ability to perform its functions. Finally, saying that the exclusionary rule should not apply in civil deportation proceedings because INS arrests are the product of mass confusion is equivalent to saying that the Fourth Amendment does not apply to INS agents at all. It is unacceptable to promote administrative efficiency over constitutional rights merely because it may be difficult to determine whether those rights have been violated.

**Key Terms:**

**Exclusionary Rule** - A rule that excludes or suppresses evidence in a criminal proceeding where that evidence was obtained in violation of an individual’s constitutional rights.

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

# United States v. Calandra

#### United States Supreme Court 414 U.S. 338 (1974)

#### Rule of Law

**A witness subpoenaed to testify before a grand jury may not invoke the exclusionary rule as grounds for refusal to answer questions relating to illegally obtained evidence.**

#### Facts

Calandra (defendant) was subpoenaed to testify before a grand jury about evidence seized pursuant to a federal search warrant. Calandra asserted that the evidence was obtained illegally and moved to suppress its admission to the grand jury. Calandra also moved for an order relieving him from having to answer questions based upon the illegally obtained evidence. The district court granted Calandra’s motion and barred the grand jury from asking questions pertaining to the seized evidence. The court of appeals affirmed. The United States (plaintiff) petitioned the Supreme Court for review.

#### Issue

May a witness subpoenaed to testify before a grand jury invoke the exclusionary rule as grounds for refusal to answer questions relating to illegally obtained evidence?

#### Holding and Reasoning (Powell, J.)

No. A witness subpoenaed to testify before a grand jury may not invoke the exclusionary rule as grounds for refusal to answer questions relating to illegally obtained evidence. The purpose of a grand jury is to make a determination as to the existence of probable cause to believe that a defendant has committed a crime. This function serves to protect individuals from baseless criminal prosecutions. The grand jury operates without judicial supervision and has broad authority to compel the production of testimony and evidence. A grand jury is an investigative process and not an adversarial proceeding. A grand jury may consider evidence that would be inadmissible for lack of probative value, but it may not compel a violation of an individual’s constitutional rights. For example, a grand jury cannot compel the production of self-incriminating testimony. The court of appeals held that the Fourth Amendment prohibited the grand jury from compelling Calandra’s testimony regarding illegally obtained evidence. The purpose of the exclusionary rule is not to provide a remedy for the subject of an unlawful search, but to deter unlawful police practices. The rule does not seek to advance a personal right but to generally deter Fourth Amendment search and seizure violations. The rule does not apply in every situation, but only in those where its deterrent purposes will be effectively achieved. Permitting the exclusionary rule to operate in grand jury proceedings would frustrate the investigative functions of a grand jury and impose delays that might defeat effective law enforcement. Extending the exclusionary rule to grand jury proceedings would not enhance its deterrent effect. There should be no concern that failure to extend the rule will serve as an enticement for police to conduct illegal searches with the goal of obtaining a grand jury indictment. Even though illegally obtained evidence would be admissible before the grand jury, it would not be admissible in a subsequent criminal trial. Questions derived from illegally obtained evidence are not the direct product of a Fourth Amendment violation. The allowance of questions derived from illegally obtained evidence does not amount to a new violation of an individual constitutional right. The allowance or disallowance of such derivative evidence implicates the availability of a remedy for a prior constitutional violation. That remedy is not available in the context of grand jury proceedings. The exclusion of illegally obtained evidence would frustrate the purpose of the grand jury without offering an equivalent advancement of the rule’s deterrent purpose. The same logic must extend to the fruits of illegal evidence, including questions derived from that evidence. The judgment of the court of appeals is reversed.

#### Dissent (Brennan, J.)

When this Court announced the deterrent principle underlying the exclusionary rule, it did so in the context of a ruling that made the exclusionary rule applicable to the states. The deterrent principle was announced as justification for the decision not to make the application of the exclusionary rule retroactive, which would have called into question the validity of criminal convictions across the nation. The exclusionary rule is an integral and fundamental element of the Fourth and Fourteenth Amendments. Calandra seeks to assert a remedy for the violation of his individual Fourth Amendment rights and is told that his only recourse is to seek damages. This ruling empowers the state to violate Fourth Amendment rights as long as it is willing to pay for the violation.

**Key Terms:**

**Fourteenth Amendment** - Provides that all persons born or naturalized in the United States are U.S. citizens. Also provides that no state shall: (1) abridge the privileges or immunities of a U.S. citizen; (2) deprive any person of life, liberty, or property, without due process of law; or (3) deny equal protection of the laws to anyone within its jurisdiction.

**Exclusionary Rule** - A rule that excludes or suppresses evidence in a criminal proceeding where that evidence was obtained in violation of an individual’s constitutional rights.

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

# Stone v. Powell

#### United States Supreme Court 428 U.S. 465 (1976)

#### Rule of Law

**Federal district courts should not hear habeas corpus petitions based on claims that illegally obtained evidence was admitted at trial if there has been a full and fair review at the state level.**

#### Facts

Powell and others (defendants) were convicted in state court. On appeal, the convictions were affirmed. The defendants all claimed that their convictions were based on illegally obtained evidence and petitioned for writs of habeas corpus on that ground. The United States Supreme Court granted certiorari.

#### Issue

Should federal district courts hear habeas corpus petitions based on claims that illegally obtained evidence was admitted at trial if there has been a full and fair review at the state level?

#### Holding and Reasoning (Powell, J.)

No. Under *Brown v. Allen*, 344 U.S. 443 (1953), prisoners have a right to full reconsideration of all constitutional claims raised by habeas corpus petition even if those claims were fully reviewed by the state court. The Court did not limit the types of cases entitled to review. Nevertheless, before *Kaufman v. United States*, 394 U.S. 217 (1969), federal courts generally held that prisoners were not entitled to collateral review of illegal search-and-seizure claims. The different treatment of Fourth Amendment violations was justified on the grounds that exclusion of illegally obtained evidence served only as a deterrent of future constitutional violations, whereas Fifth And Sixth Amendment violations “impugn the integrity of the fact-finding process.” *Kaufman* extended federal review to search and seizure claims in order to give effect to the Fourth Amendment. That decision is now overruled, and habeas corpus relief is unavailable to prisoners who have had full adjudication of such claims at the state level. The Fourth Amendment protects the sanctity of the person, the home, and property. Courts created the exclusionary rule to give meaning to the Fourth Amendment’s protections. *Mapp v. Ohio*, 367 U.S. 643 (1961), applied the exclusionary rule to the states primarily on the basis of deterring police misconduct. Pure judicial integrity would forbid introduction of illegal evidence to a grand jury or to impeach the defendant, but judicial integrity must be balanced against the cost of excluding probative evidence. Exclusion serves principally as a deterrent of police misconduct and is not an individual right or remedy for privacy violations. The exclusionary rule deters police misconduct at a high cost. Probative evidence is excluded and guilty people go free. The deterrent effect is significantly reduced at the collateral review stage and does not justify the costs. The purposes of the rule are served by the possibility of exclusion at trial and direct appeal. Thus, where a prisoner’s search and seizure claims have been fully reviewed by the state court, habeas corpus relief may not be granted on those grounds. This decision does not limit federal courts’ jurisdiction over Fourth Amendment claims.

#### Dissent (Brennan, J.)

The Court’s ruling erodes the exclusionary rule and federal habeas corpus jurisdiction without providing any legal foundation for doing so. The Court applies a balancing test to invalidate the previously held “view” that safeguarding the protections of the Fourth Amendment requires granting habeas corpus relief when a prisoner’s conviction is based on illegally obtained evidence. This goes against habeas statutes, the weight of case law, and the acts of Congress. The Court does not even purport to overrule the numerous precedents that are completely contrary to this decision. *Mapp* requires state courts to exclude evidence obtained in violation of the Fourth Amendment. A person convicted on the basis of such evidence is unconstitutionally detained. There is no logical basis for arbitrarily determining that unconstitutional detention is no longer unconstitutional on collateral attack. There is no foundation for the claim that an individual has no right to have illegally obtained evidence excluded. There are no additional “costs” created by extending the exclusionary rule to federal habeas review because the state court should have excluded the evidence at trial or appeal. Disallowing habeas corpus relief rewards states for such misconduct. The Court completely restructures the habeas statutes set out by Congress and revises the history of habeas jurisdiction. The Court claims these determinations are unrelated to the justice of the defendant’s detention and that the federal courts have not placed sufficient trust in the fully competent state courts and judges. This ruling endangers habeas jurisdiction and the body of case law regarding unconstitutional detention. *Brown* guarantees a right to reconsideration of constitutional claims under federal habeas corpus jurisdiction. The Court now attempts to create a hierarchy of rights that does not exist in the Constitution and forbids review for violations of disfavored rights. A paradigm shift of this nature should be left to Congress, and yet the Court provides no sufficient reason for turning its back on its own precedent.

# Michigan v. Tucker

94 S.Ct. 2357

Supreme Court of the United States

**State of MICHIGAN, Petitioner,**

**v.**

**Thomas W. TUCKER.**

No. 73—482.

Argued March 20, 1974.Decided June 10, 1974.

**Synopsis**

A state court prisoner's petition for writ of habeas corpus was granted by the United States District Court for the Eastern District of Michigan, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I806d7ac1550b11d9a99c85a9e6023ffa&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[352 F.Supp. 266,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972107225&pubNum=345&originatingDoc=Id8dc64c89c1c11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) and the Court of Appeals for the Sixth Circuit affirmed, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I5db41b81902311d9bc61beebb95be672&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[480 F.2d 927.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1973201166&pubNum=350&originatingDoc=Id8dc64c89c1c11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) On certiorari, the Supreme Court, Mr. Justice Rehnquist, held that **where police before interrogating a suspect warned the suspect fully except that they failed to advise that he had a right to free counsel if he could not afford to hire counsel, and where at the time of interrogation it had not yet been held that police were obliged to advise a suspect as to his right to free counsel, and where the statements made by the suspect were not admitted at his trial, the trial transpiring after the Supreme Court had upheld the suspect's right to such advice, recourse to the suspect's statements only by use, at his trial, of a witness discovered as a result of the statements was not violative of the Fifth, Sixth or Fourteenth Amendment.**

Reversed.

Mr. Justice Stewart filed a concurring opinion.

Mr. Justice Brennan filed a concurring opinion in which Mr. Justice Marshall joined.

Mr. Justice White filed a concurring opinion.

Mr. Justice Douglas dissented and filed opinion.

# \*\*HERRING v. UNITED STATES\*\*

#### United States Supreme Court 555 U.S. 135 (2009)

#### Rule of Law

**Where police personnel act negligently, but not recklessly, and lead an officer to reasonably believe an arrest warrant exists, the evidence obtained pursuant to that unlawful arrest remains admissible.**

#### Facts

A police investigator asked the Coffee County’s warrant clerk if there were any warrants out for Herring’s (defendant) arrest. When none were found, the investigator asked the clerk to check with the clerk in Dale County, who reported that there was one active arrest warrant. The investigator asked that a copy of the arrest warrant be faxed over as confirmation. However, when the Dale County clerk looked for the actual warrant she could not find it and discovered that the warrant had been recalled. She immediately called to tell the Coffee County clerk, who radioed to tell the investigator. However, while all this only took 10 to 15 minutes to transpire, the investigator had already pulled Herring over, arrested him and, after conducting a search of his car, found drugs and a gun. Herring was charged with illegally possessing drugs and a gun. He moved to have the drugs and the gun suppressed at trial because there was in fact no warrant for his arrest and thus his initial arrest had been unlawful. The trial court denied the motion on the ground that the investigator acted in good faith, and therefore, the exclusionary rule would not serve to deter future police misconduct. The court of appeals affirmed. The United States Supreme Court granted certiorari.

#### Issue

Where police personnel act negligently and make an administrative error that leads an officer to reasonably believe an arrest warrant exists, is evidence obtained pursuant to the unlawful arrest admissible at trial?

#### Holding and Reasoning (Roberts, C.J.)

Yes. If police reasonably believe that an arrest warrant exists but one in fact does not exist, the evidence acquired pursuant to the unlawful arrest is admissible if the faulty information is the result of police negligence and not deliberate police action. The exclusionary rule was created by the judiciary as a means of deterring illegal police conduct. Past cases demonstrate that when the police deliberately deny a subject his Fourth Amendment rights, the deterrent effect of the exclusionary rule outweighs the cost to society and any evidence resulting from the illegal police conduct must be excluded at trial. In contrast, when the illegal police conduct is done in good faith, the exclusionary rule does not apply because there is no unlawful police conduct that needs to be deterred. In this case, the Coffee County officers behaved properly, even going so far as to request confirmation of the outstanding arrest warrant. While it is clear that a Dale County officer made a mistake since the warrant’s recall was never properly recorded, this error was made negligently and not deliberately or recklessly. In addition, there is no indication that such errors are systemic or widespread. Therefore, the drug and gun evidence is admissible and the judgment is affirmed.

#### Dissent (Ginsburg, J.)

The drug and gun evidence should be excluded. The Court’s opinion holds that the deterrent effect of the exclusionary rule is minimal in cases where the police act negligently. However, this is not in fact the case. Tort law is premised around the belief that liability for negligence creates an incentive to act with greater care. Electronic recordkeeping has become the norm in the United States, and police departments need an incentive to maintain accurate records. In addition, while the exclusionary rule serves to deter illegal police conduct, it is also often the only remedy available to citizens who have had their Fourth Amendment rights violated.

***Herring*** significantly expanded the scope of the good faith exception to the exclusionary rule.

**Key Terms:**

**Exclusionary Rule** - A rule that excludes or suppresses evidence in a criminal proceeding where that evidence was obtained in violation of an individual’s constitutional rights.

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

***Herring v. United States (2009)***

Rule: Police personnel who act negligently (but not recklessly), and lead an officer to believe an arrest warrant exists, but one doesn’t exist, the evidence obtained from the unlawful arrest is admissible. The exclusionary rule does not apply.

County clerk tells investigator a warrant existed for Herring. Soon after, she realized mistake and could not find paper copy of arrest warrant. Turns out the warrant had been withdrawn. Before she could radio the correction, police had already pulled Herring over and arrested him after they found drugs and a gun in his car. The exclusionary rule does not apply because it was created to deter illegal police conduct. Since the officer reasonably believed there was a warrant, the arrest is considered unlawful, but the evidence recovered is admissible. No evidence the mistake was made deliberately or recklessly.

# United States v. Leon

#### United States Supreme Court 468 U.S. 897 (1984)

#### Rule of Law

**Evidence obtained in reasonable, good-faith reliance on a facially valid search warrant is not subject to the Fourth Amendment's exclusionary rule, even if the warrant is later deemed defective.**

***Leon*** created **the good-faith exception to the exclusionary rule**. The exception was later expanded to cover other circumstances.

# Arizona v. Evans

#### United States Supreme Court 514 U.S. 1 (1995)

#### Rule of Law

**The exclusionary rule does not apply to evidence obtained in a search carried out as a result of a clerical mistake of a court employee.**

# Pennsylvania Bd. of Probation and Parole v. Scott

118 S.Ct. 2014

Supreme Court of the United States

[**PENNSYLVANIA BOARD OF PROBATION AND PAROLE**](https://1.next.westlaw.com/Search/Results.html?query=advanced%3a+WCAID(I58DEF67041EB11DDAD6B0014224D2780)&saveJuris=False&contentType=BUSINESS-INVESTIGATOR&startIndex=1&contextData=(sc.Default)&categoryPageUrl=Home%2fCompanyInvestigator&originationContext=document&transitionType=DocumentItem)**, Petitioner,**

**v.**

[**Keith M. SCOTT.**](https://1.next.westlaw.com/Search/Results.html?query=advanced%3a+OAID(5056887459)&saveJuris=False&contentType=BUSINESS-INVESTIGATOR&startIndex=1&contextData=(sc.Default)&categoryPageUrl=Home%2fCompanyInvestigator&originationContext=document&transitionType=DocumentItem)

No. 97–581.

Argued March 30, 1998.Decided June 22, 1998.

**Synopsis**

Parolee sought review of an administrative order of the Pennsylvania Board of Probation and Parole, Parole No. 4488–X, denying his request for administrative relief from the [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Iae2ae3f835a611d98b61a35269fc5f88&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[Board's revocation decision. The Commonwealth Court, No. 3093 C.D. 1994, 668 A.2d 590](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995235721&pubNum=0000162&originatingDoc=I6b1e6f6c9c2511d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), reversed and remanded. The Commonwealth's petition for allowance of appeal was granted. [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Idb7b50b9369111d9abe5ec754599669c&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[The Pennsylvania Supreme Court, No. 66 M.D. 1996, 548 Pa. 418, 698 A.2d 32](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997140937&pubNum=0000162&originatingDoc=I6b1e6f6c9c2511d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), held that the exclusionary rule will apply in a parole revocation hearing if the officer conducting a search is aware or has reason to be aware of a suspect's parole or probationary status, and lacks reasonable suspicion of a parole violation justifying the search. Certiorari was granted. The Supreme Court, Justice Thomas, held that parole boards are not required by federal law to exclude evidence obtained in violation of the Fourth Amendment.

Reversed and remanded.

Justice Stevens filed a dissenting opinion.

Justice Souter filed a dissenting opinion, in which Justices Ginsburg and Breyer joined.

# United States v. Calandra

#### United States Supreme Court 414 U.S. 338 (1974)

#### Rule of Law

**A witness subpoenaed to testify before a grand jury may not invoke the exclusionary rule as grounds for refusal to answer questions relating to illegally obtained evidence.**

# Stone v. Powell

#### United States Supreme Court 428 U.S. 465 (1976)

#### Rule of Law

**Federal district courts should not hear habeas corpus petitions based on claims that illegally obtained evidence was admitted at trial if there has been a full and fair review at the state level.**

# Illinois v. Krull

#### United States Supreme Court 480 U.S. 340 (1987)

#### Rule of Law

**The exclusionary rule does not apply to evidence obtained in a search carried out pursuant to a statute subsequently found to be unconstitutional.**

# Massachusetts v. Sheppard

#### United States Supreme Court 468 U.S. 981 (1984)

#### Rule of Law

**The exclusionary rule does not apply if the officer conducting the allegedly unconstitutional search acted in objectively reasonable reliance on a warrant that is subsequently determined to be invalid.**

# Weeks v. United States

#### United States Supreme Court 232 U.S. 383 (1914)

#### Rule of Law

**The United States and federal officials are prohibited from executing unreasonable searches and seizures upon people.**

# Mapp v. Ohio

#### United States Supreme Court 367 U.S. 643 (1961)

#### Rule of Law

**Evidence obtained through an unreasonable search and seizure in violation of the Fourth Amendment is inadmissible in state criminal proceedings.**

The ***Mapp*** decision **extended** the exclusionary rule to state courts.

# Franks v. Delaware

#### United States Supreme Court 438 U.S. 154 (1978)

#### Rule of Law

**A search warrant must be voided and any evidence obtained by the warrant excluded from admission at trial when a defendant shows that an affidavit in support of the warrant contains an intentional or reckless false statement and when the affidavit does not support a finding of probable cause in the absence of the false statement.**

**State v. Reynolds, 504 S.W.3d 283 (Tenn. 2016)**

# State v. Reynolds

504 S.W.3d 283

Supreme Court of Tennessee,

AT KNOXVILLE.

**STATE of Tennessee**

**v.**

**Corrin Kathleen REYNOLDS**

No. E2013-02309-SC-R11-CD

Filed November 3, 2016September 30, 2015 Session[1](https://1.next.westlaw.com/Document/I5f6513a0a24d11e6bdb7b23a3c66d5b3/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)#co_footnote_B00012040238721) Heard at Nashville

**Synopsis**

**Background:** Defendant was charged with vehicular homicide, driving under influence (DUI), and related offenses arising out of car accident that killed two passengers. The Criminal Court, Knox County, [Steven Sword](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0125515201&originatingDoc=I5f6513a0a24d11e6bdb7b23a3c66d5b3&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I5f6513a0a24d11e6bdb7b23a3c66d5b3), J., granted defendant's motion to suppress results of mandatory blood draw, and State appealed. The Court of Criminal Appeals, [2014 WL 5840567](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2034765742&pubNum=0000999&originatingDoc=I5f6513a0a24d11e6bdb7b23a3c66d5b3&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), reversed and remanded. Defendant appealed.

**Holdings:** The Supreme Court held that:

[1](https://1.next.westlaw.com/Document/I5f6513a0a24d11e6bdb7b23a3c66d5b3/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)#co_anchor_F62040238721) **deputy had probable cause to believe that defendant was under influence of alcohol at time of accident, within meaning of implied consent statute;**

[2](https://1.next.westlaw.com/Document/I5f6513a0a24d11e6bdb7b23a3c66d5b3/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)#co_anchor_F192040238721) **possible adverse affect on defendant of medications that she was given while in emergency room had no bearing on deputy's determination of probable cause;**

[**3**](https://1.next.westlaw.com/Document/I5f6513a0a24d11e6bdb7b23a3c66d5b3/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)#co_anchor_F202040238721)**defendant's consent to warrantless blood draw was not voluntary**;

[4](https://1.next.westlaw.com/Document/I5f6513a0a24d11e6bdb7b23a3c66d5b3/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)#co_anchor_F372040238721) **warrantless blood draw, in violation of Fourth Amendment and Tennessee Constitution's prohibition against unreasonable search and seizure, came within good faith exception to exclusionary rule;** and

[5](https://1.next.westlaw.com/Document/I5f6513a0a24d11e6bdb7b23a3c66d5b3/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)#co_anchor_F382040238721) **good faith exception to the state exclusionary rule applied to evidence obtained in violation of Constitution.**

Affirmed.

[Sharon G. Lee](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301682101&originatingDoc=I5f6513a0a24d11e6bdb7b23a3c66d5b3&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I5f6513a0a24d11e6bdb7b23a3c66d5b3), J., filed dissenting opinion.

***State v. Reynolds* (TN case)**

Rule: The good faith exception to the exclusionary rule applies where officers believes in good faith they have consent. Evidence recovered from consent is admissible. The warrantless blood draw violated her rights but ruled the results of blood draw do not need to be suppressed because the officer obtained it by objectively reasonable good faith.

Woman was involved in single car accident that killed 2 of 4 occupants. Suspected of DUI. As hospital, officer asked if she would consent to a blood draw…she replied “do what you have to do”. TN SC ruled officer had probable cause for implied consent. Facts show she had been given medicine by hospital staff and he did not say she could refuse.

**State v. Davidson, 509 S.W.3d 156 (Tenn. 2017)**

**State v. Davidson**

509 S.W.3d 156

Supreme Court of **Tennessee**,

AT KNOXVILLE.

**STATE of Tennessee**

**v.**

**Lemaricus Devall DAVIDSON**

No. E2013-00394-SC-DDT-DD

January 27, 2016 SessionFiled December 19, 2016

**Synopsis**

**Background:** Defendant was convicted and sentenced to death in the Criminal Court, Knox County, [Walter C. Kurtz](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0197089101&originatingDoc=I99b2cb30c69f11e6ac07a76176915fee&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I99b2cb30c69f11e6ac07a76176915fee), J., on multiple counts of first degree murder, especially aggravated robbery, especially aggravated kidnapping, aggravated rape, and facilitation of aggravated rape. Defendant appealed. The Court of Criminal Appeals affirmed.

**Holdings:** On automatic appeal, the Supreme Court, [Lee](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301682101&originatingDoc=I99b2cb30c69f11e6ac07a76176915fee&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I99b2cb30c69f11e6ac07a76176915fee), J., held that:

[1](https://1.next.westlaw.com/Document/I99b2cb30c69f11e6ac07a76176915fee/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad604ac00000175d814268633d2b192%3FNav%3DCASE%26fragmentIdentifier%3DI99b2cb30c69f11e6ac07a76176915fee%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=73f307ea7d564d1ce17f9eef9ea2d678&list=CASE&rank=1&sessionScopeId=f463620c60d6e30418e9a0f1148e8b4e1ad0fdad240d8109740ef151af589845&originationContext=Smart%20Answer&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F192040551579) **evidence seized pursuant to invalid search warrant issued on unsigned affidavit was admissible under good faith exception to suppression requirement;**

[2](https://1.next.westlaw.com/Document/I99b2cb30c69f11e6ac07a76176915fee/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad604ac00000175d814268633d2b192%3FNav%3DCASE%26fragmentIdentifier%3DI99b2cb30c69f11e6ac07a76176915fee%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=73f307ea7d564d1ce17f9eef9ea2d678&list=CASE&rank=1&sessionScopeId=f463620c60d6e30418e9a0f1148e8b4e1ad0fdad240d8109740ef151af589845&originationContext=Smart%20Answer&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F232040551579) **defendant's statement to police was not involuntary;**

[3](https://1.next.westlaw.com/Document/I99b2cb30c69f11e6ac07a76176915fee/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad604ac00000175d814268633d2b192%3FNav%3DCASE%26fragmentIdentifier%3DI99b2cb30c69f11e6ac07a76176915fee%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=73f307ea7d564d1ce17f9eef9ea2d678&list=CASE&rank=1&sessionScopeId=f463620c60d6e30418e9a0f1148e8b4e1ad0fdad240d8109740ef151af589845&originationContext=Smart%20Answer&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F422040551579) **as a matter of first impression, defendant failed to establish that he was deprived of a fair trial by courtroom spectators' wearing buttons displaying images of the victims;**

[4](https://1.next.westlaw.com/Document/I99b2cb30c69f11e6ac07a76176915fee/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad604ac00000175d814268633d2b192%3FNav%3DCASE%26fragmentIdentifier%3DI99b2cb30c69f11e6ac07a76176915fee%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=73f307ea7d564d1ce17f9eef9ea2d678&list=CASE&rank=1&sessionScopeId=f463620c60d6e30418e9a0f1148e8b4e1ad0fdad240d8109740ef151af589845&originationContext=Smart%20Answer&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F652040551579) **expert testimony was admissible;**

[**5**](https://1.next.westlaw.com/Document/I99b2cb30c69f11e6ac07a76176915fee/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad604ac00000175d814268633d2b192%3FNav%3DCASE%26fragmentIdentifier%3DI99b2cb30c69f11e6ac07a76176915fee%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=73f307ea7d564d1ce17f9eef9ea2d678&list=CASE&rank=1&sessionScopeId=f463620c60d6e30418e9a0f1148e8b4e1ad0fdad240d8109740ef151af589845&originationContext=Smart%20Answer&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F922040551579)**evidence supported convictions;**

[6](https://1.next.westlaw.com/Document/I99b2cb30c69f11e6ac07a76176915fee/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad604ac00000175d814268633d2b192%3FNav%3DCASE%26fragmentIdentifier%3DI99b2cb30c69f11e6ac07a76176915fee%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=73f307ea7d564d1ce17f9eef9ea2d678&list=CASE&rank=1&sessionScopeId=f463620c60d6e30418e9a0f1148e8b4e1ad0fdad240d8109740ef151af589845&originationContext=Smart%20Answer&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F1022040551579) **trial court's preparation of separate judgment documents for each of the guilty verdicts properly effectuated necessary mergers;** and

[7](https://1.next.westlaw.com/Document/I99b2cb30c69f11e6ac07a76176915fee/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad604ac00000175d814268633d2b192%3FNav%3DCASE%26fragmentIdentifier%3DI99b2cb30c69f11e6ac07a76176915fee%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=73f307ea7d564d1ce17f9eef9ea2d678&list=CASE&rank=1&sessionScopeId=f463620c60d6e30418e9a0f1148e8b4e1ad0fdad240d8109740ef151af589845&originationContext=Smart%20Answer&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F1062040551579) **imposition of death penalty was warranted.**

Affirmed in part and vacated in part.

***State v. Davidson* (TN case)**

Rule: A good faith error by police in a search warrant does not exclude evidence recovered by search.

Police printed warrant on wrong length paper (too short). Signature line was cut off and had to sign in wrong place. Rule is warrant has to be one page with signature in certain spot. TN SC ruled this is a good faith exception and the evidence recovered was admissible.

**State v. Lowe, 552 S.W.3d 842 (Tenn. 2018)**

# State v. Lowe

552 S.W.3d 842

Supreme Court of Tennessee,

AT NASHVILLE.

**STATE of Tennessee**

**v.**

**Lindsey Brooke LOWE**

No. M2014-00472-SC-R11-CD

September 6, 2017 Session Heard at Knoxville[1](https://1.next.westlaw.com/Document/Ifea5f2a08c7911e881e3e57c1f40e5c7/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)#co_footnote_B00012045076763)FILED 07/20/2018

**Synopsis**

**Background:** Defendant was convicted in the Criminal Court, Sumner County, No. 2011CR834, [Dee David Gay](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0175477301&originatingDoc=Ifea5f2a08c7911e881e3e57c1f40e5c7&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ifea5f2a08c7911e881e3e57c1f40e5c7), J., of two counts of first-degree premeditated murder, two counts of first-degree felony murder, and two counts of aggravated child abuse. Defendant appealed. The Court of Criminal Appeals, [John Everett Williams](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0303136101&originatingDoc=Ifea5f2a08c7911e881e3e57c1f40e5c7&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ifea5f2a08c7911e881e3e57c1f40e5c7), J., affirmed. Defendant requested permission to appeal, which was granted.

**Holdings:** The Supreme Court held that:

[1](https://1.next.westlaw.com/Document/Ifea5f2a08c7911e881e3e57c1f40e5c7/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)#co_anchor_F62045076763) **statute allowing admission of evidence obtained in violation of procedure rule governing search warrants in cases of good-faith mistake or technical violation was unconstitutional under Separation of Powers Clause;**

[2](https://1.next.westlaw.com/Document/Ifea5f2a08c7911e881e3e57c1f40e5c7/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)#co_anchor_F72045076763) **evidence seized pursuant to search warrant was admissible under good-faith exception to exclusionary rule;**

[**3**](https://1.next.westlaw.com/Document/Ifea5f2a08c7911e881e3e57c1f40e5c7/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)#co_anchor_F202045076763)**trial court's error in failing to allow defense counsel to make its offer of proof through soliciting testimony from expert in question-and-answer form was harmless;**

[**4**](https://1.next.westlaw.com/Document/Ifea5f2a08c7911e881e3e57c1f40e5c7/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)#co_anchor_F232045076763)**defense expert witness's proffered opinion would not have substantially assisted the trial court to determine whether defendant's statement to detective was voluntary;**

[**5**](https://1.next.westlaw.com/Document/Ifea5f2a08c7911e881e3e57c1f40e5c7/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)#co_anchor_F272045076763)**defendant was not in custody at the time she made statement to detective at police station, that she had given birth to two infants, rather than just one; and**

[**6**](https://1.next.westlaw.com/Document/Ifea5f2a08c7911e881e3e57c1f40e5c7/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)#co_anchor_F302045076763)**defense expert's testimony about the reliability of defendant's confession to detective in light of detective's interviewing technique was inadmissible.**

Affirmed.

**Procedural Posture(s):** Appellate Review; Pre-Trial Hearing Motion; Trial or Guilt Phase Motion or Objection.

***State v. Lowe* (TN Case)**

Rule: A good faith error in by a judge in a search warrant does not exclude evidence recovered.

Judge put wrong time on one of the warrant forms. He put 11:45pm instead of 11:45am. TN SC ruled good faith error exception applies to a judge’s good faith mistake. Evidence recovered is admissible. If good faith is missing, the good faith rule does not apply and evidence recovered is inadmissible.

**December 3, 2020**

**Chapter 3, Section 2 – Protected Areas/Interests**

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# \*\*KATZ v. UNITED STATES\*\*

#### United States Supreme Court 389 U.S. 347 (1967)

#### Rule of Law

**The Fourth Amendment prohibition against unreasonable searches and seizures of physical items extends to recordings of oral statements.**

#### Facts

Katz (defendant) was convicted of violating federal gambling laws. At trial and against Katz’s objection, the prosecution entered into evidence recordings of Katz’s end of a phone conversation. The recordings were obtained after the FBI placed a wire-tap on the outside of the public phone booth where Katz placed the call. The court of appeals upheld the trial court decision to admit the recordings and the United States Supreme Court granted certiorari.

#### Issue

Does the unwarranted wire-tapping of a public phone booth constitute a search and seizure under the Fourth Amendment?

#### Holding and Reasoning (Stewart, J.)

Yes. Even when there is no physical invasion, wire-tapping a public phone booth is a Fourth Amendment search and seizure. The Fourth Amendment protects a person against unlawful government intrusion; it is not intended to provide constitutional protection to a specific place. Katz was justified in assuming that his phone conversation would remain private, even though the phone booth is at all other times for public use. Therefore, Katz was protected under the Fourth Amendment when he entered the phone booth and shut the door, and the unwarranted recording of his phone conversation constitutes a search and seizure under the Fourth Amendment.

#### Concurrence (Harlan, J.)

The Fourth Amendment protects a person from unreasonable searches and seizures when he or she has a subjective expectation of privacy that society deems as reasonable.

#### Concurrence (Douglas, J.)

Justice White’s concurrence proposes an unconstitutional blank check for warrantless eavesdropping by the executive branch. The president and attorney general, as executive officials, take part in the adversarial process, investigating and prosecuting those who violate national security laws. Separation of powers dictates that an uninterested, neutral magistrate determine whether wiretapping is reasonable under the Fourth Amendment. The requirements of the Fourth Amendment do not change, no matter what the underlying substantive offense.

#### Concurrence (White, J.)

The warrantless wiretapping of a private conversation inside a public phone booth was unreasonable under the Fourth Amendment in this case. Nevertheless, the majority opinion notes that the ruling does not reach the question as applied to national security cases. A warrant is not required if the president or attorney general believe wiretapping is reasonable in the interests of national security.

#### Dissent (Black, J.)

Wire-tapping does not constitute a Fourth Amendment search and seizure. A plain meaning understanding of the language in the amendment clearly shows that the founders intended the amendment to apply only to tangible things currently in existence. A conversation is not tangible and wire-tapping involves future conversations not yet in existence. Also, wire-tapping is essentially a modern form of eavesdropping and the founders did not prohibit this practice when they drafted the Fourth Amendment.

***Katz v. United States –*** Justice Harlan’s two-part test for the reasonable expectation of privacy has been especially influential.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

# Olmstead v. United States

#### United States Supreme Court 277 U.S. 438 (1928)

#### Rule of Law

**The Fourth Amendment does not extend to telephone wires and the telephone calls that travel over them.**

#### Facts

The government suspected Olmstead (defendant) of illegally importing alcohol during Prohibition. To prove this, the government tapped the phones in Olmstead’s house and office. They then listened to his conversations and from those conversations got enough evidence to convict Olmstead. Olmstead appealed and the United States granted certiorari.

#### Issue

Does the Fourth Amendment extend to telephone wires and the telephone calls that travel over them?

#### Holding and Reasoning (Taft, C.J.)

No. The Fourth Amendment does not extend to telephone wires and the telephone calls that travel over them. Telephone wires are distinguishable from paper letters at issue in *Ex Parte Jackson*, 96 U.S. 727 (1877). The United States government runs the post office, but does not have the same modicum of control over telephone calls. Listening in on telephone calls simply does not constitute a search or a seizure as contemplated by the Fourth Amendment. Telephones allow individuals to speak to each other from all corners of the country and, indeed, the world. It cannot be said that a person has a reasonable expectation of privacy from his home or office to each part of the world that telephone wires may take his conversation. In this case, therefore, the government’s tapping Olmstead’s phones and listening to his phone calls did not violate Olmstead’s Fourth Amendment rights. The conviction is affirmed.

#### Dissent (Brandeis, J.)

As time advances, technologies advance as well and the Fourth Amendment must adapt to the times to protect citizens’ privacy rights. There is essentially no difference between the letters at issue in *Jackson*and the phone calls at issue in this case. In actuality, the tapping of a telephone line is more intrusive than the opening of a letter because if you tap the line of one individual, you also inherently tap the line of every other individual that he calls.

**Key Terms:**

**Probable Cause** - A reasonable basis, amounting to more than mere suspicion, to believe that a person has committed a crime or is about to commit a crime, or that evidence relevant to a crime exists in a particular location.

# United States v. Place

#### United States Supreme Court 462 U.S. 696 (1983)

#### Rule of Law

**When police seize luggage from a suspect’s custody, the limitations applicable to investigative detentions of the person himself should define the permissible scope of an investigative detention of the person’s luggage on less than probable cause.**

#### Facts

Federal agents stopped Place (defendant) at LaGuardia Airport. The agents seized his luggage, suspecting it contained drugs, in order to obtain a warrant to search the luggage. They ended up taking the luggage to Kennedy Airport to be examined by a drug-sniffing dog. This process from initial stop to dog sniff took approximately 90 minutes. In the meantime, the agents did not inform Place as to how long the luggage would be held or how he could get it back after the investigation was complete. The drug-sniffing dog reacted positively to one of the pieces of luggage and after the agents obtained a warrant, a search of the luggage found cocaine. At trial, Place asserted that the lengthy seizure of his luggage without probable cause violated his Fourth Amendment rights. The United States Supreme Court granted certiorari.

#### Issue

When police seize luggage from a suspect’s custody on less than probable cause for purposes of investigative detention, is the permissible scope of the detention the same as the scope applicable to investigative detentions of the person himself?

#### Holding and Reasoning (O’Connor, J.)

Yes. When police seize luggage from a suspect’s custody, the limitations applicable to investigative detentions of the person under *Terry v. Ohio*, 392 U.S. 1 (1969), should define the permissible scope of an investigative detention of the person’s luggage on less than probable cause. Unless law enforcement makes it perfectly clear when and where the suspect can get his belongings back, seizure of the belongings is indistinguishable from seizure of the person himself. Realistically, the suspect must either stay with the police and his belongings or give up the belongings with no agreed-upon way to get them back. In the case at bar, Place’s luggage was seized for 90 minutes before probable cause was attained via the dog sniff. This seizure exceeded the limitations *Terry* imposes for seizure based on reasonable suspicion. Although the Court has not imposed, nor imposes here, a specific time limit on seizure based on reasonable suspicion, brevity of the seizure is still an important consideration and 90 minutes is not considered brief. In addition, the agents did not inform Place how long the luggage would be held or how he could get it back after the investigation was complete, thereby exacerbating the prolonged duration of the seizure. The Court determines that the cocaine found in the luggage is the product of an illegal seizure, and thus inadmissible.

**Key Terms:**

**Probable Cause** - A reasonable basis, amounting to more than mere suspicion, to believe that a person has committed a crime or is about to commit a crime, or that evidence relevant to a crime exists in a particular location.

**Reasonable Suspicion** - Generally, a quantum of proof sufficient to justify an objectively reasonable person in suspecting, but not necessarily believing, that someone has committed, is committing, or is about to commit a crime. Reasonable suspicion is usually the lowest quantum of proof that the law will recognize for any purpose. It is sufficient to justify brief investigatory detentions, but not full-blown arrests, by the police.

# Soldal v. Cook County

113 S.Ct. 538

Supreme Court of the United States

**Edward SOLDAL et ux.**

**v.**

**COOK COUNTY, ILLINOIS, et al.**

No. 91–6516.

Argued Oct. 5, 1992.Decided Dec. 8, 1992.

**Synopsis**

Mobile home owners brought § 1983 suit against deputy sheriffs and owner and manager of trailer park arising from trailer park employee, being observed by deputies, disconnecting trailer from utilities and towing trailer off park premises. The United States District Court for the Northern District of Illinois, [Charles P. Kocoras](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0223212301&originatingDoc=I72e77b9d9c9a11d991d0cc6b54f12d4d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I72e77b9d9c9a11d991d0cc6b54f12d4d), J., granted summary judgment in favor of defendants, and appeal was taken. A panel of the Court of Appeals for the Seventh Circuit, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ie30d47be968711d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[923 F.2d 1241,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991028179&pubNum=350&originatingDoc=I72e77b9d9c9a11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed in part, reversed in part, and remanded. After granting petition for rehearing en banc and vacating earlier opinion [931 F.2d 445,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991088482&pubNum=350&originatingDoc=I72e77b9d9c9a11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) the Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I05d028e594c011d9bdd1cfdd544ca3a4&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[942 F.2d 1073,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991146904&pubNum=350&originatingDoc=I72e77b9d9c9a11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) reaffirmed the panel decision. Certiorari was granted. The Supreme Court, Justice [White](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0257944001&originatingDoc=I72e77b9d9c9a11d991d0cc6b54f12d4d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I72e77b9d9c9a11d991d0cc6b54f12d4d), held that complaint by mobile home owners alleging that deputy sheriffs and owner and manager of mobile home park dispossessed owners of their mobile home by physically tearing it from foundation and towing it to another lot sufficiently alleged “seizure” within meaning of Fourth Amendment to state cause of action under § 1983, even if owners' “privacy” was not invaded.

Reversed and remanded.

**Procedural Posture(s):** On Appeal; Motion for Summary Judgment.

# Rakas v. Illinois

#### United States Supreme Court 439 U.S. 128 (1978)

#### Rule of Law

**A passenger in a car belonging to someone else does not have a legitimate expectation of privacy in the car or in items found in the car that do not belong to him and thus may not challenge the search of the car or seizure of the items as unconstitutional.**

#### Facts

The police pulled over a car that fit the description of a car used in a robbery. The police ordered the four occupants out of the car. Upon searching the vehicle, the police found a box of rifle shells in the glove compartment and a sawed-off rifle under the front passenger seat. Rakas (defendant) and another man in the car were arrested. Neither Rakas nor the other man had been driving the car, neither owned the car, and neither claimed he owned the shells or the rifle. Rakas moved to have the rifle and shells suppressed at trial, but the trial court denied the motion to suppress. Rakas and the other man were convicted of armed robbery. The appellate court affirmed the trial court's denial of the motion to suppress, holding that Rakas did not have standing to challenge the search of the car because he was simply a passenger in the car and did not have a "proprietary or other similar interest" in the vehicle. The state supreme court denied leave to appeal. The United States Supreme Court granted certiorari.

#### Issue

Does a passenger in a car belonging to someone else have a legitimate expectation of privacy in the car or in items found in the car that do not belong to him?

#### Holding and Reasoning (Rehnquist, J.)

No. A passenger in a car belonging to someone else does not have a legitimate expectation of privacy in the car or in items found in the car that do not belong to him and thus may not challenge the search of the car or seizure of the items as unconstitutional. The fact that a search is directed at obtaining incriminating evidence against an individual does not alone give that person standing to challenge the constitutionality of a search or seizure and invoke the exclusionary rule. Rather, Fourth Amendment rights are personal rights, and an individual may not assert a constitutional violation based solely on the search or seizure of a third person's premises or property. Moreover, instead of deciding cases like this in terms of standing, it is preferable to decide them under Fourth Amendment doctrine. In *Jones v. United States*, 362 U.S. 257 (1960), this court held that a person “legitimately on [the] premises” can challenge the legality of a search. Taken literally, this rule is too broad. A more appropriate construction of the rule is that a person legitimately on the premises may claim a Fourth Amendment violation only if he has a legitimate expectation of privacy in the place searched or thing seized. For instance, in *Jones*, Jones could question the legality of the search because he had a legitimate expectation of privacy in the home where he was staying as an overnight guest. In this case, although Rakas argues that his situation is like that of Jones, the circumstances are factually different. Jones had a key to the house in which he was staying, and he kept personal items in the home. In contrast, Rakas was simply a casual visitor in the car who had no authority to exercise dominion or control of the car, and the items seized did not belong to him. Moreover, as a mere passenger, Rakas had no legitimate expectation of privacy in the glove compartment or under-seat area of someone else's car. Accordingly, he does not have the right to question the constitutionality of the search and seizure. The judgment of conviction is affirmed.

#### Concurrence (Powell, J.)

The passengers of the car had no reasonable expectation that the car would not be searched. There is a smaller expectation of privacy in a car as opposed to a home, and the gun found under the seat could have easily slipped into view.

#### Dissent (White, J.)

The Court’s holding protects property, and not privacy interests, and the decision makes it easy for police to abuse their authority when a car has more than one occupant. Furthermore, the Court’s holding creates more questions than it answers about the scope of Fourth Amendment protections, including what, short of a property interest, is sufficient to establish a legitimate privacy expectation.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

# Berger v. New York

#### United States Supreme Court 388 U.S. 41 (1967)

#### Rule of Law

**A wiretap violates the Fourth Amendment unless its authorization is based on a detailed factual affidavit alleging the commission of a specific crime, and is for the limited purpose of ascertaining the truth of the affidavit’s allegations.**

#### Facts

A New York state law authorized judges to grant warrants for eavesdropping via wiretap if there was reasonable ground to believe that the eavesdropping would uncover evidence of a crime. The state law required an oath of a district attorney, attorney general, or high-ranking police officer that such reasonable grounds existed for the eavesdropping. The oath was required to state at whom the eavesdropping was directed, the telephone number involved, and the duration of the eavesdropping, which could not be longer than two months. The State of New York (plaintiff) brought a claim against Ralph Berger (defendant) for bribery after wiretapping a conversation between Berger and a third party. Berger challenged the constitutionality of the statute, arguing that it violated the Fourth Amendment. The trial court held the statute was valid and the appellate court affirmed. The United States Supreme Court granted certiorari.

#### Issue

Does a wiretap violate the Fourth Amendment if its authorization is not based on a detailed factual affidavit alleging the commission of a specific crime, or is not for the limited purpose of ascertaining the truth of the affidavit’s allegations?

#### Holding and Reasoning (Clark, J.)

Yes. A wiretap violates the Fourth Amendment unless its authorization is based on a detailed factual affidavit alleging the commission of a specific crime, and is for the limited purpose of ascertaining the truth of the affidavit’s allegations. Generally, the Fourth Amendment requires probable cause and particularity. Given the heightened privacy invasion of electronic surveillance, the particularity of a wiretap warrant must be both precise and discriminate. In this case, the New York statute violates the Fourth Amendment. The statute does not require specificity as to the crime allegedly committed or what law enforcement seeks to uncover by the eavesdropping. Further, a duration of up to two months essentially authorizes a series of extended searches of likely several people without any additional showings of probable cause. Moreover, by only requiring reasonable belief, the statute violates the Fourth Amendment’s probable cause requirement. In sum, the state law authorizes broad, unspecific wiretaps without requiring a detailed factual affidavit alleging the commission of a specific crime. The statute is not sufficiently particular under the Fourth Amendment, essentially permitting the use of general warrants, which are unconstitutional. The statute is invalid, and the lower court decision is reversed.

**Key Terms:**

**Search** - The official examination of a person or property in order to find evidence of crime.

**General Warrant** - An unconstitutional warrant authorizing a search or seizure without naming and describing the items or individuals to be searched and seized, in violation of the Fourth Amendment.

# \*\*CALIFORNIA v. GREENWOOD\*\*

#### United States Supreme Court 486 U.S. 35 (1988)

#### Rule of Law

**The warrantless search of trash left outside on the curb does not violate the Fourth Amendment, because a person has no reasonable expectation of privacy in trash left for collection in a publicly accessible place.**

#### Facts

Police officers had information that Greenwood (defendant) was involved in illegal drug transactions. The police had a garbage collector empty his truck and then go pick up Greenwood’s trash, which was left outside on the curb for collection. The evidence from Greenwood’s trash was offered as probable cause to support the issuance of a warrant authorizing a search of Greenwood’s home. The search of Greenwood’s home yielded evidence that led to Greenwood’s arrest on drug charges. The trial court concluded that the search of a person’s trash violated the Fourth Amendment and the California Constitution. The trial court dismissed the charges against Greenwood. The state of California (plaintiff) appealed, and the court of appeals affirmed the district court’s dismissal. The state supreme court declined to review the appellate decision. The state petitioned the United States Supreme Court for review.

#### Issue

Does the warrantless search of trash left outside on the curb violate the Fourth Amendment?

#### Holding and Reasoning (White, J.)

No. The warrantless search of trash left outside on the curb does not violate the Fourth Amendment. Fourth Amendment protections attach when (1) an individual demonstrates a subjective expectation of privacy and (2) the individual’s subjective expectation is supported by societal acceptance that the expectation is objectively reasonable. Trash is regularly exposed to the public where it may be invaded by animals and other members of the public. People place their trash out for collection with knowledge that it will be taken into the possession of a third party and with no guarantee that the trash collector will not subsequently pick through it. We conclude that society does not accept the expectation of privacy in one’s trash, which has been left outside for pickup, as objectively reasonable. That conclusion is supported by decisions from every jurisdiction of federal appellate courts. Greenwood argues that the state court’s conclusion that the California Constitution confers the right to privacy over one’s trash mandates recognition of the same right under the Fourth Amendment. States are free to impose more stringent privacy protections than those embodied in the United States Constitution, but variations in state laws do not affect the determination of reasonableness under the Fourth Amendment. The protections of the Fourth Amendment are not defined by the particularities of state law. The judgments of the state courts are reversed.

#### Dissent (Brennan, J.)

The police regularly and repeatedly searched Greenwood’s trash without a warrant, and no court has made a finding that those searches were justified by probable cause. The public will be surprised to learn that the Court disagrees with the commonly held view that rummaging through private refuse violates general expectations of appropriate behavior. When individuals can reasonably expect privacy concerning the contents of a closed container, a warrant is required to authorize search of the container even in the existence of probable cause. The contents of a trash bag are no less private simply because they are placed in the bag with the intent to be discarded. The contents of trash can reveal a broad range of private details about one’s life. The public has demonstrated its disapproval of the invasion of personal refuse by third parties, such as reporters, private investigators, and snooping neighbors. Trash rummaging is widely prohibited by municipal ordinances, which reinforce the public’s expectation of privacy. The simple fact that it is possible that one’s trash may be violated does not lead to the conclusion that privacy is not an expectation. This is not a case where Greenwood could have maintained privacy by keeping his trash within the confines of his residence. To the contrary, county ordinance required him to place his trash for collection. Finally, the voluntary relinquishment of control over a package does not amount to a relinquishment of the expectation of privacy. If it did, every letter mailed through the postal service or package turned over for delivery by a private carrier would be divested of the protections of the Fourth Amendment. Precedent has held for more than 110 years that the possibility that the privacy of a sealed package might be violated does not support a warrantless search.

***California v. Greenwood* –** a person **loses his or her expectation of privacy** for trash bags placed on the curb for pick-up by a trash collector.

**Key Terms:**

**Probable Cause** - A reasonable basis, amounting to more than mere suspicion, to believe that a person has committed a crime or is about to commit a crime, or that evidence relevant to a crime exists in a particular location.

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

# People v. Krivda

5 Cal.3d 357

Supreme Court of California,

In Bank.

**The PEOPLE, Plaintiff and Appellant,**

**v.**

**Judith KRIVDA and Roger T. Minor, Defendants and Respondents.**

Cr. 15295.

July 12, 1971.Rehearing Denied Aug. 16, 1971.

**Synopsis**

Prosecution for possession of marijuana. The Superior Court, Los Angeles County, Robert Firth, J., granted defendants' motion to suppress and on its own motion ordered the action dismissed, and the People appealed. The Supreme Court, Burke, J., held that defendants who placed contraband in trash barrels and subsequently placed barrels adjacent to street for pickup by rubbish collector could not be deemed to have abandoned the trash at that location and to have forsaken any reasonable expectation of privacy with respect thereto, and marijuana found in defendants' trash barrels was result of an illegal search and seizure, although officers did not examine contents until trash had been placed into well of refuse truck, where contraband was concealed in paper sacks within the barrels, and was not visible without emptying or searching through the barrels' contents.

Affirmed.

Wright, C.J., filed a concurring and dissenting opinion in which McComb and Sullivan, JJ., concurred.

**Procedural Posture(s):** On Appeal.

# Katz v. United States

#### United States Supreme Court 389 U.S. 347 (1967)

#### Rule of Law

**The Fourth Amendment prohibition against unreasonable searches and seizures of physical items extends to recordings of oral statements.**

# Smith v. Maryland

#### United States Supreme Court 442 U.S. 735 (1979)

#### Rule of Law

**A person has no legitimate expectation of privacy in information that the person voluntarily turns over to third parties.**

# Chapman v. United States

81 S.Ct. 776

Supreme Court of the **United** **States**

**Elmer Samuel CHAPMAN, Petitioner,**

**v.**

**UNITED STATES of America.**

No. 175.

Argued Feb. 23, 1961.Decided April 3, 1961.

**Synopsis**

The defendant was convicted of the illegal operation of a distillery.

 From a judgment of the **United** **States** District Court for the Middle District of Georgia, he appealed. The **United** **States** Court of Appeals for the Fifth Circuit, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I92f072758ed511d9bc61beebb95be672&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=0e090649853f4c0e8e5545ec3d9c09b0&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[272 F.2d 70,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1960111996&pubNum=350&originatingDoc=I265661989bed11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))affirmed, a rehearing was denied, [273 F.2d 412,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1960112261&pubNum=350&originatingDoc=I265661989bed11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and he brought certiorari. The Supreme Court, Mr. Justice Whittaker, J., held that state police officers' search of rented premises, without a warrant, in absence of the tenant but with the consent of the landlord, who had noticed the odor of mash, was unlawful and evidence seized during such search was inadmissible in federal prosecution.

Reversed.

Mr. Justice Clark dissented.

# Stoner v. California

84 S.Ct. 889

Supreme Court of the United States

**Joseph Lyle STONER, Petitioner,**

**v.**

**STATE OF CALIFORNIA.**

No. 209.

Argued Feb. 25, **1964**.Decided March 23, **1964**.Rehearing Denied May 18, **1964**.

See [377 **U.S**. 940, 84 S.Ct. 1330](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&pubNum=708&cite=84SCT1330&originatingDoc=I0a4c9e389bf011d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

**Synopsis**

Defendant was convicted of armed robbery. The Superior Court, Los Angeles County, entered judgment and order denying motion for new trial, and the defendant appealed.

 The District Court of [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=If077e0bdfad011d9bf60c1d57ebc853e&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=6b5fccee4db6449f86e1a9728b79c999&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[Appeal of **California**, Second Appellate District, 205 Cal.App.2d 108, 22 Cal.Rptr. 718,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1962109981&pubNum=227&originatingDoc=I0a4c9e389bf011d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed the conviction, the Supreme Court of **California**denied further review, and the defendant brought certiorari. The Supreme Court, Mr. Justice Stewart, J., held that search of defendant's hotel room without consent of defendant and without a search warrant was unlawful though conducted with the consent of hotel clerk.

Judgment reversed.

Mr. Justice Harlan dissented in part.

# O’Connor v. Ortega

107 S.Ct. 1492

Supreme Court of the United States

**Dennis M. O'CONNOR, et al., Petitioners**

**v.**

**Magno J. ORTEGA.**

No. 85–530.

Argued Oct. 15, 1986.Decided March 31, 1987.

**Synopsis**

Former chief of professional education at state hospital brought action against various state hospital officials, alleging claims under § 1983 and state law. On cross motions for summary judgment, the United States District Court for the Northern District of California, John P. Vucasin, Jr., J., granted summary judgment against plaintiff, and he appealed. The Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I9146592e94ad11d9a707f4371c9c34f0&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[764 F.2d 703,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985132680&pubNum=350&originatingDoc=I617e80e99c1f11d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))affirmed in part and reversed and remanded with instructions in part, and officials petitioned for certiorari. The Supreme Court, Justice O'Connor, held that: (1) public employers' intrusions on constitutionally protected privacy interest of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by standard of reasonableness under all the circumstances, and (2) whether public employer's search of hospital supervisor's office was reasonable, both in its inception and in its scope, presented factual question precluding summary judgment.

Reversed and remanded.

Justice Scalia, concurred in judgment and filed opinion.

Justice Blackmun, dissented and filed opinion in which Justices Brennan, Marshall, and Stevens, joined.

**Procedural Posture(s):** On Appeal; Motion for Summary Judgment.

# \*\*FLORIDA v. RILEY\*\*

#### United States Supreme Court 488 U.S. 445 (1989)

#### Rule of Law

**Aerial observation of an area within the curtilage of a home from a helicopter at an altitude of 400 feet is not a search requiring a warrant under the terms of the Fourth Amendment.**

#### Facts

An officer with the Pasco County Sheriff’s Office visited the rural mobile home of Riley (defendant) to investigate an anonymous tip that marijuana was being grown on the property. A partially enclosed greenhouse was located 10 to 20 feet away from the home inside a wire fence, but the officer could not see the contents from the road. The officer then flew over the property in a helicopter at a height of 400 feet, which allowed him to see marijuana plants through the open sides and missing panels of the greenhouse roof. As a result, a warrant was issued and marijuana was found growing in the greenhouse. Riley was arrested for possession of marijuana under Florida law. The lower court certified the question of whether the aerial observation in this case constituted a search requiring a warrant under the Fourth Amendment to the Florida Supreme Court. The court held that it did. The U.S. Supreme Court issued a plurality opinion on the issue.

#### Issue

Does the aerial observation of an area within the curtilage of a home by a helicopter at an altitude of 400 feet constitute a search requiring a warrant under the Fourth Amendment?

#### Holding and Reasoning (White, J.)

No. The precedent set by *California v. Ciraolo*, 476 U.S. 207(1986), is controlling. In that case, police observation of an area inside the curtilage of a home by an airplane at an altitude of 1,000 feet was not considered a search requiring a warrant under the Fourth Amendment. The result is the same in this case. Riley’s greenhouse was located inside the curtilage of his home, and the steps he took to block the area from view demonstrate a subjective expectation of privacy. Nevertheless, since the sides and roof of the greenhouse were partially uncovered, Riley did not have a reasonable expectation that the area could not be seen by aircraft. In this case, there is no practical difference between an observation made by a fixed-wing aircraft and one made by a helicopter. Helicopters are not uncommon in the area. Although the helicopter was flying below the lower altitude limit for fixed-wing aircraft, there is no such limit for helicopters. The helicopter was in compliance with air traffic laws and did not disturb the home or curtilage during the observation. No warrant was needed, and the Fourth Amendment was not violated.

#### Concurrence (O’Connor, J.)

While the aerial observation in this case did not infringe on Riley’s reasonable expectation of privacy, the plurality opinion places too much weight on the helicopter’s compliance with air traffic laws. Compliance with Federal Aviation Administration (FAA) regulations is not dispositive, and courts must still ascertain whether there is a reasonable expectation of privacy as required by *Katz v. United States*,389 U.S. 347 (1967). Riley did not refute the claim that the public commonly uses the airspace and thus failed to meet his burden to prove that his expectation of privacy in his greenhouse was reasonable.

#### Dissent (Brennan, J.)

The Fourth Amendment was violated. The plurality opinion ignores the ruling in *Katz*and rests its finding on the fact that the officer was legally permitted to fly 400 feet over Riley’s home in a helicopter. The question is not whether any member of the public could legally view the area, no matter how inconceivable, but rather whether such observation occurred so frequently that Riley could not reasonably have expected privacy. It is dangerous to dilute the protections of the Fourth Amendment when defendants are engaged in unpopular or illegal activities.

#### Dissent (Blackmun, J.)

The burden of proof should fall to the prosecutor to demonstrate that Riley’s expectation of privacy was not reasonable. This burden of proof should be applied to any case involving helicopter observation at an altitude less than 1,000 feet.

***Florida v. Riley*** shows a police officer’s observation of a person’s home from a helicopter generally isn’t a search if flown in a manner consistent with FAA regulations.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Curtilage** - The area immediately surrounding a home.

# California v. Ciraolo

#### United States Supreme Court 476 U.S. 207 (1986)

#### Rule of Law

**The warrantless police observation of an enclosed area within the curtilage of a home from an airplane at an altitude of 1,000 feet does not intrude upon any constitutionally protected reasonable expectation of privacy.**

#### Facts

Santa Clara Police Officers went to Ciraolo’s (defendant) home to investigate an anonymous tip that marijuana was being grown in the backyard. The yard was shielded from view by a six-foot perimeter fence and a ten-foot interior fence. The officers then flew over the house in a private plane and observed marijuana growing in the yard. The officers took photos with a standard 35 mm camera from a distance of 1,000 feet. Using the anonymous tip and the photos, police were able to secure a search warrant on September 8, 1982. The following day police seized 73 marijuana plants from Ciraolo’s property. The California Court of Appeals reversed. The U.S. Supreme Court granted certiorari to address whether the Fourth Amendment prohibits the warrantless aerial observation of an enclosed area within the curtilage of a home from a distance of 1,000 feet.

#### Issue

Does the warrantless police observation of an enclosed area within the curtilage of a home from an airplane at an altitude of 1,000 feet violate the Fourth Amendment?

#### Holding and Reasoning (Burger, C.J.)

No. Since the ruling in *Katz v. United States*, 389 U.S. 347(1967), the benchmark for determining whether the Fourth Amendment has been violated is whether the individual has a “constitutionally protected reasonable expectation of privacy.” Thus, an individual must demonstrate (1) a subjective expectation of privacy in the area and (2) that the expectation is reasonable in order for the protections of the Fourth Amendment to apply. In this case, the respondent’s subjective expectation of privacy, evidenced by the 10-foot fence, is undisputed. The remaining question is whether this expectation is reasonable. The area at issue is within the curtilage of the home, but the Fourth Amendment does not prohibit a law enforcement official from observing the area from a publicly accessible viewpoint where he is legally entitled to be. The officers in this case observed respondent’s yard with the naked eye from public airspace. They did not physically enter the property. “What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.” Therefore, the respondent’s expectation of privacy in this case is not reasonable, and the Fourth Amendment was not violated.

#### Dissent (Powell, J.)

The Court correctly determines that the respondent demonstrated a subjective expectation of privacy, but holds that law enforcement may use technology (an airplane) to circumvent that expectation. The analysis set forth in *Katz*centers on the individual right to privacy, and the manner of surveillance and whether the government official physically entered the property are irrelevant. Finally, the small possibility that air travelers may observe activities in an area does not present a real threat to privacy and is in no way equivalent to aerial surveillance by police.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Invasion of Privacy** - The wrongful intrusion into one’s personal life, solitude, or seclusion which may give rise to an action in tort and where damages are recoverable.

**Curtilage** - The area immediately surrounding a home.

# Bond v. United States

#### United States Supreme Court 529 U.S. 334 (2000)

#### Rule of Law

**The physical manipulation of a bag on a public bus is a type of search that violates the Fourth Amendment.**

#### Facts

Agent Cantu, having boarded a bus, started to squeeze the soft luggage in the overhead bins because he was searching for drugs on board. In the overhead bin at the back of the bus, where Bond (defendant) was seated, Cantu felt a green canvas bag and noticed that it contained a “brick-like” object. Bond said that the bag was his and allowed Cantu to search it. Cantu discovered, wrapped in duct tape, in an oval shape, a certain amount of methamphetamine, which was rolled up in a pair of pants. Bond moved to suppress the evidence, but the motion was denied and he was convicted. On appeal, Bond argued that the search was illegal. He claimed that although the bag was open to the public, Cantu had manipulated the bag in a way that the other passengers would not have. The court of appeals said that Cantu’s manipulation of the bag was intended to detect drugs and was irrelevant for the Fourth Amendment analysis. The court held that the manipulation of Bond’s bag was not a search within the meaning of the Fourth Amendment. The United States Supreme Court granted certiorari.

#### Issue

Is the physical manipulation of a bag on a public bus a type of search that violates the Fourth Amendment?

#### Holding and Reasoning (Rehnquist, C.J.)

Yes. The physical manipulation of a bag on a public bus is a type of search that violates the Fourth Amendment. Fourth Amendment analysis requires that we answer two separate questions. First, has the individual exhibited an actual expectation of privacy, or, in other words, do the individual’s actions indicate that he attempted to preserve the privacy of the object? In this case, Bond placed his objects in an opaque, green canvas bag, and positioned the bag above his seat in the overhead bin. Clearly, then, Bond attempted to preserve the privacy of the objects in the bag. The second question asks whether the individual has what society would recognize as a reasonable expectation of privacy. In this case, the individual has put the bag in the overhead bin of a public bus and must therefore expect that other passengers or bus employees might touch it or move it. But the individual does not expect that others will feel it in the attempt to explore its contents. Agent Cantu did precisely this, and for this reason we hold that his actions violate the Fourth Amendment. The judgment of the court of appeals is reversed.

#### Dissent (Breyer, J.,)

A “squeeze” is no different from the type of treatment to which any bag is subjected in the regular course of travel. Fourth Amendment analysis is already difficult, and this decision will further complicate things and require a separate analysis of the types of squeezes that run afoul of the amendment. It might also complicate law-enforcement officials’ using even the most non-intrusive means to detect drugs. If passengers want to safeguard the privacy of their things, they should place them in a suitcase with hard sides.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

# Oliver v. United States

#### United States Supreme Court 466 U.S. 170 (1984)

#### Rule of Law

**Under the open fields doctrine, a field may be entered and searched without probable cause or a warrant.**

#### Facts

Two Kentucky State Police Officers went to a farm owned by Oliver (defendant) to investigate claims that marijuana was being grown on the property. View of the property was obstructed by fences and woods, the entrance to the property was gated and locked, and “No Trespassing” signs were posted. The officers did not have a search warrant or probable cause for a search. The officers discovered the field of marijuana more than a mile from Oliver’s house. Oliver was arrested for the manufacture of a controlled substance. The district court held a pretrial hearing to determine whether to allow evidence of the discovery of the field to be presented at trial. The court held that Oliver had a reasonable expectation of privacy because his farm was not an “open” field and suppressed the evidence based on *Katz v. United States*, 389 U.S. 347 (1967). Sitting en banc, the Court of Appeals for the Sixth Circuit reversed on the grounds that *Katz* did not undermine the “open fields” doctrine from *Hester v. United States*, 265 U.S. 57 (1924), allowing police to search fields without a warrant.

#### Issue

Does a police search without a warrant or probable cause of a field where the owner has taken steps to establish his right to privacy violate the Fourth Amendment?

#### Holding and Reasoning (Powell, J.)

No. The “open fields” doctrine set forth in *Hester v. United States*, 265 U.S. 57(1924), allows police to enter and search a field without a warrant. The Fourth Amendment prohibits unreasonable searches of an individual’s house, papers, or effects. Open fields are neither specifically listed in the Fourth Amendment nor included in the term “effects.” This conclusion is supported by the legislative history of the amendment and has not been limited or overturned by the right to privacy analysis set out in *Katz*.There is no specific test for determining when an individual has a “reasonable expectation of privacy” protected by the amendment, but a person’s use of the area, the sanctity of some places, and the intent of the Framers are all significant factors. The activities that take place in open fields, like growing crops, are not entitled to privacy protections. Unlike homes and offices, the public and police can generally view or access open fields, and even fields that are fenced can be viewed from the air. Further, a police search of an open field is not a true search within the meaning of the amendment. Rather, it is a common law trespass. The law of trespass prohibits entry onto property that would generally not violate the Fourth Amendment. As such, property rights guaranteed by the law of trespass carry little weight with respect to the Fourth Amendment. The ruling in *Hester*is reaffirmed. Oliver’s field is an open field, and he did not have a reasonable expectation of privacy there. The search of Oliver’s field did not violate the Fourth Amendment.

#### Dissent (Marshall, J.)

The Court’s plain language analysis limits the protections of the Fourth Amendment to those specifically listed in the amendment, but this is irreconcilable with prior rulings extending the protections to the curtilage of a home, office buildings, or public phone booths. The assessment of whether an individual has an expectation of privacy in a particular area has generally focused on three categories of factors: (1) whether there is a legal basis for the expectation, (2) the possible uses of the area, and (3) whether the individual took steps to publicly establish his right to privacy in the area. Based on these factors, Oliver’s interests should have been constitutionally protected because (1) the trespass would give rise to criminal liability under Kentucky law since Oliver owned the field, (2) protected private activities could occur in a field like this, and (3) Oliver took steps to protect his interest. This analysis yields a simple rule: the Fourth Amendment prohibits the warrantless entry and search of private land where entry would give rise to criminal liability under state law.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Curtilage** - The area immediately surrounding a home.

**Open Fields Doctrine** - Rule articulated in *Hester v. United States*, 265 U.S. 57(1924), allowing the warrantless search of outdoor areas not included in the curtilage of a home.

# United States v. Jones

#### United States Supreme Court 132 S.Ct. 945 (2012)

#### Rule of Law

**The warrantless placement of a GPS tracking device on the undercarriage of an individual’s vehicle in order to track the person’s movements on public streets constitutes an unlawful search in violation of the Fourth Amendment.**

#### Facts

Washington, D.C. nightclub owner Antoine Jones (defendant) was suspected by the FBI of being involved in a large-scale drug trafficking operation. As part of a joint task-force operation with the police, FBI agents applied for a warrant that would allow them to place a Global Positioning System (GPS) tracking device on Jones’s vehicle in an effort to track his movements. A federal district court issued the warrant but required the agents to place the device on Jones’s vehicle within 10 days of issuance of the warrant and while the vehicle was physically located in the District of Columbia. On the eleventh day, and while the vehicle was parked in a lot in Maryland, agents placed the GPS device on the vehicle’s undercarriage. For 28 days, the Government used the device to track Jones’s movements and collected more than 2,000 pages of data. Jones was indicted on multiple counts of drug-related offenses. Prior to trial, defense counsel filed a motion to suppress the information the Government obtained from the GPS device. The district court granted the motion in part and suppressed only the data obtained while the vehicle was parked in a garage adjoining Jones’s residence. Jones was convicted and sentenced to life imprisonment. The court of appeals reversed and held the warrantless use of the GPS device violated the Fourth Amendment. The U.S. Supreme Court granted certiorari to review.

#### Issue

Does the warrantless placement of a GPS tracking device on the undercarriage of an individual’s vehicle in order to track the person’s movements on public streets constitute an unlawful search in violation of the Fourth Amendment?

#### Holding and Reasoning (Scalia, J.)

Yes. The Fourth Amendment provides, in part, that the people are to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. A vehicle is an “effect” for Fourth Amendment purposes. Thus, the government’s installation of a GPS device on Jones’s vehicle constitutes a “search.” The issue is whether the placement of the GPS device on Jones’s vehicle to monitor his movements was done in violation of the Fourth Amendment. Historically, the Court’s Fourth Amendment jurisprudence was property-based and reflected the notion that a person had a right to be free from unreasonable searches and seizures in their persons, houses, papers, and effects.” Later, the Court deviated from that exclusively property-based approach and began to hold that the Fourth Amendment “protects people, not places.” *Katz v. United States*, 389 U.S. 347, 351 (1967). Here, the Government’s warrantless placement of a GPS device on Jones’s vehicle constitutes an unlawful search in violation of the Fourth Amendment. In making that decision, the Court applies not only the approach articulated in *Katz*, namely a person’s reasonable expectation of privacy, but also incorporates the property-based trespass test articulated earlier. The judgment of the court of appeals is affirmed.

#### Concurrence (Sotomayor, J.)

Although the majority is correct in finding that the Government usurped Jones’s property for purposes of conducting surveillance without a warrant in violation of the Fourth Amendment, it unnecessarily took a very broad approach in reaching its decision. A more narrow approach is better suited to the facts of the case. Simply put, whenever the Government physically intrudes personal property to gather information, a search occurs. Here, the Government did just that when it placed a GPS tracking device on Jones’s car without a warrant.

#### Concurrence (Alito, J.)

The majority applied 18th-century tort law to the facts of the case. It correctly concluded that the installation of the GPS device on Jones’s vehicle was a trespass and thus an illegal search. However, the highly-technical 21st-century surveillance techniques of law enforcement require a better approach. In the pre-computer age, traditional surveillance for any extended period of time was difficult and costly and required many men, vehicles, and time. Today, however, the use of GPS devices and other similar devices make long-term monitoring relatively easy and cheap. Consequently, legislative bodies should take measures to gauge public attitudes and draw appropriate lines to balance privacy and public safety in a comprehensive way.

# Katz v. United States

#### United States Supreme Court 389 U.S. 347 (1967)

#### Rule of Law

**The Fourth Amendment prohibition against unreasonable searches and seizures of physical items extends to recordings of oral statements.**

# Alderman v. United States

#### United States Supreme Court 394 U.S. 165 (1969)

#### Rule of Law

**A defendant in criminal proceedings does not have standing to demand exclusion of evidence obtained in violation of another person’s constitutional rights.**

#### Facts

Alderman (defendant) and others were prosecuted for various crimes using evidence obtained through allegedly unlawful wiretapping. The United States (plaintiff) conceded that one of the challenged acts of wiretapping was illegal. The United States argued that the defendants lacked standing to demand exclusion of the wiretap evidence.

#### Issue

Does a defendant in criminal proceedings have standing to demand exclusion of evidence obtained in violation of another person’s constitutional rights?

#### Holding and Reasoning (White, J.)

No. A defendant in criminal proceedings does not have standing to demand exclusion of evidence obtained in violation of another person’s constitutional rights. The Fourth Amendment prohibits the admission at trial of any evidence obtained in violation of a defendant’s constitutional rights, as well as the fruits of illegally obtained evidence. We extended that rule to cover illegally obtained oral statements in *Silverman v. United States*365 U.S. 505(1967). The petitioners in each of the consolidated cases we now review assert that the exclusionary rule should prohibit the introduction of illegally obtained wiretap evidence regardless of whose Fourth Amendment rights were violated by the wiretaps. The standing doctrine holds that the exclusionary rule can be advanced only by the individual whose rights were violated in the act of obtaining evidence. In *Goldstein v. United States*, 316 U.S. 114 (1942), we allowed the admission of testimony against codefendants solicited through the use of communications intercepted in violation of the constitutional rights of the testifying defendant. Similarly, in *Wong Sun v. United States*, 371 U.S. 471(1963), narcotics seized during an unlawful arrest of one defendant were held to be inadmissible as evidence against that defendant, but admissible against codefendants who were not subjected to unlawful arrest. Fourth Amendment rights are individual rights and may not be asserted on behalf of a third party. We have previously recognized that the exclusionary rule serves to deter unconstitutional police practices. Extending the rule to allow defendants to assert the rights of third parties would not sufficiently advance its deterrent purpose to justify the correlated diminishment of the public’s interest in effective criminal prosecutions. State or federal legislatures may elect to extend the rule, but we decline to do so on constitutional grounds.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Exclusionary Rule** - A rule that excludes or suppresses evidence in a criminal proceeding where that evidence was obtained in violation of an individual’s constitutional rights.

# Soldal v. Cook County

113 S.Ct. 538

Supreme Court of the United States

**Edward SOLDAL et ux.**

**v.**

**COOK COUNTY, ILLINOIS, et al.**

No. 91–6516.

Argued Oct. 5, 1992.Decided Dec. 8, 1992.

**Synopsis**

Mobile home owners brought § 1983 suit against deputy sheriffs and owner and manager of trailer park arising from trailer park employee, being observed by deputies, disconnecting trailer from utilities and towing trailer off park premises. The United States District Court for the Northern District of Illinois, [Charles P. Kocoras](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0223212301&originatingDoc=I72e77b9d9c9a11d991d0cc6b54f12d4d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I72e77b9d9c9a11d991d0cc6b54f12d4d), J., granted summary judgment in favor of defendants, and appeal was taken. A panel of the Court of Appeals for the Seventh Circuit, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ie30d47be968711d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[923 F.2d 1241,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991028179&pubNum=350&originatingDoc=I72e77b9d9c9a11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed in part, reversed in part, and remanded. After granting petition for rehearing en banc and vacating earlier opinion [931 F.2d 445,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991088482&pubNum=350&originatingDoc=I72e77b9d9c9a11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) the Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I05d028e594c011d9bdd1cfdd544ca3a4&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[942 F.2d 1073,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991146904&pubNum=350&originatingDoc=I72e77b9d9c9a11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) reaffirmed the panel decision. Certiorari was granted. The Supreme Court, Justice [White](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0257944001&originatingDoc=I72e77b9d9c9a11d991d0cc6b54f12d4d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I72e77b9d9c9a11d991d0cc6b54f12d4d), held that complaint by mobile home owners alleging that deputy sheriffs and owner and manager of mobile home park dispossessed owners of their mobile home by physically tearing it from foundation and towing it to another lot sufficiently alleged “seizure” within meaning of Fourth Amendment to state cause of action under § 1983, even if owners' “privacy” was not invaded.

Reversed and remanded.

**Procedural Posture(s):** On Appeal; Motion for Summary Judgment.

# United States v. Knotts

#### United States Supreme Court 460 U.S. 276 (1983)

#### Rule of Law

**Monitoring the signals of a beeper to track the movements of a car does not constitute a search requiring a warrant under the Fourth Amendment.**

#### Facts

Chemical manufacturer 3M Company informed a Minnesota Bureau of Criminal Apprehension narcotics officer that Tristan Armstrong (defendant) was stealing chemicals used to make drugs. Police began investigating Armstrong and learned that he purchased additional chemicals from Hawkins (Hawkins) Chemical Company and delivered them to Darryl Petschen (defendant). Hawkins allowed police to place a transmitter called a beeper inside a container of chloroform, which they gave to Armstrong during his next purchase. Using the beeper and visual surveillance, police followed the container to Knotts’ (defendant) cabin in Wisconsin. Over the next three days, the police gathered enough evidence to obtain a search warrant. Inside the cabin, they found a fully stocked drug laboratory. The defendants were charged with conspiracy to manufacture controlled substances in violation of 21 U.S.C. § 846 (1976) and brought before the United States District Court for the District of Minnesota. Armstrong pled guilty and testified against Knotts and Petschen at trial. Knotts filed a motion to suppress on the grounds that the use of the beeper without a warrant violated the Fourth Amendment. The motion was denied, and Knotts was convicted and sentenced to five years in prison.

#### Issue

Does the government’s monitoring of a beeper to track the movements his car without a warrant violate the Fourth Amendment?

#### Holding and Reasoning (Rehnquist, J.)

No. Surveillance of a car by beeper is equivalent to visual surveillance of the car on public roadways. Prior case law makes clear that a person’s expectation of privacy is greatly reduced in a car. Petschen voluntarily travelled to Knotts’ cabin on public roads and made his direction and destination public information. Knotts’ expectation of privacy in his cabin and the surrounding area did not extend to Petschen’s car, which entered Knotts’ property from the public roadway. Likewise, Knotts did not have a reasonable expectation of privacy with respect to the chloroform left outside in the open fields. All of the evidence gathered against Knotts could have been obtained by visual surveillance, but the Fourth Amendment does not bar law enforcement from supplementing their senses with new technology. Since monitoring the beeper did not intrude upon Knotts’ reasonable expectation of privacy, no search occurred invoking the protections of the Fourth Amendment. The ruling of the trial court is affirmed.

#### Concurrence (Stevens, J.)

Because Knotts did not raise the issue of whether placing the beeper in the chloroform container was reasonable, the officers acted reasonably in monitoring the beeper signals. However, the majority opinion states that the chloroform container was outside in the open fields, but this is not supported by the record. Further, the assertion that the Fourth Amendment does not prohibit police from supplementing their senses with technology is overbroad and directly contradicts the holding in *Katz v. United States*,389 U.S. 347 (1967).

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Search** - The official examination of a person or property in order to find evidence of crime.

# United States v. Karo

#### United States Supreme Court 468 U.S. 705 (1984)

#### Rule of Law

**(1) A party unknowingly receiving a container containing a tracking device does not constitute a Fourth Amendment seizure. (2) The continued monitoring of a tracking device inside multiple private places constitutes a Fourth Amendment search.**

#### Facts

A government informant who sold ether containers told the Drug Enforcement Agency (DEA) (plaintiff) that James Karo (defendant) had ordered a large quantity of ether that Karo was going to use to process cocaine. With the informant's consent, the DEA installed a tracking device to monitor the movements of an ether container that Karo used. The DEAcontinued to rely on the tracking device even after it had been taken inside Karo's home, other residences, and relatively private commercial structures. The court of appeals held that the tracking device violated Karo’s right against unlawful searches and seizures.

#### Issue

(1) Does a party unknowingly receiving a container containing a tracking device constitute a Fourth Amendment seizure? (2) Does continued monitoring of a tracking device inside multiple private places constitute a Fourth Amendment search?

#### Holding and Reasoning (White, J.)

(1) No. A party unknowingly receiving a container containing a tracking device does not constitute a Fourth Amendment seizure. A seizure occurs if the government meaningfully interferes in a person's possessory interest in the person's property. In this case, while the placement of the tracking device can constitute a technical trespass, Karo’s possessory interest in the containers was not infringed upon. Therefore, there was no seizure for Fourth Amendment purposes. (2) Yes. The continued monitoring of a tracking device inside multiple private places constitutes a Fourth Amendment search. A search occurs if an expectation of privacy that society considers as reasonable is infringed. In this case, a search occurred, but not from the mere fact that the police had installed the beeper on the barrel while it was still in the informant's possession. One who purchases property assumes the risk that the seller has permitted the police to install a tracking device on it. On the other hand, the manner in which the police monitored the beeper was a search under the Fourth Amendment. Here, the DEA continued actively monitoring the beeper while it remained in several successive residences and other similarly private places, thereby learning intimate details of the interior that could not otherwise be seen without physical intrusion. Accordingly, the surveillance was tantamount to a physical intrusion into places where Karo had a reasonable expectation of privacy. Thus, a search occurred for Fourth Amendment purposes. The judgment of the court of appeals is reversed.

#### Concurrence (O'Connor, J.)

A more narrow test than the one proposed by the Court is appropriate for determining if an activated tracking device in a closed container violates a homeowner's privacy. The Court should examine a defendant's interest in the container in which the tracking device is placed. If a homeowner allows a guest to bring the guest's closed container inside the home, the homeowner surrenders any expectation of privacy involving the container. In order to have an expectation of privacy, the homeowner needs to own the container or be in control of the container's movement.

#### Concurrence/Dissent (Stevens, J.)

Placing the tracking device in the container constitutes a Fourth Amendment seizure. People have the right to exclude other people, including the government, from their property. The DEA tracking device interfered with this right as soon as Karo took possession of the containers because the DEA, and not Karo, was the one exercising control over the containers.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

# \*\*CARPENTER v. UNITED STATES\*\*

#### United States Supreme Court 484 U.S. 19 (1987)

#### Rule of Law

**The mail-fraud statute is not limited to protecting tangible property rights.**

#### Facts

R. Foster Winans, Kenneth Felis, and David Carpenter (defendants) were involved in a scheme that used confidential information to take advantage of the stock market. Winans was one of the writers on a daily column for the Wall Street Journal (the Journal) that discussed selected stocks and provided readers of the Journal with investment insight. Information published in the column often impacted the value of the stocks discussed. The Journal’s policy was that, prior to publication, the content of the column was considered confidential business information. Despite awareness of this policy, Winans entered into an agreement with Felis and Peter Brant, who were both stock brokers at Kidder Peabody. Under the agreement, Winans would reveal the contents and release dates of several columns so that Felis and Brant could trade advantageously before publication. Over a four-month period, the prepublication trades amassed net profits of approximately $690,000. The scheme was discovered when both Kidder Peabody and the Journal became suspicious of the correlation between the columns and the trades. Winans and Carpenter, Winans’s roommate, eventually went to the Securities and Exchange Commission to reveal the scheme. Winans and Felis were convicted of violating the mail and wire-fraud statutes, 18 U.S.C. §§ 1341, 1334, and other securities statutes. Carpenter was convicted of aiding and abetting. Winans and Felis appealed on the grounds that: (1) the conduct was not a scheme to defraud within the scope of the mail and wire-fraud statutes, and (2) there was no evidence that money or property was taken from the Journal, which was a required element for conviction under the statutes.

#### Issue

Is the mail-fraud statute limited to protecting tangible property rights?

#### Holding and Reasoning (White, J.)

No. The mail-fraud statute is not limited to protecting tangible property rights. In *McNally v. United States*, 483 U.S. 350 (1987), the United States Supreme Court held that the mail-fraud statute does not protect against schemes to defraud the public of the intangible rights to impartial and honest government. *McNally* did not, however, limit the scope of the mail-fraud statute to protecting only tangible property rights. Confidential business information acquired in the course of a corporation’s business, although intangible, is property to which the corporation is entitled to the exclusive use and benefit. This property right is protectable under the mail-fraud statute. The mail and wire-fraud statutes apply to any scheme to defraud another of property by use of false representations, pretenses, or promises. Further, the concept of fraud includes embezzlement, a situation in which a person fraudulently appropriates property entrusted to that person by another. In this case, the scheme to defraud the Journal of the exclusive use and benefit of its confidential business information—the contents and release dates for Winans’s column—falls within the scope of the mail and wire-fraud statutes. The scheme clearly interfered with the Journal’s property right to control all prepublication uses of the information. It is irrelevant that the scheme did not interfere with the Journal’s intended use of the information or the Journal’s ability to be the first to publish the information to the general public. Finally, it is also noted that eventual circulation of Winans’s column, which occurred through mail and wires, was an essential component to the scheme’s success due to the anticipated impact of the column on stock prices. As a result, the scheme meets all of the requirements of the mail and wire-fraud statutes, and Winans’s and Felis’s convictions for mail and wire fraud are affirmed.

In ***Carpenter v. United States***, the Court was split on the conviction for the violation of the Securities Exchange Act and left the Second Circuit decision in place.

**Key Terms:**

**Embezzlement** - The fraudulent conversion of another’s property by a person who is in a position of trust, such as an agent or employee.

**Mail Fraud Statute** - A federal statute, 18 U.S.C. § 1341, making it illegal to use the mail to attempt to execute a scheme to defraud others.

**Wire Fraud Statute** - A federal statute, 18 U.S.C. § 1343, making it illegal to defraud others by means of wire or other electronic communications in interstate or foreign commerce.

# United States v. Jones

#### United States Supreme Court 132 S.Ct. 945 (2012)

#### Rule of Law

**The warrantless placement of a GPS tracking device on the undercarriage of an individual’s vehicle in order to track the person’s movements on public streets constitutes an unlawful search in violation of the Fourth Amendment.**

# United States v. Miller

#### United States Supreme Court 425 U.S. 435 (1976)

#### Rule of Law

**Bank customers have no reasonable expectation of privacy in their bank records.**

#### Facts

Federal agents were investigating Mitch Miller (defendant) for his involvement in a bootlegging conspiracy. The agents subpoenaed two banks and received all of Miller’s bank records. As a result, Miller was indicted. Miller filed a pretrial motion to suppress the bank records obtained by subpoena for violating his Fourth Amendment rights. The United States Supreme Court granted certiorari.

#### Issue

Do bank customers have a reasonable expectation of privacy in their bank records?

#### Holding and Reasoning (Powell, J.)

No. Bank customers have no reasonable expectation of privacy in their bank records. A bank customer voluntarily gives any information contained in bank records to the bank and such records are observable by the bank’s employees. The Court has held that an individual that volunteers information to a third party assumes the risk that the third party is not going to hand over the information to the government. Finally, check, specifically, are not confidential, but rather negotiable instruments used to conduct transactions. In the present case, Miller has no reasonable expectation of privacy in his bank records. The issuance of the grand jury subpoena to obtain his bank records and the bank’s subsequent handing over of those records to federal agents did not violate Miller’s Fourth Amendment rights. The bank accounts are admissible and Miller’s motion should be denied.

#### Dissent (Brennan, J.)

A bank customer has a reasonable expectation of privacy in all of his bank transactions. An individual cannot effectively participate in the economy without using a bank.

**Key Terms:**

**Subpoena** - A formal written document directing a party to appear in court or produce documents to another party or to the court.

# Smith v. Maryland

#### United States Supreme Court 442 U.S. 735 (1979)

#### Rule of Law

**A person has no legitimate expectation of privacy in information that the person voluntarily turns over to third parties.**

# Katz v. United States

#### United States Supreme Court 389 U.S. 347 (1967)

#### Rule of Law

**The Fourth Amendment prohibition against unreasonable searches and seizures of physical items extends to recordings of oral statements.**

# United States v. Knotts

#### United States Supreme Court 460 U.S. 276 (1983)

#### Rule of Law

**Monitoring the signals of a beeper to track the movements of a car does not constitute a search requiring a warrant under the Fourth Amendment.**

# Olmstead v. United States

#### United States Supreme Court 277 U.S. 438 (1928)

#### Rule of Law

**The Fourth Amendment does not extend to telephone wires and the telephone calls that travel over them.**

#### Oklahoma Press Publishing Co. v. Walling

65 S.Ct. 1201

Supreme Court of the United States

**OKLAHOMA PRESS PUBLISHING COMPANY, petitioner,**

**v.**

**L. Metcalfe WALLING, Administrator, etc.**

No. 1171.

May 21, 1945

**Synopsis**

Facts and opinion, [147 F.2d 658](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1945115701&pubNum=350&originatingDoc=Iee8cf9dc9c0b11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

**Attorneys and Law Firms**

Messrs. Elisha Hanson, Joseph C. Stone and Charles A. Moon, for petitioner.

Assistant Solicitor General Cox, Mr. Douglas B. Maggs and Miss Bessie Margolin, for respondent.

**Opinion**

Petition for writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit granted and case transferred to the summary docket.

Granted.

# United States v. Jones

#### United States Supreme Court 132 S.Ct. 945 (2012)

#### Rule of Law

**The warrantless placement of a GPS tracking device on the undercarriage of an individual’s vehicle in order to track the person’s movements on public streets constitutes an unlawful search in violation of the Fourth Amendment.**

# Katz v. United States

#### United States Supreme Court 389 U.S. 347 (1967)

#### Rule of Law

**The Fourth Amendment prohibition against unreasonable searches and seizures of physical items extends to recordings of oral statements.**

# \*\*FLORIDA v. Jardines\*\*

#### United States Supreme Court 569 U.S. 1 (2013)

#### Rule of Law

**Using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a search within the meaning of the Fourth Amendment.**

#### Facts

After receiving a tip about a house in which marijuana was growing, a detective approached the house, which was owned by Jardines (defendant), with a drug-sniffing dog. As the detective neared Jardines's porch, the dog detected the odor of marijuana. The dog sat on the porch at the odor's strongest point, as he was trained to do. As a result of this, the detective was able to get a warrant to search the house, and Jardines was eventually arrested. At trial, Jardines argued, among other things, that the use of the dog constituted a search and violated his Fourth Amendment right against unreasonable searches. The United States Supreme Court granted certiorari.

#### Issue

Is using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home a search within the meaning of the Fourth Amendment?

#### Holding and Reasoning (Scalia, J.)

Yes. A search occurs under the Fourth Amendment when the government obtains information by physically intruding on an individual's person, house, or belongings. Although *Katz v. United States*, 389 U.S. 347 (1967), permits the obtaining of information outside of a traditional search in areas where an individual does not have a reasonable expectation of privacy, *Katz "*does not subtract anything from the [Fourth] Amendment's protections when the Government [engages] in a physical intrusion of a constitutionally protected area." For example, using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home does not invoke*Katz*, but rather is a search within the meaning of the Fourth Amendment. The use of a trained police dog with the objective of uncovering evidence goes beyond the implied license to go up to a house and, for example, drop off mail or knock on the door. It is a physical intrusion on the homeowner's property. Accordingly, in this case, the detective's use of the drug-sniffing dog to detect marijuana constituted a warrantless search of Jardines's porch—the curtilage of his home—in violation of his Fourth Amendment rights. The detective obtained information by physically intruding on Jardines's property, so there is no need to determine whether Jardines's expectation of privacy was intruded upon under *Katz*.

#### Concurrence (Kagan, J.)

The Court's ruling is correct on property grounds, but the outcome would be the same if the Court's ruling were based on *Katz*'s reasonable-expectation-of-privacy rubric.

#### Dissent (Alito, J.)

Trespass law does not support the majority's decision in this case. The majority admits that people—even police officers—have an implied license to walk up to a house without a warrant. This is so even if the officer's purpose is to obtain information by way of a conversation with the homeowner after a knock on his door. There is no support for holding that an officer's otherwise-legal presence at a homeowner's door is somehow made illegal solely due to the presence of the officer's dog. Additionally, the Court's ruling is incorrect under *Katz*'s reasonable-expectation-of-privacy rubric, because a reasonable homeowner must expect that if he is growing marijuana, the odor of the marijuana will emanate from the house onto the porch.

***Florida v. Jardines*** – taking a drug dog onto the curtilage of a person’s home to detect drug odors without a warrant violates the Fourth Amendment.

**Key Terms:**

**Curtilage** - The area immediately surrounding a home.

**Search** - The official examination of a person or property in order to find evidence of crime.

# Katz v. United States

#### United States Supreme Court 389 U.S. 347 (1967)

#### Rule of Law

**The Fourth Amendment prohibition against unreasonable searches and seizures of physical items extends to recordings of oral statements.**

# Silverman v. United States

81 S.Ct. 679

Supreme Court of the **United** **States**

**Julius SILVERMAN et al., Petitioners,**

**v.**

**UNITED STATES.**

No. 66.

Argued Dec. 5, 1960.Decided March 6, **1961**.

**Synopsis**

Defendants were found guilty of gambling offenses. From a judgment of the **United** **States** District Court for the District of Columbia, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I2088449054b711d9a99c85a9e6023ffa&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=8ba914f911e44b0e9079d3f24aedb102&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[166 F.Supp. 838,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1958109456&pubNum=345&originatingDoc=Id8f51ce29c1c11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) the defendants appealed. The **United** **States** Court of Appeals for the District of Columbia Circuit, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Iaff36da88ef811d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=8ba914f911e44b0e9079d3f24aedb102&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[107 U.S.App.D.C. 144, 275 F.2d 173,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1959104046&pubNum=350&originatingDoc=Id8f51ce29c1c11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed and the Supreme Court granted certiorari. The Supreme Court, Mr. Justice Stewart, held that the actions of police officers in attaching an electronic device, a so-called ‘spike mike’ to heating duct of house used by defendants, thereby turning duct, in effect, into a gigantic microphone running throughout entire house, constituted a violation of Fourth Amendment, and conversations overheard by police officers were inadmissible.

Reversed.

# United States v. Place

#### United States Supreme Court 462 U.S. 696 (1983)

#### Rule of Law

**When police seize luggage from a suspect’s custody, the limitations applicable to investigative detentions of the person himself should define the permissible scope of an investigative detention of the person’s luggage on less than probable cause.**

#### United States v. Jacobsen

104 S.Ct. 1652

Supreme Court of the **United** **States**

**UNITED STATES, Petitioner**

**v.**

**Bradley Thomas JACOBSEN and Donna Marie Jacobsen.**

No. 82-1167.

Argued Dec. 7, 1983.Decided April 2, **1984**.

**Synopsis**

Defendants were convicted in the **United** **States** District Court for the District of Minnesota of possession of an illegal substance with intent to distribute, and they appealed. The Court of Appeals for the Eighth Circuit, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I15e33a4492fb11d9bdd1cfdd544ca3a4&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=a4a5095a14b94ef7a2ba2c50ee767171&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[683 F.2d 296,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1982133650&pubNum=350&originatingDoc=Id4c623cb9c1d11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) reversed, and petition was filed for certiorari. The Supreme Court, Justice Stevens, held that: (1) removal by federal agents, who had been informed by employees of a private freight carrier that they observed a white powdery substance in the innermost of a series of four plastic bags that had been concealed in a tube inside a damaged package, of the tube from the box, the plastic bags from the tube and a trace of powder from the innermost bag infringed no legitimate expectation of privacy and therefore did not constitute a “search” within meaning of Fourth Amendment and, while agents' assertion of dominion and control over the package and its contents did constitute a “seizure,” that warrantless seizure was not unreasonable, and (2) federal agents were not required to have a warrant before testing small quantity of a powder to determine whether it was cocaine.

Reversed.

Justice White filed separate opinions concurring in part and concurring in the judgment.

Justice Brennan filed dissenting opinion in which Justice Marshall joined.

# Illinois v. Caballes

#### United States Supreme Court 543 U.S. 405 (2005)

#### Rule of Law

**The Fourth Amendment does not require reasonable, articulable suspicion to administer a canine sniff test during a routine traffic stop.**

#### Facts

Roy Caballes (defendant) was pulled over for a routine traffic stop by Illinois State Trooper Daniel Gillette. Another trooper, Craig Graham, heard Gillette’s report on the radio and took his narcotics-detection dog to the scene. Graham let his dog sniff the car while Gillette wrote Caballes a warning ticket. The dog detected drugs in the trunk, and the officers conducted a search. They found marijuana and arrested Caballes. This process took ten minutes. At trial, Caballes moved to suppress the evidence and quash his arrest. The trial judge denied the motion, because the stop was not unreasonably prolonged and the dog’s alert gave the officers probable cause to search the trunk. Caballes was convicted, fined $256,136, and sentenced to 12 years in prison. The appellate court upheld the conviction, but the Illinois Supreme Court reversed on the grounds that the sniff test unfairly broadened an ordinary traffic stop and turned it into a drug investigation without “specific and articulable facts” indicating the presence of drugs. The U.S. Supreme Court granted certiorari to address whether the Fourth Amendment prohibits employing a drug dog to perform a sniff test during a routine traffic stop unless the officer has “reasonable, articulable suspicion.”

#### Issue

Does the use of a drug dog to perform a sniff test during a routine traffic stop without reasonable, articulable suspicion violate the Fourth Amendment?

#### Holding and Reasoning (Stevens, J.)

No. A drug dog may ordinarily be used to perform a sniff test during the course of an otherwise lawful traffic stop without violating the Fourth Amendment. A legitimate traffic stop for the purpose of giving the driver a warning ticket is a lawful seizure under the Fourth Amendment. However, that stop may not be unreasonably prolonged. Further, police conduct must intrude upon an individual’s legitimate privacy interest before it will be considered a search under the Fourth Amendment. Because there is no legitimate interest in possessing drugs, actions by police that serve only to uncover such possession are not searches. In *United States v. Place*, 462 U.S. 696 (1983), sniff tests by trained drug dogs were considered sui generis because they are unlikely to indicate anything other than the presence or absence of drugs. In this case, the traffic stop was lawful and not overlong. Caballes was unable to substantiate his argument that drug dog error rates contradict the sui generis nature of sniff tests set forth in *Place*. As such, sniff tests do not intrude on an individual’s legitimate privacy interests. In this case, the sniff test was properly performed during the course of a lawful traffic stop and did not reveal any of Caballes’ private information other than the presence of drugs in the trunk, unlike the thermal-imaging devices in *Kyllo v. United States*, 533 U.S. 27 (2001). The Fourth Amendment was not violated.

#### Dissent (Souter, J.)

The sniff test was an unauthorized search. The holding in*Place* that drug dog sniff tests are sui generis is based on the faulty assumption that drug dogs do not err. Since that decision, it has become clear that drug dogs exhibit a high rate of false positives and the sui generis treatment is no longer justified. Canine sniff tests should be treated as searches.

#### Dissent (Ginsburg, J.)

Caballes was stopped for driving six miles per hour above the speed limit. Gillette did not request assistance or a dog sniff. Even if the sniff test did not lengthen the stop, it unreasonably broadened the scope of the stop into a drug investigation. The Fourth Amendment was violated.

**Key Terms:**

**Sui Generis** - A thing that is unique or in a class of its own.

**Collins v. Virginia**

138 S.Ct. 1663

Supreme Court of the United States

**Ryan Austin COLLINS, Petitioner**

**v.**

**VIRGINIA.**

No. 16–1027.

Argued Jan. 9, **2018**.Decided May 29, **2018**.

**Synopsis**

**Background:** After denial of defendant's motion to suppress evidence obtained from warrantless search of motorcycle parked in driveway of home, defendant was convicted at a bench trial in the **Virginia** Circuit Court, Albemarle County, [Cheryl V. Higgins](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0333829101&originatingDoc=I84783e40633111e8bbbcd57aa014637b&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I84783e40633111e8bbbcd57aa014637b), J., of receiving stolen goods. Defendant appealed. The **Virginia** Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I36d8d3292fdf11e5a807ad48145ed9f1&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=fc3f7b5b15484c13b38e891a62867dfa&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[65 Va.App. 37, 773 S.E.2d 618](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036731906&pubNum=0000711&originatingDoc=I84783e40633111e8bbbcd57aa014637b&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), affirmed. Defendant appealed. The **Virginia** Supreme Court, [Donald W. Lemons](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0271511301&originatingDoc=I84783e40633111e8bbbcd57aa014637b&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I84783e40633111e8bbbcd57aa014637b), C.J., [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Id3406d907b9411e68bf9cabfb8a03530&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=fc3f7b5b15484c13b38e891a62867dfa&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[292 **Va**. 486, 790 S.E.2d 611](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2039785440&pubNum=0000711&originatingDoc=I84783e40633111e8bbbcd57aa014637b&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), affirmed. Certiorari was granted.

**Holdings:** The Supreme Court, Justice [Sotomayor](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I84783e40633111e8bbbcd57aa014637b&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I84783e40633111e8bbbcd57aa014637b), held that:

[1](https://1.next.westlaw.com/Document/I84783e40633111e8bbbcd57aa014637b/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad73aa600000176deffb3cb261a1122%3FNav%3DCASE%26fragmentIdentifier%3DI84783e40633111e8bbbcd57aa014637b%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=eaf040fbee6bda64666f66a4c4b98937&list=CASE&rank=1&sessionScopeId=f463620c60d6e30418e9a0f1148e8b4e1ad0fdad240d8109740ef151af589845&originationContext=Smart%20Answer&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F112044624679) partially enclosed top portion of driveway of home, in which defendant's motorcycle was parked, was curtilage, for Fourth Amendment purposes, and

[2](https://1.next.westlaw.com/Document/I84783e40633111e8bbbcd57aa014637b/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad73aa600000176deffb3cb261a1122%3FNav%3DCASE%26fragmentIdentifier%3DI84783e40633111e8bbbcd57aa014637b%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=eaf040fbee6bda64666f66a4c4b98937&list=CASE&rank=1&sessionScopeId=f463620c60d6e30418e9a0f1148e8b4e1ad0fdad240d8109740ef151af589845&originationContext=Smart%20Answer&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F142044624679) automobile exception to warrant requirement for searches did not justify police officer's invasion of curtilage of home.

Reversed and remanded.

Justice [Thomas](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I84783e40633111e8bbbcd57aa014637b&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I84783e40633111e8bbbcd57aa014637b) filed a concurring opinion.

Justice [Alito](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I84783e40633111e8bbbcd57aa014637b&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I84783e40633111e8bbbcd57aa014637b) filed a dissenting opinion.

**Procedural Posture(s):** Appellate Review; Petition for Writ of Certiorari; Pre-Trial Hearing Motion.

# California v. Carney

#### United States Supreme Court 471 U.S. 386 (1985)

#### Rule of Law

**Under the Fourth Amendment, a vehicle that can be readily moved and that has a reduced expectation of privacy due to its use as a licensed motor vehicle may be searched without a warrant provided probable cause exists.**

# Kyllo v. United States

#### United States Supreme Court 533 U.S. 27 (2001)

#### Rule of Law

**Law enforcement's use of sense-enhancing technology to see details of a private home that would not be discoverable without physically entering the home constitutes a Fourth Amendment search.**

#### Facts

Kyllo (defendant) was arrested for growing marijuana in his home. The police came to discover the marijuana with the use of a thermal-imaging device used to detect the heat from the high-intensity lamps used to grow the plants inside. The thermal-imaging device was used by an officer on the street outside Kyllo’s home to scan the house. The scan revealed that part of the house was significantly hotter than the rest. The police used this information to obtain a warrant to search Kyllo’s home where they found over 100 marijuana plants. Kyllo moved to suppress the evidence seized from his home, but the court denied the motion. Kyllo then entered a conditional guilty plea. The United States Court of Appeals for the Ninth Circuit affirmed the denial of the motion to suppress. The United States Supreme Court granted certiorari.

#### Issue

Does law enforcement's use of sense-enhancing technology to see details of a private home that would be undiscoverable without physically entering the home constitute a Fourth Amendment search?

#### Holding and Reasoning (Scalia, J.)

Yes. All details of what transpires in a home are intimate details and protected by the Fourth Amendment unless they are freely observable by the public. Using a device that is not publicly available to see details of a private home that would be undiscoverable without physically entering the home constitutes a Fourth Amendment search. This type of search is presumptively unreasonable without a warrant. Here, although there was no physical intrusion on Kyllo’s home, the thermal-imaging device was used to determine what was happening in his home. The warrantless search of Kyllo's home using the thermal-imaging device was unconstitutional. Accordingly, the judgment is reversed, and the case is remanded for a determination of whether there was sufficient evidence without the thermal imaging to support the warrant.

#### Dissent (Stevens, J.)

The use of a thermal-imaging device does not constitute a Fourth Amendment search, and therefore no warrant is needed. Members of the general public are capable of determining on their own if one home is hotter than another through the use of their ordinary senses, such as by observing where ice is melting the fastest. Furthermore, the thermal-imaging device does not constitute a search because it detects heat emanating through the side of the house, not heat still in the house. Therefore, there is no intrusion into the home, and the device merely detects information that has come out into the public domain.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

# \*\*UNITED STATES v. WHITE\*\*

#### United States Supreme Court 401 U.S. 745 (1971)

#### Rule of Law

**The Fourth Amendment right against unreasonable searches and seizures does not protect people from their misplaced expectations of trust and therefore there is no Fourth Amendment search and seizure when the person the defendant is speaking with is secretly a government agent or an informant wearing a wire and recording what is being said.**

#### Facts

White (defendant) was convicted on two charges involving illegal narcotics. At trial, over White’s objections, government agents were permitted to testify to conversations White had had with a government informant. The government agents had overheard these conversations through a wire-tap the informant had been wearing, allowing them to hear every word in real time. The court of appeals reversed the conviction holding that the testimony was inadmissible at trial.

#### Issue

Does the Fourth Amendment prohibit government agents from testifying to what they overheard over a wire-tap worn by a government informant?

#### Holding and Reasoning (White, J.)

No. The Fourth Amendment does not prohibit government agents from testifying to what they heard over a wire-tap worn by an informant. The Court has held that police can write down notes about a conversation they have with a defendant while undercover and testify to those transactions. For constitutional purposes, there is no distinction between immediately writing down these transactions and simultaneously recording or relaying the conversation to agents through electronic devices. While in *Katz v. United States*, 389 U.S. 347 (1967), the Court held that the use of a recording device on the outside of a phone booth amounts to an unconstitutional search because the user of the phone booth has a justifiable expectation that his conversation will remain private, the *Katz*decision does not alter this rule. Here, unlike in *Katz*, the defendants assume the risk when they confide in others about their illegal activities. Therefore, electronic surveillance that allows agents to listen in real time is admissible provided the agent is not otherwise violating the defendant’s reasonable expectations of privacy. Accordingly, the judgment of the court of appeals is reversed.

#### Dissent (Douglas, J.)

While electronic surveillance is merely the modern means of eavesdropping, it is an assault on privacy and therefore should be regulated by Fourth Amendment protections.

#### Dissent (Harlan, J.)

The immediate relaying of information to government agents via electronic surveillance should be protected under the Fourth Amendment and a warrant should be required. Such a police tactic is not the same as an informant recording information or telling the police what the defendant said because there is greater invasion of privacy and the risk of un-checked third-party monitoring could have a negative impact on society at large.

***White*** permits police officers to listen to a suspect’s conversations with a police informant wearing a wire.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

# Katz v. United States

#### United States Supreme Court 389 U.S. 347 (1967)

#### Rule of Law

**The Fourth Amendment prohibition against unreasonable searches and seizures of physical items extends to recordings of oral statements.**

# Hoffa v. United States

#### United States Supreme Court 385 U.S. 293 (1966)

#### Rule of Law

**The Fourth Amendment does not protect a wrongdoer’s misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.**

#### Facts

James Hoffa, et al. (defendants) were charged with attempting to bribe members of a federal jury during their trial for violations of a federal labor act (Test Fleet trial). Edward Partin, a coworker of Hoffa’s who was facing many unrelated criminal charges, began serving as a confidential informant for law enforcement to reduce his charges. Throughout the course of the Test Fleet trial, Partin frequented Hoffa’s hotel suite and was with Hoffa often. During this time, Hoffa made many statements indicating that he was attempting to bribe members of the Test Fleet trial jury. At trial, Partin testified to these statements and the prosecution introduced various reports from Partin indicating the same. The defendants argued that because Partin did not tell them that he was a government informant, it voided the consent that Hoffa had given him to enter the hotel suite. In addition, the defendants argued that Partin effectively conducted an illegal search as a government agent by listening to the defendants’ statements under false pretenses. The trial court convicted the defendants. The court of appeals affirmed. The United States Supreme Court granted certiorari.

#### Issue

Does the Fourth Amendment protect a wrongdoer’s misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it?

#### Holding and Reasoning (Stewart, J.)

No. The Fourth Amendment does not protect a wrongdoer’s misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. In such case, the wrongdoer has no legitimate interest at stake that the Fourth Amendment protects. In the case at bar, Hoffa was not relying on the security of his hotel suite—something that the Fourth Amendment protects from unreasonable search—when he made the incriminating statements. Rather, he was relying on his misplaced belief that Partin would not divulge his incriminating statements to law enforcement. The risk of speaking to a government informant is “the kind of risk we necessarily assume whenever we speak.” As a result, the lower courts properly admitted into evidence statements that the defendants made to Partin, as well as Partin’s testimony. The convictions are affirmed.

#### Dissent (Warren, C.J.)

Given Partin’s background and incentive to cooperate, the Court should not even have to reach the Fourth Amendment question. The convictions are based heavily on Partin’s testimony and Partin’s testimony came about in exchange for significant remuneration. The Court should use its supervisory powers to rectify “the affront to the quality and fairness of federal law enforcement which this case presents.”

**Key Terms:**

**Exclusionary Rule** - A rule that excludes or suppresses evidence in a criminal proceeding where that evidence was obtained in violation of an individual’s constitutional rights.

**Supervisory Power** - Ability of federal courts to administer procedural rules outside of the Constitution and established law.

**Desist v. United States**

89 S.Ct. 1048

Supreme Court of the United States

**Samuel DESIST et al., Petitioners,**

**v.**

**UNITED STATES.**

**Thomas R. KAISER, Petitioner,**

**v.**

**NEW YORK.**

Nos. 12 and 62.

March 24, 1969

## Synopsis

Dissenting opinion.

For opinions of the Court see [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I64e787649c1d11d9bc61beebb95be672&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[89 S.Ct. 1030, 1044](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1969132933&pubNum=708&originatingDoc=Id39653f89be911d993e6d35cc61aab4a&refType=RP&fi=co_pp_sp_708_1044&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_1044).

# Zurcher v. Stanford Daily

#### United States Supreme Court 463 U.S. 547 (1978)

#### Rule of Law

**It does not violate constitutional protections to issue a search warrant for the offices of a newspaper even though the object of the search could be demanded through the issuance of a subpoena duces tecum.**

#### Facts

A reporter for the Stanford Daily (plaintiff) captured photographs of a violent confrontation between police and protesters at Stanford University Hospital. The county District Attorney (defendant) obtained a warrant to search the offices of the Stanford Daily for photographic materials providing evidence relevant to the circumstances of the confrontation. Officers searched various areas of the offices, including desks and trash cans, but did not open any locked doors or containers. Some members of the newspaper staff were present during the search. The staff members did not inform police that they were viewing confidential materials during some aspects of the search. The only evidence obtained from the search was the photographs taken by the reporter on the scene. The Stanford Daily filed suit in the federal district court seeking a declaratory judgment. The district court issued a rule that would have the effect of prohibiting the issuance of a search warrant when the subject of the search is not suspected of criminal activity, except in cases in which there is probable cause to believe that a subpoena duces tecum would not be obeyed and that evidence might be destroyed. The district court also held that First Amendment considerations supported a prohibition against the issuance of a warrant to search a newspaper office in most cases. The district court decision was affirmed on appeal and the county District Attorney petitioned the United States Supreme Court for review. The Supreme Court reversed the district court’s rule restricting the issuance of a search warrant and proceeded to consider the First Amendment implications of the search.

#### Issue

Does it violate constitutional protections to issue a search warrant for the offices of a newspaper when the object of the search could be demanded through the issuance of a subpoena duces tecum?

#### Holding and Reasoning (White, J.)

No. It does not violate constitutional protections to issue a search warrant for the offices of a newspaper when the object of the search could be demanded through the issuance of a subpoena duces tecum. The district court concluded that searches of newspaper offices should be generally prohibited over concerns that the threat of a search would deter the provision of confidential information and the documentation of events by reporters due to concerns of compulsory disclosure. The district court also perceived that the threat of search would hinder prompt publication of important events and jeopardize the confidentiality of editorial decisions, which would result in self-censorship by news organizations. Fourth Amendment search and seizure requirements must be applied rigorously when the object of a search implicates First Amendment protections. The Fourth Amendment prohibits the issuance of a general warrant by imposing particularity requirements demanding a description of places to be searched and evidence expected to be discovered by a search. Issuance of a warrant that leaves it to the discretion of law enforcement to determine the permissible scope of a search amounts, for all practical purposes, to the issuance of a general warrant. The particularity requirements must be stringently observed when the object of a search may be subject to constitutional protections. Although the Constitution recognizes the significance of the tension between government and a free press, it does not prohibit the issuance of a warrant or require the imposition of any special procedures when the press is the subject of a search. Neither does the constitution require that the subject of a search be suspected of criminal activity. A properly conducted probable cause determination, when coupled with the protections of Fourth Amendment particularity requirements and the general test of reasonableness, affords adequate protection against the detrimental impacts of subjecting the press to search warrants. The evidence does not indicate any history of governmental abuse of press freedom through the issuance of search warrants. The warrant in this case meets all the requirements of constitutionality. If a probable cause determination sufficiently correlates the object of a search to a crime, there is no reason to limit the use of search warrants in preference to subpoenas. The decisions of the state courts are reversed.

#### Concurrence (Powell, J.)

Justice Stewart proposes an outright ban on searches of the press when a subpoena could be used as an alternative. The adequacy of a subpoena in any given case would be a challenging determination that would need to be addressed on a case-by-case basis. The Constitution does not require any such differentiation between the press and the general public.

#### Dissent (Stewart, J.)

The possibility of an unannounced search threatens the integrity of confidential sources. Confidentiality is critical to the function of a free and informative press. A warrant authorizes a search of broad scope, whereas a subpoena can identify with particularity the evidence demanded and enable the press organization to produce the required documentation without risk to source confidentiality. It seems inevitable that the effect of this rule will be to deter the provision of sensitive information and stifle its release to the public.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**First Amendment** - Guarantees that the government will not abridge freedoms of the press, religion, and speech; the right to peacefully assemble; and the right to petition the government to remedy grievances.

**Subpoena Duces Tecum** - A court order for the production and inspection of documents or other items of physical evidence.

**December 10, 2020**

**Chapter 3, Section 3 – Probable Cause**

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**PowerPoint Slides from Frogge:**

**WARRANT REQUIREMENT**

**All arrests warrants and search warrants may only be issued if supported by probable cause.**

**Judges decide whether probable cause exists to justify an arrest warrant or a search warrant.**

**Reasonable suspicion**

**Probable cause**

**Preponderance of the evidence**

**Clear and convincing**

**Beyond a reasonable doubt**

**PROBABLE CAUSE**

**Objective test: When the facts and circumstances justify a reasonable belief that**

**A crime has been committed by the person to be arrested; and/or**

**Evidence will be found in a particular place to be searched**

**PROBABLE CAUSE DEFINITION**

**PROBABLE:**

**(1) A crime has been committed; AND**

**(2) by the person to be arrested; OR**

**PROBABLE:**

**(1) Evidence will be found in a particular place to be searched**

**Probable Cause is a practical, nontechnical concept that balances the competing needs of the people to be free from unreasonable interference with privacy and unfounded charges of crime while at the same time, allowing the government to enforce the laws in the community’s protection.**

‘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**

**Although the reviewing court will pay substantial deference to judicial determinations of probable cause, the court must still insist that the magistrate perform his ‘neutral and detached’ function and not serve merely as a rubber stamp for the police.**

**Although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant,, the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, was ‘credible’ or his information ‘reliable.‘**

**Federal vs. State law for confronting misstatements in search warrant applications**

* **Federal: Motion to suppress if search warrant contains deliberately false statements or statements made with reckless disregard for truth**
* **Defendant has burden to make a preliminary showing before she is entitled to an evidentiary hearing**
* **If statements are deliberately false or made with reckless disregard for the truth, court should consider warrant application without the challenged statements. If application still contains probable cause, it is valid**
* **State: Differs in that if statement is deliberately false, warrant is invalid and evidence is suppressed even if statement is immaterial. If statement is made with reckless disregard for the truth, court should (just like federal, above) consider warrant application without the challenged statements. If application still contains probable cause, it is valid**

# \*\*SPINELLI v. UNITED STATES\*\*

#### United States Supreme Court 393 U.S. 410 (1969)

#### Rule of Law

**An affidavit that lacks sufficient detail to explain why an informant is reliable and how he came to his conclusions does not provide the necessary probable cause to obtain a search warrant.**

#### Facts

The FBI obtained a search warrant and uncovered evidence that was ultimately used to convict William Spinelli (defendant) of illegal gambling. The affidavit primarily rested on information from a confidential informant, and the FBI was able to corroborate some of this information through its own investigation. Spinelli challenged the constitutionality of the warrant. The district court denied Spinelli's motion, holding he did not have standing to raise a Fourth Amendment claim. The court of appeals found that Spinelli did have standing and further held that the warrant was issued without probable cause. After a rehearing en banc, the court of appeals sustained the warrant and affirmed Spinelli's conviction. The United States Supreme Court granted certiorari to consider the validity of the search and seizure.

#### Issue

Does information from an informant establish the necessary probable cause to obtain a search warrant if the affidavit fails to contain details as to why the informant is reliable or explain how he came to the conclusions he did?

#### Holding and Reasoning (Harlan, J.)

No. In *Aguilar v. Texas*, 378 U.S. 108 (1964), the Court held that a warrant application must set forth the underlying circumstances necessary for the magistrate to judge the validity of an informant’s conclusions, and it must establish that the informant is credible and the information is reliable. An affidavit that lacks sufficient detail to explain why an informant is reliable and how he came to his conclusions does not provide the necessary probable cause to obtain a search warrant. In this case, the FBI failed to show that its informant was trustworthy, that he obtained his information in a reliable way, or that his conclusions were even valid. Although the FBI did corroborate some of the informant’s information, it was unable to corroborate sufficient detail so as to arise to the level of probable cause. Therefore, the affidavit does not establish probable cause, and the judgment of the court of appeals is reversed.

#### Concurrence (White, J.)

In *Draper v. United States*, 358 U.S. 307 (1959), the Court held that partial corroboration of an informant’s statement can establish probable cause because it raises the assumption that the remaining part of the statement is also true. Therefore, under *Draper*, the affidavit would establish probable cause because the police had corroborated part of the informant’s story, and the assumption would then arise that the rest of the informant’s information was accurate, as well. However, the Court has thus far confined the *Draper* holding to its facts, and to affirm the lower court’s holding would produce an equally divided Court.

#### Dissent (Fortas, J.)

An officer's affidavit in support of a warrant is entitled to a common-sense evaluation. The affidavit here is sufficient to demonstrate probable cause for the issuance of a warrant; it discusses the relevant surveillance and includes many reliable, detailed facts. The appellate court's judgment should be affirmed.

#### Dissent (Black, J.)

The *Aguilar* decision already inappropriately expanded the scope of a magistrate's search-warrant hearing, and the Court's holding in this case extends *Aguilar* even further. The Constitution does not require the facts in support of a search warrant to be alleged with the degree of certainty and specificity the majority requires. All that is required is probable cause, and the affidavit in this case is more than sufficient to show probable cause that Spinelli was committing a crime. To require more detail would effectively mean officers must prove a suspect's actual guilt to obtain a warrant, but this is not the appropriate standard. The conviction should be affirmed.

***Spinelli*** and ***Aguilar*** were later overruled and the courts adopted the totality-of-the-circumstances approach.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Probable Cause** - A reasonable basis, amounting to more than mere suspicion, to believe that a person has committed a crime or is about to commit a crime, or that evidence relevant to a crime exists in a particular location.

**Relevant Cases**

* *Aguilar v. Texas,* A search warrant had issued upon an affidavit of police officers who swore only that they had "received reliable information from a credible person and do believe" that narcotics were being illegally stored on the described premises.
* *Nathanson v. United States,* He had a previous record of indulging in such practices.
* *Draper v. United States,* Got on a train and returned with heroin. The police got their info in a reliable way. The magistrate could reasonably infer that the information was obtained in a reliable way

The supreme court looks *to Aguilar* to analyze this case. The info must be credible and reliable. The underlying circumstances and how a person knew about the information.

This is NO LONGER THE CURRENT LAW, but the prongs are still taken into account.

The two-prong test is for a warrant that is based on hearsay.

**SPINELLI V. UNITED STATES (1969)**

**Pursuant to a search warrant, FBI conducted a search and found evidence that Spinelli travelled across state lines to conduct gambling activities. Spinelli was ultimately charged, and convicted. Spinelli challenged the search, lost, appealed, lost, appeals here.**

**Issue: Did the search warrant application contain sufficient probable cause?**

**Pursuant to a search warrant, FBI conducted a search and found evidence that Spinelli travelled across state lines to conduct gambling activities. Spinelli was ultimately charged, and convicted. Spinelli challenged the search, lost, appealed, lost, appeals here.**

**Issue: Did the search warrant application contain sufficient probable cause?**

**No: It is better than the affidavit in Aguilar, because it contains a confidential informant’s tip and police corroboration of the innocent parts, of it, but it still falls short. Aguilar required (1) basis of knowledge, and (2) veracity (reliability). A reviewing judge should first see if informant’s tip passes Aguilar. If not, then turn to the corroboration. Here, the tip is not enough. In US v. Draper, the informant, not the cops, provided lots of detail demonstrating reliability, and had been reliable in the past.**

**Concurrence: This is just like Draper. But I will vote for reversal for reasons.**

**AGUILAR-SPINELLI TEST**

**When a search warrant affidavit is based on informant hearsay, then the affidavit must include information from which the magistrate may independently determine that the hearsay speaker knows what he is talking about and he is believable.**

1. **BASIS of KNOWLEDGE – how does he know what he claims to know?**

**2. VERACITY – why should the magistrate believe what the informant said?**

**a. Credibility**

**b. Reliability**

# Aguilar v. Texas

#### United States Supreme Court 378 U.S. 108 (1964)

#### Rule of Law

**Evidence obtained pursuant to a warrant supported only by the beliefs or suspicions of an unidentified informant is not admissible in criminal proceedings.**

#### Facts

Aguilar (defendant) was arrested on a warrant issued by a Justice of the Peace. The affidavit provided by police officers in support of the warrant stated that they had received information from an unidentified informant that Aguilar possessed drugs at his residence. At trial, Aguilar objected to the introduction of evidence acquired during the search conducted pursuant to the warrant. The trial court overruled Aguilar’s objections and he was convicted of heroin possession. The state courts upheld Aguilar’s conviction and he appealed to the United States Supreme Court.

#### Issue

Is evidence obtained pursuant to a warrant supported only by the beliefs or suspicions of an unidentified informant admissible in criminal proceedings?

#### Holding and Reasoning (Goldberg, J.)

No. Evidence obtained pursuant to a warrant supported only by the beliefs or suspicions of an unidentified informant is not admissible in criminal proceedings. The Fourth Amendment demands that a warrant be issued only upon probable cause. To allow police to conduct a search without first obtaining a judicial determination of probable cause would defeat the protections guaranteed by the Fourth Amendment. When an affidavit in support of a warrant has been reviewed by a neutral magistrate, the reviewing court will afford substantial deference to the judicial determination of probable cause. Nonetheless, the affidavit must provide a substantial basis for a judge to conclude that probable cause exists. In *Nathanson v. United States* (1933), this court reviewed a warrant based upon the affiant’s sworn suspicion and belief that a suspect possessed certain items. We held that an affiant’s belief and suspicion, without more, do not provide a sufficient basis for a judge to find probable cause. In *Giordenello v. United States* (1958), we applied the same rule to the statement of probable cause supporting a criminal complaint. We held that the failure to identify the source of information relied upon as an indicator of probable cause afforded insufficient grounds to support a finding of probable cause. The affidavit in support of the warrant authorizing the police search of Aguilar’s home does not allege that the affiant had personal knowledge of facts establishing probable cause. The affidavit does not even allege that the unidentified informant had personal knowledge of any facts establishing probable cause. All that one can conclude from the affidavit is that the informant had some suspicion that Aguilar was in possession of drugs. The affidavit offered no basis for the court to assess the reliability of the facts alleged. Hearsay may be relied upon as the basis for an affidavit in support of a warrant, but the affidavit must set forth some additional information that would enable a court to assess the credibility of the hearsay allegations. The warrant authorizing the search of Aguilar’s home did not provide a sufficient basis for a finding of probable cause. Evidence obtained from the search conducted pursuant to the warrant should have been excluded from admission at trial.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Probable Cause** - A reasonable basis, amounting to more than mere suspicion, to believe that a person has committed a crime or is about to commit a crime, or that evidence relevant to a crime exists in a particular location.

**AGUILAR V. TEXAS (1964)**

**Facts: Officers got a search warrant based on their statement that they had “received reliable information from a credible person and do believe “ that narcotics were being illegally stored on the described premises.” Narcotics were found. Aguilar convicted, appealed, lost. Appeals here.**

**Issue: Was the search warrant affidavit sufficient for probable cause?**

**Reversed. Although an affidavit supporting a search warrant may be based on hearsay information and need not reflect the direct personal observations of the affiant, the magistrate must be informed of some of the underlying circumstances relied on by the person providing the information and some of the underlying circumstances from which the affiant concluded that the informant, whose identity was not disclosed, was credible or his information reliable,**

**Nathanson v. United States**

54 S.Ct. 11

Supreme Court of the United States

**NATHANSON**

**v.**

**UNITED STATES.**

No. 39.

Argued Oct. 9, 1933.Decided Nov. 6, 1933.

**Synopsis**

J. J. Nathanson was convicted of the possession of intoxicating liquor in violation of the National Prohibition Act. The conviction was affirmed by the Circuit Court of Appeals ([](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I8346bc49547811d997e0acd5cbb90d3f&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[63 F.(2d) 937),](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1933125854&pubNum=350&originatingDoc=I0e68cb339cb611d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) and the defendant brings certiorari ([289 U.S. 720, 53 S.Ct. 792, 77 L.Ed. 1472)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1933201377&pubNum=708&originatingDoc=I0e68cb339cb611d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

Judgment reversed.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

**Draper v. United States**

79 S.Ct. 329

Supreme Court of the **United** **States**

**James Alonzo DRAPER, Petitioner,**

**v.**

**UNITED STATES of America.**

No. 136.

Argued Dec. 11, 1958.Decided Jan. 26, **1959**.

**Synopsis**

Prosecution for knowingly concealing and transporting narcotic drugs in violation of federal narcotics laws. The **United** **States** District Court for the District of Colorado, [146 F.Supp. 689,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1957107471&pubNum=345&originatingDoc=Ia53d8f139aea11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) denied defendant's motion for suppression of evidence and, after trial, a judgment of conviction was entered, and defendant appealed. The Court of Appeals, [248 F.2d 295,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1957110531&pubNum=350&originatingDoc=Ia53d8f139aea11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed and defendant was granted certiorari. The Supreme Court, Mr. Justice Whittaker, held that where a government agent was given information by an informer who had proved reliable in the past, that defendant, who was unknown to agent, would alight from a certain train on either of two days, wearing certain clothing, and carrying a tan zipper bag, and would be walking fast, and carrying narcotics, and agent observed defendant who fitted the description given agent alighting from one of the named trains, agent had probable cause and reasonable grounds for believing that defendant was committing a violation of the federal laws relating to narcotic drugs, and therefore heroin discovered in search incident to lawful arrest which agent effected after so observing defendant was competent evidence.

Affirmed.

Mr. Justice Douglas dissented.

# \*\*ILLIONOIS v. GATES\*\*

#### United States Supreme Court 462 U.S. 213 (1983)

#### Rule of Law

**A warrant application satisfies the Fourth Amendment probable cause requirement so long as it establishes a substantial basis for concluding that a search will uncover evidence of wrongdoing.**

#### Facts

Police received an anonymous letter implicating Sue and Lance Gates (defendants) in an elaborate illegal drug scheme. The letter contained many details about the couple and their drug business, including how the Gateses would obtain their illegal marijuana to sell and when the next transaction would occur. Based on this information, the police department conducted its own investigation which revealed that parts of the informant’s tip were true, and only one discrepancy between what the informant said would happen and what did happen was uncovered. The police were able to secure a search warrant of the Gateses’ home and car where they found drugs, weapons and other contraband. The Illinois Supreme Court upheld the lower court’s ruling that the search was unlawful. The court held that the anonymous letter and the police detective’s affidavit outlining the police investigation did not support the necessary probable cause needed to obtain the search warrant.

#### Issue

Does a warrant application based on partially corroborated evidence from an unknown informant satisfy the probable cause requirement of the Fourth Amendment?

#### Holding and Reasoning (Rehnquist, J.)

Yes. Corroborated statements by an unknown informant can amount to probable cause. *Aguilar v. Texas*, 378 U.S. 108 (1964), and *Spinelli v. United States*, 393 U.S. 410 (1969), established a two pronged test to determine whether probable cause existed. Using this standard, the magistrate or judge must first look to the veracity or reliability of the informant, and then look to how the informant came to know the information. However, this approach is too technical, forcing judges to look at issues separately when it would be more reasonable to consider them together by applying a totality of the circumstances test. Such a test is preferable because a magistrate’s decision should be given great deference when reviewed by other courts (*Spinelli*). Furthermore, because affidavits are drafted by non-lawyers, such technical requirements as those needed by the two prong approach do not actually help magistrates in determining probable cause. Finally, if a warrant application is subject to severe scrutiny, police officers may be deterred from seeking warrants in the first place and the strict standards of the two prong test may interfere with the ability of police to protect and serve the public. Here, the totality of the circumstances adds up to probable cause and the warrant was properly issued. While the anonymous letter standing alone does not amount to probable cause, once it is coupled with the lead detective’s affidavit corroborating parts of the letter, particularly those parts predicting the Gateses’ future actions, probable cause is established. Since the informant was correct about the Gateses’ future plans, the magistrate issuing the warrant reasonably assumed the veracity of the informant in regards to the other allegations. Accordingly, the judgment of the Illinois Supreme Court is reversed.

#### Concurrence (White, J.)

Using the two pronged approach from *Aguilar* and *Spinelli*, the warrant was properly issued and the Court should not overturn its precedent in favor of a totality of the circumstances approach. The informant predicted the Gateses’ actions which were then corroborated by the police. From this it is clear that the informant is both reliable, satisfying the first prong, and that he must have obtained his information in a reliable way, satisfying the second.

#### Dissent (Brennan, J.)

The majority is wrong to replace the two pronged approach with a totality of the circumstances approach and its holding suggests that the Court is prioritizing efficiency over constitutional rights. Precedent suggests that the Court affirms findings of probable cause when it is certain that information was obtained in a reliable way by a trustworthy person. Replacing the two pronged approach takes away the structure magistrates have used to make this determination, risks limiting the magistrate’s role as an independent arbitrator, and thereby risks inaccuracy in probable cause determinations.

#### Dissent (Stevens, J.)

The warrant was issued improperly. When the warrant was issued there was no probable cause of criminal activity because the magistrate was aware that the informant had been mistaken regarding a material detail.

***Gates*** introduced a more flexible standard for probably cause based on an anonymous tip.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Probable Cause** - A reasonable basis, amounting to more than mere suspicion, to believe that a person has committed a crime or is about to commit a crime, or that evidence relevant to a crime exists in a particular location.

**Relevant cases**

* *Florida v. Harris,* the court should look at the circumstances
* *Jones v. United States,* the informant had given correct information on prior occasions.
* *Rugendorf v. United States,* there were two informants who had previously been reliable.
* *Ker v. California,* there was a previous offense and through what officers saw, legally, there was probable cause.
* *United States v. Harris,* such admissions "carry their own indicia of credibility, sufficient to find support for probable cause

The court says that the aguilar-spinelli test is too rigid and the totality of the circumstances test should be applied.

**Totality of the circumstances test:** Look at other things outside of the two prongs. There may be more strength in one prong that makes up for the other. The deficiency in one prong might make up with the strength of the other prong.

TOTALITY OF THE CIRCUMSTANCES IS THE NEW STANDARD AND THIS IS TRUE FOR TENNESSEE

**ILLINOIS V. GATES**

**Facts: Bloomingdale, Ill police received a tip via anonymous letter that a couple, including the Defendant, was selling drugs. The letter gave specific details about the travel habits and drug dealing of the couple. Police investigated and corroborated many of the details. They obtained a search warrant and found drugs and guns. Gates moved to suppress, granted. Affirmed on appeal at C of A, and by Ill Sup. Ct. State appeals here**

**Issue: Was the search warrant affidavit sufficient to support the warrant?**

**Yes, reversed The two prongs of Aguilar Spinelli should not be mechanically applied with no overlap. The reliability and informant’s basis of knowledge are relevant, but probable cause must involve a review of the “totality of the circumstances.” Thus, a deficiency in one prong may be overcome by strength in the other. Probable cause is “common sense . . . practical . . .flexible . . . fluid . . . [etc.) “**

**Concurrence: (White) This should have been upheld under Aguilar Spinelli, Aguilar Spinelli requires an informant’s veracity and basis of knowledge, which may be supplied by police corroboration. Here, the tip wasn’t enough, but the police investigation was. This is like Draper, in which the police supplied the corroboration that satisfied the two-pronged test. I’m afraid “totality of the circumstances” goes too far.”**

**Dissent: (Brennan): Spinelli was confusing, because it implied police corroboration could satisfy both prongs. White’s concurrence gets it right: police corroboration can provide missing veracity, but not basis of knowledge. Given White’s interpretation, I would keep Aguilar Spinelli.. Here, the corroboration satisfies the veracity prong, not basis of knowledge.**

**Dissent: (Stevens): Sue Gates didn’t do what the informant said. He said she would fly, but the detective said she drove. This is important, because the informant made them look more guilty. Also, the fact that there was a discrepancy makes the corroboration look less unusual. Finally, we shouldn’t rely on liars to get a warrant to bust into houses.**

# Spinelli v. United States

#### United States Supreme Court 393 U.S. 410 (1969)

#### Rule of Law

**An affidavit that lacks sufficient detail to explain why an informant is reliable and how he came to his conclusions does not provide the necessary probable cause to obtain a search warrant.**

# Florida v. Harris

#### United States Supreme Court 133 S. Ct. 1050 (2013)

#### Rule of Law

**Probable cause to search exists when the totality of the circumstances causes a reasonably cautious person to believe that contraband or evidence of a crime is present.**

#### Facts

Officer William Wheetley pulled over Clayton Harris (defendant) because Harris’s truck had an expired license plate. Wheetley noted that Harris was visibly nervous, unable to sit still, shaking, and breathing rapidly. Wheetley walked his K-9, Aldo, around the truck. Aldo was a German shepherd trained to detect narcotics. Aldo alerted at the driver-side door handle, signaling that he detected drugs. Wheetley discovered 200 loose pseudoephedrine pills, 8,000 matches, a bottle of hydrochloric acid, two containers of antifreeze, and a coffee filter full of iodine crystals, all ingredients for making methamphetamine. The State of Florida (plaintiff) charged Harris with possessing pseudoephedrine for use in manufacturing methamphetamine. Harris moved to dismiss the evidence found in his truck, alleging that Wheetley did not have probable cause to search the vehicle. The state introduced evidence regarding the training of both Wheetley and Aldo in detecting the presence of drugs. The evidence showed that they had completed significant training and specific courses regarding the detection of drugs and that Aldo performed well in training exercises. However, the state did not maintain complete records of Aldo’s performance in the field, like false positives. The trial court denied the motion to suppress, and Harris entered a no-contest plea that reserved his right to appeal the ruling. Harris appealed, and the Florida Supreme Court reversed, holding that the state must present field-performance records to establish a drug dog’s reliability. The state petitioned the United States Supreme Court for review.

#### Issue

Does probable cause to search exist when the totality of the circumstances causes a reasonably cautious person to believe that contraband or evidence of a crime is present?

#### Holding and Reasoning (Kagan, J.)

Yes. Probable cause to search exists when the totality of the circumstances causes a reasonably cautious person to believe that contraband or evidence of a crime is present. Generally, probable cause is a flexible standard that does not require a preponderance of the evidence or proof beyond a reasonable doubt. Rather, all that is required is the kind of fair probability on which reasonable and prudent people act. Probable cause should be determined based on the totality of the circumstances, rather than rigid rules and bright-line tests. In this case, the Florida Supreme Court adopted a rigid rule requiring the state to introduce evidence of a drug dog’s performance in the field in order to establish credibility. This rule is inconsistent with the probable-cause analysis. Additionally, a dog’s performance in the field is not necessarily a more reliable indicator of its ability to detect drugs. A dog’s alert may not turn up drugs, but the dog may have detected drugs that were too well hidden or present in quantities too small for the officer to locate, or the residual odor of drugs previously in the vehicle or on the driver’s person. Standard training records and certifications are controlled and should reflect whether a drug dog alerts to where drugs have been placed. Defendants may challenge training methods and assessments to contest the dog’s reliability. In other words, a probable-cause hearing based on a dog’s alert should proceed like most other hearings. Each side puts forth its best evidence and arguments, and the trial court should decide whether the totality of the circumstances supports a probable-cause finding. Here, the evidence the state offered regarding Aldo’s training and certifications was sufficient to establish Aldo’s reliability. Accordingly, the Florida Supreme Court’s decision is reversed.

**Jones v. United States (1960)**

80 S.Ct. 725

Supreme Court of the **United** **States**

**Cecil JONES, Petitioner,**

**v.**

**UNITED STATES of America.**

No. 69.

Argued Jan. 21, **1960**.Decided March 28, **1960**.

**Synopsis**

Defendant was convicted of violation of federal narcotics laws.

To review a judgment of the Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I92f702208ed511d9bc61beebb95be672&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=89d9d77422f44dd8959cd3b62df9a9d3&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[104 U.S.App.D.C. 345, 262 F.2d 234,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1958102469&pubNum=350&originatingDoc=Id4ca90b19c1d11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) which affirmed a judgment of the **United** **States** District Court for the District of Columbia, the defendant brought certiorari. The Supreme Court, Mr. Justice Frankfurter, held, inter alia, that defendant had standing to contend that entry and subsequent seizure were unlawful notwithstanding he testified that property seized was not his and that place of arrest was not his home, where to hold that defendant's failure to acknowledge interest in narcotics or premises prevented his attack upon search, would be to permit the Government to have advantage of contradictory positions as basis for conviction, since conviction flowed from defendant's possession of narcotics at time of search, yet fruits of that search, upon which conviction depended, were admitted into evidence on ground that defendant did not have possession of narcotics at that time, so that prosecution subjected defendant to penalties meted out to one in lawless possession while refusing him remedies designed for one in that situation, and that defendant's testimony on motion to suppress that he was present in apartment with permission of its owner made out a sufficient interest in the premises to establish him as a ‘person aggrieved’ by search.

Vacated and remanded.

Mr. Justice Douglas dissented in part.

**Kerr v. California**

83 S.Ct. 1623

Supreme Court of the United States

**George D. KER et al., Petitioners,**

**v.**

**STATE OF CALIFORNIA.**

No. 53.

Argued Dec. 11, 1962.Decided June 10, **1963**.

**Synopsis**

Prosecution for possession of marijuana in violation of the **California** Health and Safety Code. The Superior Court, Los Angeles County, entered judgment of conviction and denied a motion for new trial and the defendants appealed. The District Court of Appeal, Second Appellate District, [195 Cal.App.2d 246, 15 Cal.Rptr. 767,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1961109103&pubNum=227&originatingDoc=Id8e31b899c1c11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed, and the defendants brought certiorari. The Supreme Court, Mr. Justice Clark, held, inter alia, that under circumstances including showing that arresting officers had observed defendant, a person known to be trafficking in marijuana, contact a known dealer in marijuana prior to driving to defendant's apartment, and that marijuana was in plain sight in kitchen of apartment, which made it obvious to arresting officers, even before they started to search, that occupants were in process of committing felony of possession of marijuana, arrest of occupants without warrants was valid, and the evidence seized was constitutionally admissible.

Affirmed.

Mr. Justice Brennan, Mr. Chief Justice Warren, Mr. Justice Douglas and Mr. Justice Goldberg dissented in part.

**Nathanson v. United States**

54 S.Ct. 11

Supreme Court of the United States

**NATHANSON**

**v.**

**UNITED STATES.**

No. 39.

Argued Oct. 9, 1933.Decided Nov. 6, 1933.

**Synopsis**

J. J. Nathanson was convicted of the possession of intoxicating liquor in violation of the National Prohibition Act. The conviction was affirmed by the Circuit Court of Appeals ([](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I8346bc49547811d997e0acd5cbb90d3f&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[63 F.(2d) 937),](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1933125854&pubNum=350&originatingDoc=I0e68cb339cb611d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) and the defendant brings certiorari ([289 U.S. 720, 53 S.Ct. 792, 77 L.Ed. 1472)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1933201377&pubNum=708&originatingDoc=I0e68cb339cb611d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

Judgment reversed.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

# Aguilar v. Texas

#### United States Supreme Court 378 U.S. 108 (1964)

#### Rule of Law

**Evidence obtained pursuant to a warrant supported only by the beliefs or suspicions of an unidentified informant is not admissible in criminal proceedings.**

**Draper v. United States**

79 S.Ct. 329

Supreme Court of the **United** **States**

**James Alonzo DRAPER, Petitioner,**

**v.**

**UNITED STATES of America.**

No. 136.

Argued Dec. 11, 1958.Decided Jan. 26, **1959**.

**Synopsis**

Prosecution for knowingly concealing and transporting narcotic drugs in violation of federal narcotics laws. The **United** **States** District Court for the District of Colorado, [146 F.Supp. 689,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1957107471&pubNum=345&originatingDoc=Ia53d8f139aea11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) denied defendant's motion for suppression of evidence and, after trial, a judgment of conviction was entered, and defendant appealed. The Court of Appeals, [248 F.2d 295,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1957110531&pubNum=350&originatingDoc=Ia53d8f139aea11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed and defendant was granted certiorari. The Supreme Court, Mr. Justice Whittaker, held that where a government agent was given information by an informer who had proved reliable in the past, that defendant, who was unknown to agent, would alight from a certain train on either of two days, wearing certain clothing, and carrying a tan zipper bag, and would be walking fast, and carrying narcotics, and agent observed defendant who fitted the description given agent alighting from one of the named trains, agent had probable cause and reasonable grounds for believing that defendant was committing a violation of the federal laws relating to narcotic drugs, and therefore heroin discovered in search incident to lawful arrest which agent effected after so observing defendant was competent evidence.

Affirmed.

Mr. Justice Douglas dissented.

**United States v. Harris**

91 S.Ct. 2075

Supreme Court of the **United** **States**

**UNITED STATES, Petitioner,**

**v.**

**Roosevelt Hudson HARRIS.**

No. 30.

Argued March 23, **1971**.Decided June 28, **1971**.

**Synopsis**

Defendant was convicted in the **United** **States** District Court for the Eastern District of Kentucky, at London, of possession non-tax-paid liquor, and he appealed. The Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ia2335e9b8fad11d9bc61beebb95be672&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=20e7db59b74f4d6c82a6be7753dec09c&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[412 F.2d 796,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1969119166&pubNum=350&originatingDoc=I236083ec9c1e11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) reversed and certiorari was granted. Mr. Chief Justice Burger announced the Supreme Court's judgment and delivered an opinion that affidavit which recited that during past four years defendant had a reputation with affiant of being a trafficker of non-tax-paid whiskey, that during such period a constable had located a cache of whiskey in an abandoned house under defendant's control, and that an informer whom affiant found to be a prudent person told affiant that he had purchased illicit whiskey within the residence for a period of two years and within past two weeks provided a sufficient factual basis for crediting report of unnamed informant and when coupled with affiant's own knowledge afforded a basis upon which magistrate could reasonably issue a search warrant.

Reversed.

Mr. Justice Black and Mr. Justice Blackmun joined in the opinion of The Chief Justice.

Mr. Justice Stewart joined in Part I.

Mr. Justice White joined in Part III.

Mr. Justice Black and Mr. Justice Blackmun filed concurring opinions.

Mr. Justice Harlan filed a dissenting opinion in which Mr. Justice Douglas, Mr. Justice Brennan and Mr. Justice Marshall joined.

# \*\*MARYLAND v. PRINGLE\*\*

#### United States Supreme Court 540 U.S. 366 (2003)

#### Rule of Law

**The presence of drugs in a car gives rise to probable cause to arrest any occupant of the car who had knowledge about the drugs and exercised dominion and control over them.**

#### Facts

A police officer pulled a car over for speeding. Inside the car were three occupants: Partlow, the car's owner, was in the driver’s seat; Pringle (defendant) was in the front passenger seat; and Smith was in the back seat. The officer saw a roll of money in the glove compartment when Partlow opened it to get his registration. Partlow denied he had any weapons or drugs in the car and agreed to a search. The officer found $763 in the glove compartment and five baggies of cocaine between the back-seat armrest and the back seat. When all three men claimed ignorance of the drugs and money, the officer arrested all of them. Pringle later waived his *Miranda*rights and confessed that the money and drugs were his. At trial, Pringle moved to suppress the confession on the grounds that it was the fruit of an illegal arrest. The trial court denied the motion, and Pringle was convicted by a jury on charges of cocaine possession and possession with intent to distribute cocaine. Pringle was sentenced to 10 years imprisonment without parole. The Court of Special Appeals of Maryland upheld the conviction, but a divided Court of Appeals of Maryland reversed. The court held that finding the drugs in the car did not give the officer probable cause to arrest Pringle because he had no indication that Pringle had knowledge, dominion, or control of the drugs. The United States Supreme Court granted certiorari.

#### Issue

Does the presence of drugs in a car give rise to probable cause to arrest any occupant of the car who had knowledge about the drugs and exercised dominion and control over them?

#### Holding and Reasoning (Rehnquist, C.J.)

Yes. The probable-cause requirement attempts to balance the individual's right to be free from interference against the ability of the government to enforce the law. The definition of probable cause is imprecise and dependent upon the totality of the circumstances, but probable cause generally requires that the arresting officer had a reasonable basis for believing in the guilt of a particular person. In this case, once the officer found the five baggies of cocaine, the officer had probable cause to think a felony had been committed. Further, it was reasonable to assume that any of the occupants of the car knew about and exercised dominion and control over the drugs. There were only three men in the car, the officer found $763 in the glove compartment in front of where Pringle was sitting, the cocaine was accessible to all three men, and all of the men claimed ignorance about the drugs and money. These facts are distinguishable from a guilt-by-association case such as *Ybarra v. Illinois*, 444 U.S. 85 (1979). In *Ybarra*, police officers conducted a search of a tavern pursuant to a warrant and patted down tavern patrons including Ybarra. During the patdown of Ybarra, officers found heroin. The *Ybarra* Court ultimately held that Ybarra's presence during the execution of the search warrant was merely coincidental, and the fact that Ybarra happened to be in proximity to other people independently suspected of wrongdoing did not give rise to sufficiently individualized probable cause to search Ybarra's person. Here, by contrast, Pringle and the other two men were in a small car. The driver and passengers in a car are often engaged in the same enterprise with the same incentive to conceal any wrongdoing, and the presence of the cash and drugs in the vehicle here indicated likely drug dealing, which all of the car's occupants tried to conceal. Accordingly, there was sufficient probable cause to arrest Pringle, and his arrest did not violate the Fourth and Fourteenth Amendments. The judgment is reversed, and the case is remanded.

***Maryland v. Pringle* –** The amount of evidence required to establish probably cause is much lower than the amount of evidence required to support a criminal conviction.

**Key Terms:**

**Probable Cause** - A reasonable basis, amounting to more than mere suspicion, to believe that a person has committed a crime or is about to commit a crime, or that evidence relevant to a crime exists in a particular location.

**Totality of the Circumstances Test** - A standard that considers all of the relevant facts and circumstances, rather than a few specific factors.

**Relevant cases**

* *Ybarra v. Illinois,* police officers obtained a warrant to search a tavern and its bartender for evidence of possession of a controlled substance. This was held unlawful. Being in the bar was not enough for probable cause. There must be suspicion as to the one person.
* *United States v. Di Re,* 3 people in a vehicle selling counterfeit gasoline rations. Without a warrant, the officer arrest them, but does not search the car.
* *District of Columbia v. Wesby,* there was probable cause to enter this house because of the condition of the house, the conduct going on, and the reaction to the officers.
* *Wyoming v. Houghton,* common interest in concealing the fruits or the evidence of their wrong-doing

**Constructive possession:** the power and the desire to exercise dominion and control

**Dominion and control**

**Search Warrants**

***MARYLAND V. PRINGLE* (2003)**

**Facts: Baltimore police stopped a car for speeding. The Defendant was the front seat passenger. Police ultimately asked for permission to search the car, and the driver gave it. Police found cash and drugs in the car. Police Officer asked occupants who possessed the drugs, and said if no one confessed, all were being arrested. No one confessed and all were arrested. Pringle confessed the next day, says friends didn’t know. Later, Pringle moved to suppress, was denied. Jury convicted. He appealed, Maryland Court of Appeals reversed. State appeals here.**

**Issue: Was the evidence sufficient to arrest Pringle?**

**Yes, it is entirely reasonable to assume they all had “constructive possession.” They were all in the car and the drugs and money was in the glove box. The Defendant’s reliance on Ybarra and Di Re is misplaced, because, c’mon, it’s a car. They’re small, and this seems like drug dealing. Sometimes drug dealers travel in groups. In cars. Or something.**

**United States v. Di Re**

68 S.Ct. 222

Supreme Court of the **United** **States**

**UNITED STATES**

**v.**

**DI RE.**

No. 61.

ArguedOct. 17, 1947.Decided Jan. 5, **1948**.

**Synopsis**

Michael **Di** **Re** was convicted on a charge of knowingly possessing counterfeit gasoline ration coupons in violation of the Second War Powers Act of 1942, s 301, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=NAA2879F0B5BF11D8983DF34406B5929B&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=c6a7e6a90c644812bb8a6dae535ec9f3&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[50 U.S.C.A.Appendix, s 633](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000866&cite=50APPUSCAS633&originatingDoc=Ic1d2310c9c1e11d991d0cc6b54f12d4d&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). Judgment was reversed by the Circuit Court of Appeals, [159 F.2d 818,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1947117213&pubNum=350&originatingDoc=Ic1d2310c9c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and the **United** **States** brings certiorari.

Affirmed.

Mr. Chief Justice VINSON and Mr. Justice BLACK dissenting.

On Writ of Certiorari to the **United** **States** Circuit Court of Appeals for the Second Circuit.

***UNITED STATES V. DI RE* (1948)**

**Facts: Informant told federal investigator that he would receive counterfeit gasoline ration coupons from Buttitta at a certain place. Investigator went to the place and saw the informant in the back seat of the car holding the coupons, Buttitta in the driver’s seat and Di Re in the passenger seat. Informant said that Buttitta gave him the coupons. All arrested. Di Re challenges arrest.**

**Issue: Must probable cause be specific to the individual?**

**Ruling: Yes, any assumption that all were involved disappeared where the informant did not implicate Di Re. There was simply no evidence he was involved.**

# Ybarra v. Illinois

#### United States Supreme Court 444 U.S. 85 (1979)

#### Rule of Law

**A person’s mere proximity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person.**

#### Facts

Law enforcement obtained a search warrant for a bar and its bartender. In executing the search warrant, law enforcement searched every patron that happened to be in the bar at that time, including Ybarra (defendant). Upon searching Ybarra, an officer found heroin in his pocket. No bar patrons, including Ybarra, were mentioned in the search warrant. The trial court found the heroin admissible. The United States Supreme Court granted certiorari.

#### Issue

Does a person’s mere proximity to others independently suspected of criminal activity give rise to probable cause to search that person?

#### Holding and Reasoning (Stewart, J.)

No. A person’s mere proximity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. Here, there was no probable cause to search Ybarra. The search warrant was for the bar and the bartender. It did not include any generic bar patrons, let alone Ybarra specifically. The police conducting the search did not recognize Ybarra and did not have any reason to believe that he was involved in the bartender’s drug activities. In addition, although the prosecution claims that the search of Ybarra was conducted pursuant to *Terry v. Ohio*, 392 U.S. 1 (1969), the officer provided no evidence that he believed that Ybarra was armed and dangerous. As a result of the foregoing, the search of Ybarra violated his Fourth Amendment rights. The lower courts are reversed.

#### Dissent (Rehnquist, J.)

This case presents a different set of circumstances than gave rise to the *Terry* suspicion standard. First, in this case, a magistrate determined that a search of the bar was necessary. Moreover, an officer executing a search warrant is inherently in more danger than an officer encountering someone on the street.

**Key Terms:**

**Probable Cause** - A reasonable basis, amounting to more than mere suspicion, to believe that a person has committed a crime or is about to commit a crime, or that evidence relevant to a crime exists in a particular location.

**YBARRA V. ILLINOIS (1979)**

**Facts: Police officers obtained a search warrant for a bar and the bartender. While serving the search warrant, police searched all the patrons, too. They found Ybarra’s heroin in a cigarette pack in his pocket.**

**Does probable cause require individualized suspicion?**

**Ruling: Yes, mere propinquity to others individually suspected of criminal activity does not give rise to probable cause. There must be individualized suspicion.**

**District of Columbia v. Wesby**

138 S.Ct. 577

Supreme Court of the United States

**DISTRICT OF COLUMBIA, et al., Petitioners**

**v.**

**Theodore WESBY, et al.**

No. 15–1485.

Argued Oct. 4, 2017.Decided Jan. 22, 2018.

**Synopsis**

**Background:** Arrestees brought action under § 1983 and District of Columbia law against police officers and the District of Columbia, asserting claims for false arrest and negligent supervision. The United States District Court for the District of Columbia, [Robert L. Wilkins](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0326533301&originatingDoc=I73719576ff7111e794bae40cad3637b1&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I73719576ff7111e794bae40cad3637b1), J., [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I24f6949141f811e1bd928e1973ff4e60&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[841 F.Supp.2d 20](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2026885103&pubNum=0004637&originatingDoc=I73719576ff7111e794bae40cad3637b1&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), granted partial summary judgment to arrestees, and defendants appealed. The United States Court of Appeals for the District of Columbia Circuit, [Pillard](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0483877601&originatingDoc=I73719576ff7111e794bae40cad3637b1&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I73719576ff7111e794bae40cad3637b1), Circuit Judge, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=If298190632c411e4a795ac035416da91&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[765 F.3d 13](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2034251717&pubNum=0000506&originatingDoc=I73719576ff7111e794bae40cad3637b1&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), affirmed, and rehearing en banc was denied, [816 F.3d 96](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2038251174&pubNum=0000506&originatingDoc=I73719576ff7111e794bae40cad3637b1&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)). Certiorari was granted.

**Holdings:** The Supreme Court, Justice [Thomas](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I73719576ff7111e794bae40cad3637b1&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I73719576ff7111e794bae40cad3637b1), held that:

[1](https://1.next.westlaw.com/Document/I73719576ff7111e794bae40cad3637b1/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_anchor_F92043651334) officers had probable cause to make arrests for unlawful entry, and

[2](https://1.next.westlaw.com/Document/I73719576ff7111e794bae40cad3637b1/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_anchor_F342043651334) even if officers lacked probable cause, they had qualified immunity from arrestees' § 1983 false arrest claims.

Reversed and remanded.

Justice [Sotomayor](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I73719576ff7111e794bae40cad3637b1&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I73719576ff7111e794bae40cad3637b1) filed opinion concurring in part and concurring in the judgment.

Justice [Ginsburg](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I73719576ff7111e794bae40cad3637b1&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I73719576ff7111e794bae40cad3637b1) filed opinion concurring in the judgment in part.

**Procedural Posture(s):** On Appeal; Petition for Writ of Certiorari; Motion for Summary Judgment.

# Wyoming v. Houghton

#### United States Supreme Court 526 U.S. 295 (1999)

#### Rule of Law

**Where an officer has probable cause to search a car, he may search containers that belong to a passenger in the car if the containers could possibly contain the object of the search.**

**State v. Tuttle, 515 S.W.3d 282 (Tenn. 2017)**

**State v. Tuttle**

515 S.W.3d 282

Supreme Court of Tennessee,

AT NASHVILLE.

**STATE of Tennessee**

**v.**

**Jerry Lewis TUTTLE**

October 5, 2016 SessionFiled April 5, 2017

**Synopsis**

**Background:** Defendant was convicted in the Circuit Court, Maury County, Nos. 21695, 22091, [Stella L. Hargrove](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0279931901&originatingDoc=I43e0b1001aae11e7815ea6969ee18a03&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I43e0b1001aae11e7815ea6969ee18a03), J., of simple possession of cocaine, possession of marijuana with intent to sell, conspiracy to possess marijuana in an amount over 300 pounds with intent to sell or deliver, conspiracy to commit money laundering, money laundering, and possession of a firearm with the intent to go armed during the commission of a dangerous felony. The Circuit Court also ordered forfeiture of cash and other personal property found during search of defendant's residence. Defendant appealed. The Court of Criminal Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ib18042d0565511e59310dee353d566e2&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Search))[2015 WL 5251990](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2037135416&pubNum=0000999&originatingDoc=I43e0b1001aae11e7815ea6969ee18a03&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), reversed trial court's ruling on defendant's motion to suppress, vacated the conspiracy convictions, and affirmed the forfeiture of cash. State filed application for permission to appeal, which was granted.

**Holdings:** The Supreme Court, [Clark](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183827601&originatingDoc=I43e0b1001aae11e7815ea6969ee18a03&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I43e0b1001aae11e7815ea6969ee18a03), J., held that:

[1](https://1.next.westlaw.com/Document/I43e0b1001aae11e7815ea6969ee18a03/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)#co_anchor_F12041391309) totality-of-the-circumstances analysis is used for determining whether an affidavit establishes probable cause for issuance of a warrant; overruling [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I04222ff0e7b011d99439b076ef9ec4de&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Search))[*State v. Jacumin*, 778 S.W.2d 430](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989152291&pubNum=0000713&originatingDoc=I43e0b1001aae11e7815ea6969ee18a03&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search));

[2](https://1.next.westlaw.com/Document/I43e0b1001aae11e7815ea6969ee18a03/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)#co_anchor_F322041391309) paragraph in search warrant affidavit, although admittedly imprecise and perhaps resulting from negligence, did not constitute a false statement so as to invalidate search warrant;

[3](https://1.next.westlaw.com/Document/I43e0b1001aae11e7815ea6969ee18a03/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)#co_anchor_F362041391309) trooper's search warrant affidavit provided the magistrate with a substantial basis for concluding from the totality of the circumstances that a search warrant would uncover evidence of wrongdoing;

[4](https://1.next.westlaw.com/Document/I43e0b1001aae11e7815ea6969ee18a03/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)#co_anchor_F442041391309) evidence was sufficient to support the defendant's conviction of conspiracy to possess over 300 pounds of marijuana with the intent to sell it;

[5](https://1.next.westlaw.com/Document/I43e0b1001aae11e7815ea6969ee18a03/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)#co_anchor_F452041391309) evidence was sufficient to support the defendant's conviction for conspiracy to commit money laundering;

[6](https://1.next.westlaw.com/Document/I43e0b1001aae11e7815ea6969ee18a03/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)#co_anchor_F462041391309) State satisfied its burden of proving that money was subject to forfeiture; and

[7](https://1.next.westlaw.com/Document/I43e0b1001aae11e7815ea6969ee18a03/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)#co_anchor_F542041391309) State complied with the procedural and substantive requirements of forfeiture statute.

Affirmed in part and reversed in part.

**Facts:** Davis was stopped and got asked where he got the drugs. He turned into an informant. That info eventually gets back to the father. The police corroborated to a certain extent. There was a huge investigation with wire taps.

**Issue:** Did the affidavit have sufficient probable cause?

**Rule:** Yes, there was lots of corroboration.

**Analysis:** They used the totality of the circumstances test to establish probable cause. The supreme Court said that we need to not use the aguilar-spinelli test. They rely on *Gates.*

**Conclusion:** There is no difference now between federal and state court for Tennessee. There used to be Jacumin and now there is Tuttle.

Based upon the foregoing analyses, we reverse the portion of the Court of Criminal Appeals's decision invalidating the search warrant and vacating the defendant's convictions but affirm, on different grounds, the intermediate appellate court's decision upholding the forfeiture order. We otherwise affirm and reinstate in all respects the judgment of the trial court. Costs of this appeal are taxed to the defendant, Jerry Lewis Tuttle, for which execution may issue if necessary. Affirmed in part and reversed in part.

* You can use the two prongs as a part of of the totality of the circumstances test

***STATE V. TUTTLE* (TN 2017)**

**Facts: Davis became an informant for THP, and said that the Defendant’s son was receiving shipments of drugs. Police corroborated that Davis was involved in drug dealing and that other drug trafficking organizations were delivering drugs to someone with the defendant’s son’s nickname (“Red” or “El Rojo.”) This led to further investigation which led to a search of the defendant’s property. Trial court denied suppression, CCA reversed.**

**Did the search warrant affidavit provide sufficient probable cause?**

**Yes. Tennessee has relied on Jacumin, which was essentially the Aguilar Spinelli test. This Court decided Jacumin based on the state constitution 6 years after Gates, but found the totality test too lenient. Now we have lots of experience with Gates and think it makes a lot more sense. Common sense, etc. Jacumin is overturned. Now Tennessee is consistent with federal courts, uses the totality of the circumstances approach. Here, there was probable cause.**

**Chapter 3, section 4 Search Warrants**

**Chapter 3. Section 4 Search Warrants**

**The 4th and 14th Amendment**

**The warrant requirement:** To arrest or search someone or their house, you have to have a warrant and they have to be supported by probable cause (decided by a judge or sometimes a magistrate)

**Probable Cause: "**Something more" an objective test- when the facts and circumstances justify a reasonable belief, balances the needs of both sides

**PowerPoint Slides From Frogge**

**Search Warrant Requirements**

1. **Warrant must be signed by neutral detached magistrate or judge who has jurisdiction in the county where search will be**
2. **Warrant must be sworn to by affiant and establish probable cause**
3. **Must particularly describe the placed to be searched and the person or thing to be seized**
4. **TN allows warrant to be executed day or night but federal law requires day unless excepted by court**
5. **Knock and announce before entry required unless warrant allows “no knock” entry. Police must wait reasonable time. Reasonableness depends on on length of time it should take to answer and nature of contraband sought and whether it could be destroyed.**
6. **Search limited to place where named items could be**
7. **Police may seize item if obvious contraband (“if incriminating nature is immediately apparent” discovered by police in a place where police are allowed to be. May not seize if they need to investigate further to see if its contraband.**
8. **Tennessee law requires service within 5 days. Federal law requires a reasonable time**

# \*\*MARYLAND v. GARRISON\*\*

#### United States Supreme Court 480 U.S. 79 (1987)

#### Rule of Law

**A search made under an otherwise valid warrant containing a mistake does not violate the Fourth Amendment if the police acted reasonably.**

#### Facts

Police in Baltimore asked for a warrant authorizing the search of Lawrence McWebb’s apartment. After speaking with an informant, visually surveying the exterior of the building, and questioning the utility company, officers reasonably determined that there was only one apartment on the third floor of the building. There were actually two apartments on the third floor, one belonging to McWebb and one to Garrison (defendant). Probable cause was shown, and the warrant authorized the search of “the premises known as 2036 Park Avenue third floor apartment.” Officers used McWebb’s key to open the door on the third floor and came to an entryway with open doors on either side. Police began searching Garrison’s apartment and found drugs and drug paraphernalia before realizing there were two apartments. The search was then stopped. Based on the evidence discovered before the search was stopped, Garrison was convicted under the Maryland Controlled Substances Act after his motion to suppress the evidence was denied. The three lower courts in Maryland determined that the warrant was valid at the time it was issued. The state supreme court reversed, holding that the motion should have been granted. The United States Supreme Court granted certiorari.

#### Issue

Does a search made pursuant to a warrant containing a mistake violate the Fourth Amendment prohibition of unreasonable searches and seizures?

#### Holding and Reasoning (Stevens, J.)

No. The Fourth Amendment requires warrants to specifically describe the person or property that is subject to search or seizure. The Framers crafted this rule to prohibit government intrusions caused by exploratory or general searches. A warrant’s legitimacy must be assessed in light of the information reasonably available to the officers and the judge at the time of issuance. Finding evidence of a crime will not save an invalid warrant, and discovering a mistake after a warrant is issued will not nullify a lawful warrant. Since the officers in this case acted reasonably and did not know of the mistake, the warrant was valid at the time of issuance. Nevertheless, assessing whether Garrison’s constitutional rights were violated requires determining whether the officers’ mistaken search was “objectively understandable and reasonable.” In this case, the mistake was reasonable and understandable. The officers reasonably believed there was only one apartment on the third floor, conducted the search reasonably, and stopped the search when the mistake was realized. There was no violation of the Fourth Amendment, and Maryland’s high court is reversed.

#### Dissent (Blackmun, J.)

The warrant authorized the search of only McWebb’s apartment, and the officers unlawfully expanded the search to Garrison’s apartment. There were no exigent circumstances justifying the expansion. Case law has consistently required that the description of a single apartment in a warrant must be sufficiently specific to avoid searching other units in the same building. Thus, the search of Garrison’s apartment was warrantless.

The Court in ***Maryland v. Garrison*** ruled that there’s some latitude for honest mistakes, as long as the officer’s actions are reasonable.

**Relevant Cases**

* *Groh v. Ramiraz,* the affiant himself prepared the warrant and it was not in good faith.
* *Leon,* The good-faith exception if reasonable.
* *Wilson v. Layne,* The police were lawfully present

***MARYLAND V. GARRISON* (1987)**

**Facts: Baltimore police obtained and executed a search warrant for one McWebb and his apartment, identified as the third floor of an address. When they went to serve the warrant, there were two apartments on the third floor. They searched the wrong apartment, which belonged to Garrison, and found drugs. He moved to suppress, was denied, and appealed to the MD Court of Appeals, which reversed. Maryland appeals here.**

**Issue 1: Was the affidavit specific enough? Issue 2: Was the warrant served correctly?**

**Issue 1: Yes, because it was the best information the police had at the time. There is no allegation that they knew there were two apartments. We shouldn’t second guess (!)**

**Issue 2: No worries, because it was an honest mistake. Also, they quit as soon as they realized it was the wrong place.**

**Dissent: The warrant was invalid, because IT WAS THE WRONG GUY. All the police had to do was investigate. Not a reasonable mistake. Especially regarding service. There were two apartments!!!**

**MARYLAND V. GARRISON**

**Purpose of the particularity requirement:**

**To prevent general searches**

# Groh v. Ramirez

#### United States Supreme Court 540 U.S. 551 (2004)

#### Rule of Law

**A warrant that does not specifically describe the person or property to be searched or seized or incorporate supporting documents with those descriptions is invalid under the Fourth Amendment.**

#### Facts

In February 1997, Alcohol, Tobacco and Firearms (ATF) Agent Jeff Groh (defendant) received information that Joseph Ramirez and his family (plaintiffs) had a large number of weapons on their ranch in Montana. Groh presented an application for a warrant to search the ranch for various weapons and documents and a comprehensive supporting affidavit to a Magistrate. The Magistrate signed the warrant form Groh had prepared. The warrant form did not name and describe the items to be seized or incorporate the supporting documents by reference. The supporting documents were not provided to the plaintiffs with the warrant, but Groh did describe the items to be seized to the plaintiffs orally. The plaintiffs filed civil suit against Groh and other police officers, but the district court found no Fourth Amendment violation and granted summary judgment to the defendants. The Court of Appeals held that the warrant was invalid because it did not describe the place to be searched and items to be seized.

#### Issue

Does a general warrant violate the Fourth Amendment if the supporting documents contained the required specificity?

#### Holding and Reasoning (Stevens, J.)

Yes. A valid warrant under the Fourth Amendment must name and describe the person or property to be searched or seized with particularity. A warrant that fails to do this is invalid on its face. This defect can only be cured by the specificity of the application and supporting documents if those documents are properly incorporated by reference into the warrant and provided to the person whose property is subject to search. Requiring this specificity protects individuals from general searches and ensures that they are informed of the legitimacy and scope of the search. Groh argued that the search did not violate the Fourth Amendment even though the warrant was invalid because there was sufficient probable cause, the search was conducted reasonably, and he described the property to be seized orally to the plaintiffs. Groh’s argument fails. The warrant does not specify the property to be seized at all and is therefore invalid. The officers could easily have acted outside the scope of the search authorized by the Magistrate, and the plaintiffs would have had no way of knowing. This search must be treated as a warrantless search in violation of the Fourth Amendment. Groh’s search of the plaintiffs’ ranch without a valid warrant was unconstitutional.

#### Dissent (Thomas, J.)

This was a search carried out under a defective warrant, not a warrantless search. The plaintiffs received the protections of the Warrant Clause when a neutral Magistrate reviewed the evidence and found probable cause, and the search was carried out reasonably. Therefore, the search was constitutional.

**Key Terms:**

**Warrant Clause** - A portion of the Fourth Amendment to the United States Constitution, incorporated in the Bill of Rights, that prohibits the search of private property in the absence of a warrant supported by sworn statements and a finding of probable cause.

**Incorporation by Reference** - The doctrine by which documents separate from a contract, but referred to therein, are incorporated into the contract and read together with the contract as an integrated document.

**Facial** - Obvious or on the surface of something.

# United States v. Leon

#### United States Supreme Court 468 U.S. 897 (1984)

#### Rule of Law

**Evidence obtained in reasonable, good-faith reliance on a facially valid search warrant is not subject to the Fourth Amendment's exclusionary rule, even if the warrant is later deemed defective.**

***Leon*** created **the good-faith exception to the exclusionary rule**. The exception was later expanded to cover other circumstances.

**Hill v. California**

91 S.Ct. 1106

Supreme Court of the United States

**Archie William HILL, Jr., Petitioner,**

**v.**

**State of CALIFORNIA.**

No. 51.

Argued Jan. 19, 1970.Reargued Oct. 21, 1970.Decided April 5, 1971.

## Synopsis

Defendant was convicted, in the Superior Court, Los Angeles County, of robbery and kidnapping for purpose of robbery. The [California Supreme Court, 69 Cal.2d 550, 72 Cal.Rptr. 641, 446 P.2d 521,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1968130456&pubNum=661&originatingDoc=Id8dd01019c1c11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed. On certiorari granted, the Supreme Court, Mr. Justice White, held that when police, who had probable cause to arrest defendant, arrested another in defendant's apartment, reasonably believing arrestee to be defendant, police were entitled to do what law would have allowed them to do if arrestee had in fact been defendant, that is, to conduct search incident to arrest and seize evidence of crime which police had probable cause to believe that defendant had committed; and arrest and subsequent search were reasonable and valid under Fourth Amendment.

Affirmed.

Mr. Justice Black concurred in the result.

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

Mr. Justice Harlan filed a concurring and dissenting opinion, in which Mr. Justice Marshall joined.

# Wilson v. Lane

#### Supreme Court of Georgia 614 S.E.2d 88 (2005)

#### Rule of Law

**To prove lack of testamentary capacity, the party challenging the will must present proof showing that the testator’s condition prevented her from having a decided and rational desire as to the disposition of her property.**

#### Facts

Katherine Lane (propounder), as executrix of Jewel Jones Greer’s will, offered her will for probate. The will distributed the estate in equal shares to 16 blood relatives and Lane, Greer’s caregiver before her death. Floyd Wilson (caveator) filed a caveat claiming that Greer lacked testamentary capacity. At a trial in Jasper County Superior Court, the evidence included testimony that Greer was eccentric and feeble, but still of sound mind at the time of executing her will. The evidence also showed, however, that Greer may have been suffering from Alzheimer’s or senile dementia and that a petition for guardianship of Greer was filed by Lane a few months after the will was executed. The petition claimed that Greer was no longer capable of managing her own affairs and her incapacity was caused by Alzheimer’s-related dementia. An expert, whose report indicated that Greer may have early to mid-stage dementia related to Alzheimer’s disease, admitted that he had only reviewed her medical records and had not actually examined her. Testimony also indicated that the petition was filed by Lane in response to concerns raised by the Department of Family and Children’s Services, to enable Greer to continue living in her own home. The jury found that Greer lacked testamentary capacity, but the trial court reversed the jury’s verdict and granted Lane’s motion for judgment notwithstanding the verdict.

#### Issue

May a party challenge a testator’s testamentary capacity by showing that the testator may have been suffering from Alzheimer’s disease at the time of executing the will?

#### Holding and Reasoning (Fletcher, C.J.)

No. Showing that the testator may have been suffering from Alzheimer’s, without showing how the disease prevented the testator from having a decided and rational desire regarding the disposition of her property, is insufficient to set aside a will for lack of testamentary capacity. Here, evidence showed that Greer had difficulty bathing and dressing herself, was irrationally afraid of flooding in her home, and called the fire department reporting a fire that did not exist. However, these eccentricities do not show that she lacked testamentary capacity. Nor does the fact that a guardianship petition filed just a few months after Greer executed her will included an expert report stating that she may be suffering from early to mid-stage Alzheimer’s disease necessarily show a lack of testamentary capacity. The expert’s testimony was equivocal and he admitted not having examined her. Lastly, Greer’s ability to continue living alone in her home does not reflect an inability to form a rational and direct desire as to the disposition of her estate. The trial court order granting the motion for judgment notwithstanding the verdict is affirmed.

#### Dissent (Carley, J.)

The majority is correct that the evidence could support a finding that Greer did not lack testamentary capacity. However, since the jury found that she did lack testamentary capacity, the evidence when viewed strongly in favor of the jury’s verdict, could also support a finding that Greer lacked testamentary capacity. Where the evidence is conflicting, the decision should go to the jury. Therefore, since the jury’s verdict was supported by the evidence, the court’s grant of the judgment notwithstanding the verdict was in error and should not be affirmed.

**Key Terms:**

**Testamentary Capacity** - The ability of a person executing a will to understand the nature of their actions in executing the will, the nature and contents of their estate, the natural objects of their bounty, and how these factors affect the distribution of their estate.

**Executor/Executrix** - A person responsible for managing the estate and carrying out the instructions set out by the testator in his or her will, including probating the will and distributing the estate assets according to the terms of the will.

# \*\*RICHARDS v. WISCONSIN\*\*

#### United States Supreme Court 520 U.S. 385 (1997)

#### Rule of Law

**The Fourth Amendment’s reasonableness requirement incorporates the common law rule that police entering a home must knock and announce their identity and purpose before attempting forcible entry, unless exigent circumstances exist and to do so would undermine law enforcement interest.**

#### Facts

The police obtained a search warrant to search Richards’s (defendant) hotel room for drugs. When the police went to the hotel to execute the warrant, they hid their true identity, with one officer identifying himself as the maintenance man. However, when Richards cracked the door open with the chain still on, he could tell it was the police so the police resorted to kicking down the door to gain entry. Once inside, they found cash, cocaine, and Richards as he was trying to escape out a window. On account of the police failing to knock and announce their presence, Richards moved to have the evidence found in the hotel suppressed. The trial court denied the motion. The state supreme court affirmed the decision and held that when executing a search warrant in a felony drug case, the police need never knock and announce their presence because such investigations frequently involve dangerous situations and the possibility that evidence can quickly and easily be destroyed.

#### Issue

Is it permissible to have a per se rule that police need never knock and announce their presence when executing a search warrant for a felony drug investigation since exigent circumstances are frequently present?

#### Holding and Reasoning (Stevens, J.)

No. While the general rule is that the police must knock and announce their presence before a warrant can be executed, whether or not this rule should in fact be followed in a specific instance must be determined on a case-by-case basis at the time the warrant is being executed. The state supreme court’s blanket rule exempting the police from such a determination is misguided because it makes assumptions about the culture of a specific category of criminal behavior. While the assumption that felony drug investigations often involve violence and the potential for evidence to be destroyed, this is not always the case and therefore the blanket exclusion is based on an overgeneralization. Furthermore, creating a per-se rule based on the culture of a certain type of criminal activity is a dangerous precedent to set since such reasoning can easily be applied to other categories of criminal behavior. If this happens, the knock and announce rule of the Fourth Amendment’s reasonableness requirement would become meaningless. Therefore, the knock and announce requirement, coupled with the exigent circumstances exception, is the proper rule to balance people’s Fourth Amendment rights with the interest of law enforcement, and the per-se exclusion is therefore unconstitutional. This being said, the Court agrees with the judgment of the state supreme court. The Court holds that under the circumstances, the officers acted reasonably by choosing not to knock and announce their presence. Once Richards knew who they were, the police reasonably assumed they needed to act quickly to successfully execute the warrant. Accordingly, the judgment is affirmed.

#### *Hudson v. Michigan* altered *Richards* and held that the 4th Amendment’s exclusionary rule doesn’t apply to a violation of the knock and announce rule.

**Key Terms:**

#### Fourth Amendment - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Per Se Rule/Exception** - A rule that is applied uniformly without consideration of the specific situation or circumstance.

**Relevant cases**

* *United States v. Banks,* There ought to be sufficient time for the occupant to answer the door, but this varies by situation

* *Maryland v. Buie,* the point to make when the reasonableness of a no-knock entry is challenged

What did the police tell the judge to obtain the warrant?

#### RICHARDS V. WISCONSIN (1997)

#### Facts: Police obtained information that the Defendant, along with others, was dealing drugs from a Madison, WI hotel room. They applied for a “no knock” warrant, and were denied. They were granted a regular search warrant, however. When police arrived to serve the warrant, one of them dressed as a maintenance man and knocked on the door. The Defendant cracked the door open in response, and slammed it shut trying to jump out the window. Police arrested him and found drugs Richards moved to suppress based on the police violating the knock and announce rule. Trial Court denied the motion. WI Supreme Court affirmed, delineating a “drug dealer” exception to the knock and announce rule. Richards appeals here.

#### Issue: Did the Trial Court err in denying the suppression motion where the police did not properly knock and announce?

#### Ruling: No, but we reject Wisconsin’s blanket exception to the knock and announce rule. There are exceptions, for example, where there is indicia of dangerousness or loss of evidence, but that is a case-by-case analysis. All drug dealers aren’t dangerous, and this exception could apply to everybody. But, here we think it was reasonable to do away with the requirement, because it was reasonable to think Richards might destroy evidence based on his behavior.

# Wilson v. Arkansas

#### United States Supreme Court 514 U.S. 927 (1995)

#### Rule of Law

**The knock and announce rule is part of the reasonableness test required to assess whether a search was valid under the Fourth Amendment.**

# United States v. Banks

#### United States Supreme Court 540 U.S. 31 (2003)

#### Rule of Law

**Exigent circumstances exist for forced entry after enough time has passed to make it reasonable to suspect imminent loss of evidence.**

# Maryland v. Buie

#### United States Supreme Court 494 U.S. 325 (1990)

#### Rule of Law

**Incident to an arrest, the police may conduct a protective sweep of a premises based on reasonable suspicion that other people who pose a threat are in the building, provided the search is limited to those areas where a person may be hiding.**

#### Facts

The police obtained an arrest warrant for Buie for an armed robbery of a restaurant and executed the warrant at Buie’s home. Upon entering the home, the officers spread out to find Buie. One officer proceeded to check the basement and, with his gun drawn, shouted down the basement stairs for anyone down there to come out. Eventually, Buie emerged and he was arrested. Another officer then went into the basement to ensure no one else was present who could pose a threat to the police. In the basement, and in plain view, the officer noticed a red running suit that matched the description of what the thief was wearing when the restaurant was robbed. At trial, Buie’s request to suppress the running suit was denied.

#### Issue

Incident to a lawful arrest, may the police conduct a warrantless search of a premises when they have reasonable suspicion to believe that other people who may pose a threat could be hiding in the home?

#### Holding and Reasoning (White, J.)

Yes. Incident to a lawful arrest, a protective sweep of a premises is permitted provided it is supported by reasonable suspicion justified by articulable facts that others may be hiding in the building. The protective sweep is limited to areas where people could be hiding; and it lasts no longer than necessary to dispel the reasonable suspicion. However, incident to a lawful arrest, and without probable cause or even reasonable suspicion, the police may search areas of the premises immediately adjoining the place of arrest where someone posing a risk to the police could be hiding. While the unwarranted search of a home is generally unreasonable under the Fourth Amendment, the balancing test applied in *Terry v. Ohio*, 392 U.S. 1(1968), is applicable here. In that case, it was held that the police may conduct a cursory search for weapons when they stop a citizen on the street, provided there is reasonable suspicion to believe that the person is armed. In *Terry*, the officer had to ensure that the man he stopped on the street was not armed, and here the officer must ensure that there is no one else in the house who may attack him. Like in *Terry*, the concern about officer safety outweighs the subject’s privacy interest and justifies a warrantless search. This holding is consistent with *Chimel v. California*, 395 U.S. 752 (1969). *Chimel* held that the police may search the area in the immediate control of an arrestee where he may access a weapon or destroy evidence. Similarly, a protective sweep is a limited search of potential hiding places. A more extensive search is permissible only when there is reasonable suspicion based on articulable facts. Therefore, the case is remanded.

#### Concurrence (Stevens, J.)

The Court’s holding applies only to protective sweeps, not evidentiary searches. When the officer chose to enter the basement and not simply peer into the basement to ensure there was no one down there who may have posed a threat, he may have crossed the line from conducting a proper protective sweep to conducting an unconstitutional search of the basement. This issue should be resolved by the state courts and therefore the decision to remand the case is appropriate.

#### Dissent (Brennan, J.)

The Court is wrong to extend the *Terry* doctrine to protective sweeps of an arrestee’s home because such an intrusion is far more akin to a “top-to-bottom” search than it is to a limited pat-down for weapons. The Court is wrong to assume that a protective sweep of the home is minimally intrusive because it is limited in scope and timing. A protective sweep such as that now permitted by the Court allows officers to look into every room, closet, car, etc. It allows them to observe all paperwork and other items that are not safely placed in small containers. Because the Fourth Amendment is principally concerned with protecting people’s privacy interests in their home, the police must have probable cause before they conduct such an intrusive search as that now permitted by the Court based only on reasonable suspicion.

**Key Terms:**

**Fourth Amendment -** An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

# Terry v. Ohio

#### United States Supreme Court 392 U.S. 1 (1968)

#### Rule of Law

**When an officer observes unusual conduct that reasonably leads him to assume that criminal activity is afoot and that the people he is interacting with are armed, the police officer may conduct a limited search for weapons.**

# *Terry* was the first time the Court permitted a warrantless search for less than probable cause.

#### Facts

An experienced police officer observed two men outside a store. Several times, the men walked up to the store window, peered inside, and then walked away. The officer found this behavior suspicious and suspected the men of planning a robbery of the store. At trial, the officer also testified that he thought the men may be armed. The officer approached the men and identified himself as the police. When the men merely mumbled answers in response to his inquiries, the officer grabbed Terry (defendant), spun him around, and patted down his outer clothing to determine whether Terry was armed. The officer discovered a gun in Terry’s coat pocket. The officer then conducted the same type of pat down of the other man and discovered a gun on him as well. Both men were charged with carrying a concealed weapon and Terry was convicted.

#### Issue

Absent probable cause, may a police officer detain a person on the street and conduct a limited search for weapons?

#### Holding and Reasoning (Warren, C.J.)

Yes. When an officer observes suspicious conduct that reasonably leads him to believe that a crime is occurring or about to occur, the officer may identify himself as a police officer and make an initial inquiry. If after this the officer still believes a threat to himself or others exists, the officer may conduct a limited search for weapons. When a police officer stops someone on the street, that person is “seized” because he is not free to simply walk away, and Fourth Amendment protections apply. Similarly, a pat-down of someone’s outer clothes constitutes a Fourth Amendment search. The Fourth Amendment prohibits unreasonable searches and seizures. Therefore, the issue to be decided here is whether the police action was reasonable. This involves asking whether the stop itself was reasonable and also whether the scope of the search is reasonable in light of the circumstances that warranted the temporary seizure in the first place. The officer must be able to articulate those facts that led him to intrude on a person’s Fourth Amendment rights. To determine reasonableness, the government’s interests of effective law enforcement and officer safety must be weighed against Terry’s Fourth Amendment right to privacy. If the stop and search is deemed to be unreasonable, the evidence obtained cannot be used at trial pursuant to the exclusionary rule. However, the exclusionary rule is aimed at preventing police misconduct and the rule is therefore limited in situations where other concerns, such as police safety, trump such an evidentiary concern. Therefore, a police officer’s interest in his own safety and the safety of others outweighs an individual’s Fourth Amendment rights when an officer lawfully stops a citizen on the street, and the officer may conduct a search for weapons if he reasonably believes, based on specific facts, that the person is armed. In this case, the officer acted reasonably. Based on their behavior, it was reasonable for the officer to assume the two men were planning a robbery. The government’s interest in law enforcement trumps any minimal invasion of privacy the two men may have experienced when the officer approached them to talk. Furthermore, the officer’s pat-down was reasonable because his concerns were not abated by what the two men had to say; it was reasonable to assume that two men planning a robbery would be armed; the pat-down was limited to a search for weapons; and, most importantly, the officer’s interest in his own safety outweighed the privacy interest of the two men. The judgment is affirmed.

#### Concurrence (Harlan, J.)

If an officer reasonably stops a citizen on the street, to ensure his own safety, the officer may immediately search the citizen and need not first question him.

#### Concurrence (White, J.)

A citizen who is stopped on the street by an officer need not answer the officer’s questions. The refusal to answer, while maybe heightening the officer’s suspicions, is alone no basis for arrest.

#### Dissent (Douglas, J.)

A magistrate needs probable cause before he may issue a warrant. Therefore, today’s holding, that police may conduct a search and seizure based only on reasonable suspicion, gives police greater authority than a judge.

**Key Terms:**

**Fourth Amendment -** An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

# United States v. Ramirez

#### United States Court of Appeals for the Ninth Circuit 480 F.2d 76 (1973)

#### Rule of Law

**A defendant may be sentenced under a repealed statute for acts committed prior to the repeal of a law.**

#### Facts

Ramirez (defendant) and Ballan (defendant) and 16 others were charged with conspiracy to import, receive, conceal, and transport marijuana in violation of 21 U.S.C. § 176a. The acts were alleged to have been committed during the time period of March 1970 to November 1970. Defendants were found guilty and sentenced on June 20, 1972. Ramirez received a sentence of seven years in prison and a $15,000 fine and Ballan received a sentence of five years in prison and a fine of $5,000. The sentences were imposed under § 176a, which was repealed May 1, 1971, by the Comprehensive Drug Abuse Prevention and Control Act of 1970. Ramirez and Ballan appealed.

#### Issue

May a defendant be sentenced under a repealed statute for acts committed prior to the repeal of a law?

#### Holding and Reasoning (Per curiam)

Yes. Ramirez and Ballan (collectively, the defendants) first argue that the government cannot initiate a prosecution after the effective date of repeal for acts that occurred prior to the effective date. In *United States v. Cummings*, 468 F.2d 274 (9th Cir.1972), the alleged criminal acts took place before the repeal of the statute in question and the indictment was returned after the law’s repeal. There, the court noted that the prosecutions were saved by the general saving statute found in 1 U.S.C. § 109, and the special savings clauses of the statute. Congress did not intend to grant amnesty to the unapprehended as of May 1, 1971, while continuing interdiction and punishment for basically the same conduct for violations occurring after May 1, 1971. Defendants next argue that they cannot be punished under the repealed provisions, but must be punished under the new penalty provisions. In *Bradley v. United States*, 410 U.S. 605 (1973), the U.S. Supreme Court held that “sentencing is part of prosecution.” Here, if the acts were committed prior to the repeal of the law on May 1, 1971, then sentencing should be imposed upon Appellants under the old law. Finally, Ramirez claims that sentencing under the penalties of the repealed act amounts to cruel and unusual punishment in violation of the Eighth Amendment. In *United States v. Fithian*, 452 F.2d 505 (9th Cir.1971), the court noted that sentencing under a repealed provision “was the only course available.” Further 1 U.S.C. § 109 provides that repeal “shall not have the effect to release or extinguish any penalty…” and remains in force to sustain “the enforcement of such penalty.” The sentence imposed upon Ramirez was below the maximum sentence allowed and thus does not violate the Eighth Amendment. The judgment of the district court is affirmed.

#### Dissent (Hufstedler, J.)

The majority incorrectly interprets *Bradley* to justify imposition of a sentence after the relevant law, § 176a, has been repealed. The keystone of the *Bradley* rationale is its construction of the word “prosecutions” as “clearly imports a beginning and an end.” The “beginning” of a prosecution as *Bradley* held, is the return of an indictment. The “end” is the conclusion of sentencing. The indictments against Defendants were returned after § 176a had been repealed. *Bradley* means that any prosecution initiated before repeal of the statute carries with it the old § 176a penalty. Conversely, any prosecution under § 176a begun after repeal of the section for the substantive offense committed before repeal carries with it the penalties of the successor statute. The judgments of conviction should be vacated.

**Tenn. R. Crim. P. 41**

Tenn. R. Crim. P., Rule 41

**Rule 41. Search and Seizure**

[Currentness](https://1.next.westlaw.com/Document/N1BB7CDB003A511DCA094A3249C637898/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.Document)&userEnteredCitation=Tenn.+R.+Crim.+P.+41#co_anchor_I694E8440E12E11EAB9E2CD0ACABD5002)

**(a) Authority to Issue Warrant.** A magistrate with jurisdiction in the county where the property sought is located may issue a search warrant authorized by this rule. The district attorney general, assistant district attorney general, criminal investigator, or any other law-enforcement officer may request a search warrant.

**(b) Persons or Property Subject to Seizure by Warrant.** A magistrate may issue a warrant under this rule to search for and seize any of the following:

(1) evidence of a crime;

(2) contraband, the fruits of crime, or items otherwise criminally possessed;

(3) property designed or intended for use, or that has been used in a crime;

(4) a person whose arrest is supported by probable cause; or

(5) a person who is unlawfully restrained.

**(c) Issuance and Content of Warrant.**

(1) Issuance. A warrant shall issue only on an affidavit or affidavits that are sworn before the magistrate and establish the grounds for issuing the warrant.

(2) Requesting a Warrant by Electronic Means. A magistrate may issue a warrant based on information communicated by telephone or other reliable electronic means. The proposed warrant, the signed affidavit, and accompanying documents may be transmitted by electronic facsimile transmission (fax) or by electronic transfer with electronic signatures to the magistrate, who may act upon the transmitted documents as if they were originals. If the warrant is being sought by electronic means rather than face-to-face, the warrant affidavit shall be sworn to or affirmed by administration of the oath by audio-visual means by the magistrate, and the examination of the affiant by the magistrate shall also be by audio-visual means: provided, the warrant affidavit shall be in writing and received by the magistrate prior to the administration of the oath and examination of the affiant. The affidavit with electronic signature received by the magistrate and the warrant approved by the magistrate, signed with electronic signature, shall be deemed originals. The magistrate shall facilitate the filing of the original warrant with the clerk of the court and shall take reasonable steps to prevent tampering with the warrant. The issuing magistrate shall retain a copy of the warrant as part of his or her official records. The issuing magistrate shall issue a copy of the warrant, with electronic signatures, to the affiant. This section does not alter the requirement that the affidavit be submitted to the magistrate in writing regardless of the means of transmission.

(3) Content. If the magistrate is satisfied that there is probable cause to believe that grounds for the application exist, the magistrate shall issue a warrant as follows:

(A) The warrant shall, as the case may be, identify the property or place to be searched, or name or describe the person to be searched; the warrant also shall name or describe the property or person to be seized.

(B) The search warrant shall command the law enforcement officer to search promptly the person or place named and to seize the specified property or person.

(C) The search warrant shall be directed to and served by:

(i) the sheriff or any deputy sheriff of the county where the warrant is issued; or

(ii) any constable or any other law enforcement officer with authority in the county.

(D) The magistrate shall endorse on the search warrant the hour, date, and name of the officer to whom the warrant was delivered for execution.

(4) Hearsay. The magistrate may base a finding of probable cause on hearsay evidence in whole or in part.

**(d) Copies and Record of Warrant.** The magistrate shall prepare an original and two exact copies of each search warrant. The magistrate shall keep one copy as a part of his or her official records. The other copy shall be left with the person or persons on whom the search warrant is served. The exact copy of the search warrant and the endorsement are admissible evidence.

**(e) Procedures to Execute Warrant.**

(1) Who May Execute. The search warrant may only be executed by the law enforcement officer, or one of them, to whom it is directed. Other persons may aid such officer at the officer's request, but the officer must be present and participate in the execution.

(2) Authority for Forcible Entry. If, after notice of his or her authority and purpose, a law enforcement officer is not granted admittance, or in the absence of anyone with authority to grant admittance, the peace officer with a search warrant may break open any door or window of a building or vehicle, or any part thereof, described to be searched in the warrant to the extent that it is reasonably necessary to execute the warrant and does not unnecessarily damage the property.

(3) Timely Execution. The warrant must be executed within five days after its date.

(4) Leaving Copy of Warrant and Receipt. The officer executing the warrant shall:

(A) give to the person from whom or from whose premises the property was taken a copy of the warrant and a receipt for the property; or

(B) shall leave the copy and receipt at a place from which the property was taken.

**(f) Procedures After Execution of Warrant.**

(1) Return and Inventory. The officer executing the warrant shall promptly make a return, accompanied by a written inventory of any property taken. Upon request, the magistrate shall cause to be delivered a copy of the return and the inventory to the person from whom or from whose premises the property was taken and to the applicant for the warrant.

(2) Documents to Court Clerk. Unless the property is directed to be restored under these rules, the magistrate shall transmit the executed original warrant with the officer's return and inventory to the clerk of the court having jurisdiction of the alleged offense in respect to which the search warrant was issued.

**(g) Motion for Return or Suppression of Property.** A person aggrieved by an unlawful or invalid search or seizure may move the court pursuant to [Rule 12(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1008875&cite=TNRRCRPR12&originatingDoc=N1BB7CDB003A511DCA094A3249C637898&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) to suppress any evidence obtained in the unlawful search or seizure. If property was unlawfully seized, the aggrieved person may move for the return of the property. The motion to suppress and/or the motion to return property unlawfully seized, may be granted, under applicable substantive law and except as to the return of contraband, if the evidence in support of the motion shows that:

(1) the search or seizure was made illegally without a search warrant or illegally with an invalid search warrant, or in any other way in violation of the constitutional protection against unreasonable searches and seizures;

(2) a search warrant was relied on, but the search warrant or supporting affidavit is legally insufficient on its face and hence invalid;

(3) the search warrant relied on was issued on evidence consisting in material part of willful or reckless misrepresentations of the applicant to the issuing magistrate, resulting in a fraudulent procurement;

(4) the search warrant does not describe the property seized, and the seized property is not of such a character as to be subject to lawful seizure without a warrant;

(5) the magistrate did not:

(A) make an original and two copies of the search warrant; or

(B) did not endorse on the warrant the date and time of issuance and the name of the officer to whom the warrant was issued; or

(6) the serving officer--where possible--did not leave a copy of the warrant with the person or persons on whom the search warrant was served.

**(h) Nonwaiver of Objection by Testimony of Defendant as to Illegally Obtained Evidence.** A defendant does not waive the right to object to the admissibility of evidence if:

(1) inadmissible evidence obtained by an illegal search or seizure is erroneously introduced against the defendant; and

(2) the defendant subsequently testifies as to the same evidence but gives it an innocent or mitigating cast as to the charge and denies the charge.

## Credits

[Amended effective August 22, 1984; amended January 18, 2006, effective July 1, 2006; amended January 2, 2015, effective July 1, 2015; January 8, 2018, effective July 1, 2018.]

<**Research Note**>

<See Raybin, Tennessee Practice, volumes 9-11, for a comprehensive treatment of criminal practice and procedure.>

## Editors' Notes

**ADVISORY COMMISSION COMMENTS**

Rule 41(b) is intended to conform to [Rule 41 of the Federal Rules of Criminal Procedure](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000598&cite=USFRCRPR41&originatingDoc=N1BB7CDB003A511DCA094A3249C637898&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). Search warrants have traditionally been issued for the seizure of physical items. The Rule now allows for a search warrant for persons. For example, a search warrant is now available to search for a person who is kidnaped under circumstances where exigent circumstances might not justify a warrantless entry. The amendment also allows for a search warrant to effect an arrest where required by the decision in [Steagald v. United States, 451 U.S. 204 (1981)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981117282&pubNum=0000780&originatingDoc=N1BB7CDB003A511DCA094A3249C637898&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)). The commission does not intend to suggest under what circumstances a search warrant is required to effect an arrest, but rather permits judicial authorization for a search warrant where required.

Property ordered suppressed or otherwise excluded from admission into evidence by any general sessions court or court exercising that jurisdiction shall not be returned to any owner or claimant over the objection of the district attorney general or his or her representative. The state must be free to pursue the prosecution to the next level, without being stripped of its evidence. The motion under subdivision (g) is meant to apply only to courts of record of general criminal trial jurisdiction such as Circuit and Criminal Courts.

Under subdivision (g)(1) the commission intended to say explicitly that the violation of any constitutional provision, such as a Fifth Amendment right, which results by operation of law in violation of the Fourth Amendment protection against unreasonable searches and seizures may be raised.

The provision of subdivision (h) is designed to change the rule of [Lester v. State, 216 Tenn. 615, 393 S.W.2d 288 (1975)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1965128674&pubNum=0000713&originatingDoc=N1BB7CDB003A511DCA094A3249C637898&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), which often caused a defendant to waive one right by exercising another. Note that the provision applies only when the testifying defendant denies the charge.

**ADVISORY COMMISSION COMMENT [2015]**

Subdivision (c) was amended by adding a new paragraph (2) (and renumbering what are now paragraphs (3) and (4)). New paragraph (c)(2) allows a search warrant to be obtained without requiring the affiant and the issuing magistrate to be in each other's physical presence during the application/issuance process. The amendment to the rule does not alter the requirement that the affidavit be submitted to the magistrate in writing regardless of the means of transmission.

**ADVISORY COMMISSION COMMENT [2018]**

The 2018 amendment removes the word “shall” and inserts “may” in the section of the rule regarding the exclusion of evidence, and makes Rule 41 more consistent with recent statutory changes, see 2011 Tenn. Pub. Acts, ch. 252 codified at [Tenn. Code Ann. § 40-6-108](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS40-6-108&originatingDoc=N1BB7CDB003A511DCA094A3249C637898&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), and recent case law, see[State v. Reynolds, 504 S.W.3d 283, 313 (Tenn. 2016)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2040238721&pubNum=0004644&originatingDoc=N1BB7CDB003A511DCA094A3249C637898&refType=RP&fi=co_pp_sp_4644_313&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_4644_313) (recognizing a good-faith exception to the judicially created exclusionary rule, which permits the introduction of evidence obtained “when the law enforcement officers' action is in objectively reasonable good faith reliance on binding appellate precedent that specifically authorizes a particular police practice” [italics added]); see also[State v. Tuttle, 515 S.W.3d 282, 308 (Tenn. 2017)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2041391309&pubNum=0004644&originatingDoc=N1BB7CDB003A511DCA094A3249C637898&refType=RP&fi=co_pp_sp_4644_308&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_sp_4644_308) (negligent mistakes in wording of search warrant insufficient to invalidate search warrant). In Reynolds, the Tennessee Supreme Court also clarified that Rule 41, a procedural rule, does not provide greater protection than applicable substantive law on the exclusionary rule and its exceptions. The amendment makes clear that this procedural rule does not take precedence over applicable substantive law related to the exclusionary rule and its exceptions.

**TCA 40-6-101 through 108**

T. C. A. § 40-6-101

**§ 40-6-101. Definitions**

[Currentness](https://1.next.westlaw.com/Document/N49EBC6C0CCE411DB8F04FB3E68C8F4C5/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.Search)&userEnteredCitation=tca+40-6-101#co_anchor_I9B3310F01F9711EB8358F9CDD67CFA07)

A search warrant is an order in writing in the name of the state, signed by a magistrate, directed to the sheriff, any constable, or any peace officer of the county, commanding the sheriff, constable or peace officer to search for personal property, and bring it before the magistrate.

T. C. A. § 40-6-102

**§ 40-6-102. Grounds**

[Currentness](https://1.next.westlaw.com/Document/N4A457F80CCE411DB8F04FB3E68C8F4C5/View/FullText.html?originationContext=previousnextsection&contextData=(sc.UserEnteredCitation)&transitionType=StatuteNavigator&needToInjectTerms=False#co_anchor_IC48D76201F9711EB8358F9CDD67CFA07)

A search warrant may be issued on any one (1) of the following grounds:

(1) Where the property was stolen or embezzled;

(2) Where the property was used as the means of committing a felony;

(3) Where the property is in the possession of any person with the intent to use it as a means of committing a public offense, or in the possession of another to whom the person may have delivered it, for the purpose of concealing it, or preventing its discovery; and

(4) Any other ground provided by law.

**Tenn. Code Ann. Section 40-6-102**: **GROUNDS A search warrant may be issued on any one (1) of the following grounds:**

* **(1) Where the property was stolen or embezzled;**
* **(2) Where the property was used as the means of committing a felony;**
* **(3) Where the property is in the possession of any person with the intent to use it as a means of committing a public offense, or in the possession of another to whom the person may have delivered it, for the purpose of concealing it, or preventing its discovery; and**
* **(4) Any other ground provided by law.**

T. C. A. § 40-6-103

**§ 40-6-103. Probable cause and affidavit**

[Currentness](https://1.next.westlaw.com/Document/N4ABB99E0CCE411DB8F04FB3E68C8F4C5/View/FullText.html?originationContext=previousnextsection&contextData=(sc.Document)&transitionType=StatuteNavigator&needToInjectTerms=False#co_anchor_ICDBDC1A01F9711EB8358F9CDD67CFA07)

A search warrant can only be issued on probable cause, supported by affidavit, naming or describing the person, and particularly describing the property, and the place to be searched.

**Tenn. Code Ann. Section 40-6-103** **PROBABLE CAUSE AND AFFIDAVIT: A search warrant can only be issued on probable cause, supported by affidavit, naming or describing the person, and particularly describing the property, and the place to be searched**

T. C. A. § 40-6-104

**§ 40-6-104. Complainants and witnesses; examination**

[Currentness](https://1.next.westlaw.com/Document/N4BBEB200CCE411DB8F04FB3E68C8F4C5/View/FullText.html?originationContext=previousnextsection&contextData=(sc.Document)&transitionType=StatuteNavigator&needToInjectTerms=False#co_anchor_I1F7439601F9911EB8358F9CDD67CFA07)

The magistrate, before issuing the warrant, shall examine on oath the complainant and any witness the complainant may produce, and take their affidavits in writing, and cause them to be subscribed by the persons making the affidavits. The affidavits must set forth facts tending to establish the grounds of the application, or probable cause for believing the grounds exist.

**Tenn. Code Ann. Section 40-6-104**: **DEFINITIONS A search warrant is an order in writing in the name of the state, signed by a magistrate, directed to the sheriff, any constable, or any peace officer of the county, commanding the sheriff, constable or peace officer to search for personal property, and bring it before the magistrate.**

**Tenn. Code Ann. Section 40-6-104**: **COMPLAINTS AND WITNESSES; EXAMINATION The magistrate, before issuing the warrant, shall examine on oath the complainant and any witness the complainant may produce, and take their affidavits in writing, and cause them to be subscribed by the persons making the affidavits. The affidavits must set forth facts tending to establish the grounds of the application, or probable cause for believing the grounds exist**

T. C. A. § 40-6-105

**§ 40-6-105. Issuance**

[Currentness](https://1.next.westlaw.com/Document/N4C1E5E30CCE411DB8F04FB3E68C8F4C5/View/FullText.html?originationContext=previousnextsection&contextData=(sc.Document)&transitionType=StatuteNavigator&needToInjectTerms=False#co_anchor_ICD2B5AC01F9911EB8358F9CDD67CFA07)

The magistrate, if satisfied of the existence of the grounds of the application, or that there is probable ground to believe their existence, shall issue a search warrant signed by the magistrate, directed to the sheriff, any constable or any peace officer, commanding the sheriff, constable or peace officer immediately to search the person or place named for the property specified, and to bring it before the magistrate.

**Tenn. Code Ann. Section 40-6-105**: **ISSUANCE The magistrate, if satisfied of the existence of the grounds of the application, or that there is probable ground to believe their existence, shall issue a search warrant signed by the magistrate, directed to the sheriff, any constable or any peace officer, commanding the sheriff, constable or peace officer immediately to search the person or place named for the property specified, and to bring it before the magistrate.**

T. C. A. § 40-6-106

**§ 40-6-106. Form**

[Currentness](https://1.next.westlaw.com/Document/N4CBE6EC0CCE411DB8F04FB3E68C8F4C5/View/FullText.html?originationContext=previousnextsection&contextData=(sc.Document)&transitionType=StatuteNavigator&needToInjectTerms=False#co_anchor_IB4D494A01F9911EB8358F9CDD67CFA07)

The warrant may be substantially in the following form:

State of Tennessee,

County of \_\_\_\_\_\_\_\_\_\_.

To the sheriff or any constable of the county:

Proof by affidavit having been made before me by A. B., that (stating the particular grounds of the application; or, if the affidavits are not positive, “that there is probable cause for believing that,” stating the particular grounds of the application): You are therefore hereby commanded to make immediate search on the person of C. D. (or “in the house of E. F.,” or “in the house situated,” describing it, or any other place to be searched, with reasonable particularity, as the case may be), for the following property (describing it with reasonable particularity); and if you find the same, or any part thereof, to bring it forthwith before me at (stating the place).

This \_\_\_\_\_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_, 20\_\_\_. L. M., Magistrate

**Tenn. Code Ann. Section 40-6-106** **FORM: The warrant may be substantially in the following form:**

* **State of Tennessee,**
* **County of \_\_\_\_\_\_\_\_\_\_.**
* **To the sheriff or any constable of the county:**
* **Proof by affidavit having been made before me by A. B., that (stating the particular grounds of the application; or, if the affidavits are not positive, “that there is probable cause for believing that,” stating the particular grounds of the application): You are therefore hereby commanded to make immediate search on the person of C. D. (or “in the house of E. F.,” or “in the house situated,” describing it, or any other place to be searched, with reasonable particularity, as the case may be), for the following property (describing it with reasonable particularity); and if you find the same, or any part thereof, to bring it forthwith before me at (stating the place).**
* **This \_\_\_\_\_\_\_\_\_\_ day of \_\_\_\_\_\_\_\_\_\_, 20\_\_\_. L. M., Magistrate**

T. C. A. § 40-6-107

**§ 40-6-107. Execution and return**

[Currentness](https://1.next.westlaw.com/Document/N4D3377B0CCE411DB8F04FB3E68C8F4C5/View/FullText.html?originationContext=previousnextsection&contextData=(sc.Document)&transitionType=StatuteNavigator&needToInjectTerms=False#co_anchor_IAA872B401F9711EB8358F9CDD67CFA07)

(a) A search warrant shall be executed and returned to the magistrate by whom it was issued within five (5) days after its date, after which time, unless executed, it is void.

(b) All search warrants in this state may be executed either in the daytime or in the nighttime.

**Effective: July 1, 2011**

T. C. A. § 40-6-108

**§ 40-6-108. Evidence seized through good faith mistake or technical violation**

[Currentness](https://1.next.westlaw.com/Document/NFDB90CA0C7A111E094A8DCB1E309278A/View/FullText.html?originationContext=previousnextsection&contextData=(sc.Document)&transitionType=StatuteNavigator&needToInjectTerms=False#co_anchor_IFA3804701F9711EB8358F9CDD67CFA07)

(a) Notwithstanding any law to the contrary, any evidence that is seized as a result of executing a search warrant issued pursuant to this part or pursuant to [Tennessee Rules of Criminal Procedure Rule 41](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1008875&cite=TNRRCRPR41&originatingDoc=NFDB90CA0C7A111E094A8DCB1E309278A&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Document)) that is otherwise admissible in a criminal proceeding and not in violation of the constitution of the United States or Tennessee shall not be suppressed as a result of any violation of this part or any violation of [Tennessee Rules of Criminal Procedure Rule 41](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1008875&cite=TNRRCRPR41&originatingDoc=NFDB90CA0C7A111E094A8DCB1E309278A&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Document)) if the court determines that such violation was a result of a good faith mistake or technical violation made by a law enforcement officer, court official, or the issuing magistrate as defined in subsection (c).

(b) This section does not limit or prohibit the enforcement of any appropriate civil remedy in actions pursuant to other provisions of law against any individual or government entity found to have conducted an unreasonable search or seizure; provided, however, that unless otherwise provided by federal law or the constitution of Tennessee, if any evidence is seized as a result of a good faith mistake or technical violation, as defined in subsection (c), the individual or government entity shall not be civilly liable.

(c) As used in this section, unless the context otherwise requires, “good faith mistake or technical violation” means:

(1) An unintentional clerical error or clerical omission made by a law enforcement officer, court official or issuing magistrate in the form, preparation, issuance, filing and handling of copies, or return and inventory of a search warrant;

(2) When the officer to whom the warrant is delivered for execution is not present during the execution but an officer with law enforcement authority over the premises does otherwise execute the search warrant;

(3) A reasonable reliance on a statute that is subsequently ruled unconstitutional; or controlling court precedent that is overruled after the issuance of a search warrant, unless the court overruling the precedent orders the new precedent to be applied retroactively.

**Franks v. Delaware, 98 S.Ct. 2674 (1978)**

# Franks v. Delaware

#### United States Supreme Court 438 U.S. 154 (1978)

#### Rule of Law

**A search warrant must be voided and any evidence obtained by the warrant excluded from admission at trial when a defendant shows that an affidavit in support of the warrant contains an intentional or reckless false statement and when the affidavit does not support a finding of probable cause in the absence of the false statement.**

#### Facts

Franks (defendant) was charged with assault and made a statement to a police officer that led to him coming under suspicion for a second assault. An affidavit in support of a warrant to search Franks’ apartment contained a statement that a police officer had personally contacted Franks’ employers and that the employers had described his typical clothing. Franks filed a motion to suppress the evidence obtained through the warrant and requested that he be allowed to call for testimony his employers and the officer who issued the affidavit in support of the warrant. The prosecution argued that state statute limited court review to the sufficiency of the affidavit and afforded no right for the defendant to question the veracity of the affidavit. The trial court sustained the prosecution’s argument and the state supreme court affirmed on appeal. Franks petitioned the United States Supreme Court for review.

#### Issue

Must a search warrant be voided and any evidence obtained by the warrant excluded from admission at trial when a defendant shows that an affidavit in support of the warrant contains an intentional or reckless false statement and when the affidavit does not support a finding of probable cause in the absence of the false statement?

#### Holding and Reasoning (Blackmun, J.)

Yes. A search warrant must be voided and any evidence obtained by the warrant excluded from admission at trial when a defendant shows that an affidavit in support of the warrant contains an intentional or reckless false statement and when the affidavit does not support a finding of probable cause in the absence of the false statement. The Warrant Clause of the Fourth Amendment requires warrants to issue only upon a finding of probable cause supported by oath or affirmation. This requirement does not mean that every allegation of fact set forth in an affidavit must be correct, but it does require that the affiant actually believe the allegations to be correct. The state argues that applying the exclusionary rule to deter false swearing in affidavits is not justified for the same reasons that we have declined to apply the exclusionary rule in other cases. The exclusionary rule is not a personal constitutional right and it will not be applied when its deterrent effect upon unlawful police conduct is outweighed by the public interest in a fair determination of guilt or innocence. The state also notes that the truthfulness of allegations in an affidavit will often be beyond the control of the affiant, as they may come from hearsay or anonymous informants. These are important considerations, but they do not justify an outright ban against challenges to the veracity of an affidavit. Denying a challenge under any circumstances would render the oath or affirmation requirement of the Warrant Clause meaningless. The *ex parte*nature of a warrant application deprives the defendant of any adversarial proceedings to challenge the validity of a warrant and necessarily involves a less vigorous factual inquiry. A defendant’s right to be free from arrest under an invalid warrant is not likely to be vindicated by district attorneys prosecuting offending police officers for perjury. Our holding does not diminish the significance of the *ex parte*determination of probable cause, because it is limited only to cases in which an affiant has made a false statement intentionally or with reckless disregard for the truth. A veracity hearing would be conducted outside a jury, so there is no risk that it will confuse determinations of guilt or innocence. An affidavit in support of a warrant is presumed to be truthful. A defendant wishing to challenge an affidavit must make a substantial preliminary showing of a reckless or intentional false statement. No hearing will be required if an affidavit continues to sustain a finding of probable cause after false statements are removed. Only when the false statements are essential to support probable cause will a hearing be necessary. The establishment of a procedure for resolving challenges to the veracity of affidavits is a matter for the state to determine. We remand this case to the state for further proceedings in accordance with this opinion.

**Facts:** The police obtained a warrant while lying. They said that interviews took place when they didn't.

**Issue:** what to do when the police officers lie to obtain a warrant?

**Rule:** The trial denied the motion to suppress. Both courts affirmed. It was the function of the magistrate to determine to reliability of the information. The Supreme Court said that yes you can challenge false statements of a police officer. It was challenged through the 4th amendment. They said you need proof. If you prove the lie, then the reviewing court has to remove the information and decide if there is still probable cause.

***Franks v. Delaware* (1978)**

**Facts: Police charged Franks with rape after finding evidence (clothes and a knife) at his apartment pursuant to a search warrant. Franks moved to suppress, and offered to prove the police officer lied in the search warrant affidavit. The trial court sustained the State's objection to the witnesses and denied the motion to suppress. Franks convicted. The Delaware Supreme Court affirmed**

**Issue: Can a defendant challenge an officer’s sworn statement in a search warrant affidavit? How?**

**Where the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment, as incorporated in the Fourteenth Amendment, requires that a hearing be held at the defendant's request. The trial court here therefore erred in refusing to examine the adequacy of petitioner's proffer of misrepresentation in the warrant affidavit.**

* **(a) To mandate an evidentiary hearing, the challenger's attack must be more than conclusory and must be supported by more than a mere desire to cross-examine. The allegation of deliberate falsehood or of reckless disregard must point out specifically with supporting reasons the portion of the warrant affidavit that is claimed to be false. It also must be accompanied by an offer of proof, including affidavits or sworn or otherwise reliable statements of witnesses, or a satisfactory explanation of their absence. .**
* **(b) If these requirements as to allegations and offer of proof are met, and if, when material that is the subject of the alleged falsity or reckless disregard is set to one side, there remains sufficient content in the warrant affidavit to support a finding of probable cause, no hearing is required, but if the remaining content is insufficient, the defendant is entitled under the Fourth and Fourteenth Amendments to a hearing.**
* **(c) If, after a hearing, a defendant establishes by a preponderance of the evidence that the false statement was included in the affidavit by the affiant knowingly and intentionally, or with reckless disregard for the truth, and the false statement was necessary to the finding of probable cause, then the search warrant must be voided and the fruits of the search excluded from the trial to the same extent as if probable cause was lacking on the face of the affidavit.**

**State v. Little, 560 S.W.2d 403 (Tenn. 1978)**

**State v. Little**

560 S.W.2d 403

Supreme Court of Tennessee.

**STATE of Tennessee, Petitioner,**

**v.**

**Jo Ann LITTLE, and Cheryl Szeigis, Respondents.**

Jan. 3, 1978.

**Synopsis**

Defendants were convicted before the Criminal Court, Davidson County, Raymond H. Leathers, J., of possession of controlled substance, heroin, for purpose of resale, and they appealed. The Court of Criminal Appeals reversed and dismissed convictions, and State appealed. The Supreme Court, Fones, J., held that: (1) 1965 statute governing motions to suppress abrogated rule of law that criminal defendant must contest grounds on which search warrant is issued before magistrate or right is waived; (2) two circumstances that authorize impeachment of affidavit sufficient on its face are when false statement is made with intent to deceive court, whether material or immaterial to issue of probable cause, and when false statement, essential to establishment of probable cause, is recklessly made, and (3) officer affiant's admittedly false statement that informant had supplied him with narcotic information in past that was at all times correct was essential to establishment of probable cause, and was recklessly made, thus authorizing impeachment of affidavit sufficient on its face and suppression of evidence obtained thereunder.

Judgment of the Court of Criminal Appeals affirmed.

**Procedural Posture(s):** On Appeal.

**Facts:** The informant was reliable and had had provided info on 2 cases. Turns out he didn't know that.

**Issue:** Did the officers testimony invalidate the warrant?

**Rule:** The trial court convicted him on 2 accounts of substance. Court of criminal appeals reversed it. The TN Supreme court held that they are for the defendant. TN says that

The main difference between *Franks and Little* is that they look at the intent of police officer and they will completely through out the warrant, not just a part of the warrant in little. This is true for Tennessee**. ON TEST!!!!!!!!!!!! A hypo where the cop lies and says it's in Fed Court. One in state court too. Result is the same if negligent, but if they lie, there is a difference between fed and state court**

***State v. Little* (TN 1978)**

**Police obtained a search warrant for the Defendants based on an affidavit they later admitted contained false statements. The Defendants were convicted, and appealed. The Court of appeals reversed, and the State appeals here.**

**Issue: Did the officer’s false statements invalidate the warrant?**

**“We are in accord with U. S. v. Luna, supra, that there are two circumstances that authorize the impeachment of an affidavit sufficient on its face, (1) a false statement made with intent to deceive the Court, whether material or immaterial to the issue of probable cause, and (2) a false statement, essential to the establishment of probable cause, recklessly made. Recklessness may be established by showing that a statement was false when made and that affiant did not have reasonable grounds for believing it, at that time.” Affirmed.**

# December 17, 2020

Chapter 3, Section 5 – Arrest and Search of Persons

Chapter 3, Section 6 – Seizure and Search of Premises

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

Chapter 3, Section 5 – Arrest and Search of Persons

# \*\*UNITED STATES v. WATSON\*\*

#### United States Supreme Court 423 U.S. 411 (1976)

#### Rule of Law

**A warrantless arrest is permitted if there is probable cause to believe the person has committed a felony.**

#### Facts

On August 17, 1972, a reliable informant alerted a postal inspector that Watson (defendant) had a stolen credit card. The informant gave the card to the inspector and agreed to set up a meeting with Watson. During the meeting, the informant signaled that Watson had more stolen cards. Police arrested Watson, read his rights as required by *Miranda v. Arizona*, 384 U.S. 436 (1966), and asked to search his car. Watson said, "go ahead," and repeated that officers could "go ahead" with the search even after an officer told him that anything found in the car would "go against" Watson. Watson gave officers the keys to the car, and officers found two stolen credit cards inside the car. Watson was charged with possessing stolen mail. Before trial, Watson moved to suppress the evidence found in the car. He claimed that the warrantless arrest was invalid and that his consent to search the car was involuntary and ineffective because he was not informed that he could withhold consent. The trial court denied the motion, and Watson was convicted. The appellate court reversed, holding that the warrantless arrest of Watson was unconstitutional and that Watson's consent to search the car was coerced and thus invalid. The United States Supreme Court granted certiorari.

#### Issue

Does a warrantless arrest violate the Fourth Amendment if there is probable cause to believe that the person has committed a felony?

#### Holding and Reasoning (White, J.)

No. Police may arrest a suspect without a warrant if there is probable cause to believe the suspect committed a felony. The United States Code expressly authorizes postal inspectors to make warrantless arrests if there are “reasonable grounds” for believing the suspect committed a felony. This same authority has been granted to various groups of officers of the federal government, such as the U.S. Marshals and FBI agents. This demonstrates that Congress has deemed these types of warrantless arrests reasonable under the Fourth Amendment. The judgment of Congress on matters of constitutionality is given great deference. Moreover, case law reflects the longstanding common-law rule regarding the validity of warrantless arrests for suspected felons. In this case, there was probable cause for the postal inspector and his subordinate officers to believe that Watson had committed a felony. Accordingly, Watson’s arrest was constitutional. Moreover, because Watson's arrest was constitutional, his consent to search the car did not result from an illegal arrest. Nor do the circumstances here indicate that Watson's consent was the product of coercion. Although Watson was under arrest when he consented, he gave consent on a public street and not while confined at the police station. Additionally, he was given *Miranda* warnings, and he was told that anything found in the car could be used against him. Watson still told officers to "go ahead" with the search. Although Watson may not have known that he could withhold consent, this is not controlling, because he was not mentally incompetent, incapable of making a free choice, or otherwise a "newcomer to the law." Accordingly, Watson's consent to the search was not illegally coerced. The appellate court's judgment is reversed.

#### Concurrence (Stewart, J.)

The Court's holding is limited to a warrantless arrest made in a public place upon probable cause. The Court did not decide whether or when officers must obtain a warrant before entering a private place to arrest someone.

#### Concurrence (Powell, J.)

In this case, the Court specifically holds for the first time that the Fourth Amendment allows officers to make a warrantless arrest in a public place, even if the officers had a sufficient opportunity to first obtain a warrant after developing probable cause. In the warrantless-search context, the Court has previously held that an officer's probable cause to search a private place does not excuse the officer's unexplained failure to obtain a warrant before conducting the search. Although it may seem that arrests and searches should be subject to the same warrant requirements, warrantless felony arrests have historically been allowed, and law-enforcement agencies have developed their procedural requirements for arrests and investigations around the understanding that warrantless arrests based on probable cause are proper. Requiring a warrant or exigent circumstances for a felony arrest would pose a serious burden on law enforcement. The Court's holding is therefore proper, even though it treats warrantless arrests and warrantless searches differently. In any event, even if Watson's arrest was unconstitutional, his consent to search the vehicle was so clearly voluntary and the product of free will that it disposes of this case.

#### Dissent (Marshall, J.)

The officers present during Watson’s meeting with the informant had probable cause to believe a felony was being committed in their presence; therefore, the arrest was valid under the exigent-circumstances doctrine. In other words, the probable cause developed during the meeting with the informant was an independent, sufficient basis for arrest. The appellate court's decision should be reversed on this basis alone and remanded for further proceedings, including a more detailed examination of whether Watson could voluntarily give consent to search the car while in custody. However, the Court goes far beyond the question presented by this case to issue a rule that is contrary to the current interpretation of the Fourth Amendment. Requiring a warrant for an arrest absent exigent circumstances protects sacred individual rights without impeding legitimate governmental interests in law enforcement.

***United States v. Watson –*** Law enforcement officers can arrest a suspect in a public place on probable cause that the suspect has committed a felony offense.

**Key Terms:**

**Exigent Circumstances Doctrine** - An exception to the warrant requirement of the Fourth Amendment allowing police to make a warrantless entry, search, or seizure in circumstances that demand immediate action, such as a threat to human safety, the likely escape of a suspect, or the likely destruction of evidence.

**Ipse Dixit** - Latin for "he said it himself," used to refer to a statement that has been asserted but not proven.

***United States v. Watson*** **1976**

**A warrantless arrest is permitted if there is probable cause to believe the person has committed a felony.**

**United States v. Watson 423 US 411 (1976)**

**Reliable informant (provided reliable info 5-10 times in the past) gave postal inspector stolen credit card that Watson had provided and said that Watson claimed he could get more. Postal inspector set up sting and informant met with Watson who said he had more stolen cards. Upon prearranged signal from informant that Watson had more cards, postal inspector arrested Watson and searched him and found no cards. Postal inspector provided Miranda warnings and asked to search Watson’s car. Watson said “go ahead.” A search of the car revealed two stolen cards under the floor mat. Watson was prosecuted for four counts of possessing stolen mail, two of the counts were for the two cards found in the car. Watson moved to suppress these two cards on the grounds that they were the fruits of an illegal arrest because the arrest was made without an arrest warrant (which is what the federal statute allowed for postal inspectors, among others). District Court denied, 9th Circuit Court of Appeals reversed, holding that the police had time for a warrant and that the subsequent search was involuntary.**

**Issue: Was the warrantless arrest (and subsequent consent) a violation of the 4th Amendment?**

**Holding: No, Congress said it (public arrest with probable cause) was a reasonable seizure, and common law backs that up. Under common law police could arrest without a warrant for felonies and misdemeanors committed in officer’s presence, or for felonies outside the officer’s presence. Gerstein mandates prompt judicial review**

**Concurrence: Warrant required except in a few “jealously and carefully drawn exceptional circumstances.”**

**Dissent: Exigent circumstances would have justified this arrest; History doesn’t really support “public arrest with probable cause” exception. In weighing privacy against “burdening a legitimate governmental interest,” exigent circumstances would outweigh privacy.**

**United States v. Robinson 414 US 218 (1973)**

**Facts: D.C. metro police officer recognized Robinson driving and knew he didn’t have a license from a stop a few days earlier. Robinson conceded police had probable cause to believe he was driving without a valid license when they stopped him. Officer made custodial arrest and searched Robinson, felt something in his coat pocket, pulled out a crumpled cigarette pack and looked inside. Also discovered 14 capsules of heroin inside. Heroin was admitted at trial where Robinson was convicted of possession of heroin. Convicted in District Court, Appeals Court reversed, holding search violated 4th Amendment. Government appeals here.**

**Issue: Was the search in violation of the 4th Amendment.**

**Holding: No, search incident to arrest is (a) reasonable, and (b) an exception to the warrant requirement, Court notes (1) Custodial arrest justifies full body search including any packages on the person. (2) Also includes the “grab area.” Reason for the rule is officer safety and need to preserve evidence for use at trial.**

**Creates easy rule for law enforcement**

**Dissent: You cant avoid a case-by-case analysis. There are three separate search issues: (1) Pat down of coat pocket (2) Removal of the unknown object from the pocket (3) Opening the cigarette package and looking inside. Terry v. Ohio might permit the pat down, but not the removal or opening.**

**Advocates case-by-case analysis to thwart pretextual traffic stops as means of conducting searches**

# Gerstein v. Pugh

#### United States Supreme Court 420 U.S. 103 (1975)

#### Rule of Law

**A defendant charged with a crime by information may not be detained for an extended period of time without a judicial determination of probable cause.**

***Gerstein v. Pugh* 1975**

**A defendant charged with a crime by information may not be detained for an extended period of time without a judicial determination of probable cause. The Fourth Amendment requires a TIMELY judicial determination of probable cause as a prerequisite to detention (and it need not be adversial).**

**Gerstein v. Pugh, 420 US 103 (1975)**

**Facts: Complex facts not relevant here, but basically two Defendants charged by a prosecutor, one denied bail, and denied any meaningful judicial review for substantial amount of time.**

**Issue: Are defendants charged without a warrant entitled to a timely hearing on probable cause?**

**Yes, the decision to charge is not enough.**

**Maximum protection of individual rights could be assured by requiring a magistrate's review of the factual justification prior to any arrest, but such a requirement would constitute an intolerable handicap for legitimate law enforcement.**

**“ ‘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.’**

**These adversary safeguards are not essential for the probable cause determination required by the Fourth Amendment. The sole issue is whether there is probable cause for detaining the arrested person pending further proceedings. This issue can be determined reliably without an adversary hearing. The standard is the same as that for arrest. That standard—probable cause to believe the suspect has committed a crime—traditionally has been decided by a magistrate in a nonadversary proceeding on hearsay and written testimony, and the Court has approved these informal modes of proof.**

**Under this practical compromise, a policeman's on-the-scene assessment of probable cause provides legal justification for arresting a person suspected of crime, and for a brief period of detention to take the administrative steps incident to arrest. Once the suspect is in custody, however, the reasons that justify dispensing with the magistrate's neutral judgment evaporate**

**“the Fourth Amendment requires a timely judicial determination of probable cause as a prerequisite to detention [and it need not be adversarial].”**

# County of Riverside v. McLaughlin

#### United States Supreme Court 500 U.S. 44 (1991)

#### Rule of Law

**A judicial determination of probable cause made within 48 hours of arrest is generally sufficiently prompt.**

***County of Riverside v. McLaughlin* 1991**

**A judicial determination of probable cause made with 48 hours of arrest is generally sufficiently prompt.**

**Powell v. Nevada**

114 S.Ct. 1280

Supreme Court of the United States

**Kitrich POWELL, Petitioner,**

**v.**

**NEVADA.**

No. 92–8841.

Argued Feb. 22, 1994.Decided March 30, 1994.

**Synopsis**

Defendant was convicted by the Eighth Judicial District Court, Clark County, [John S. McGroarty](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0261891801&originatingDoc=Ic314098e9c4f11d9bdd1cfdd544ca3a4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ic314098e9c4f11d9bdd1cfdd544ca3a4), J., of first-degree murder of his girlfriend's four-year-old daughter, and he appealed. The Nevada Supreme Court, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I5f539d92f5a311d9bf60c1d57ebc853e&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[108 Nev. 700, 838 P.2d 921,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992157977&pubNum=661&originatingDoc=Ic314098e9c4f11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed, and defendant petitioned for review. The United States Supreme Court, Justice [Ginsburg](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=Ic314098e9c4f11d9bdd1cfdd544ca3a4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ic314098e9c4f11d9bdd1cfdd544ca3a4), held that the *McLaughlin*rule that judicial probable cause determination had to be made within 48 hours of warrantless arrest, applied retroactively.

Vacated and remanded.

Justice [Thomas](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=Ic314098e9c4f11d9bdd1cfdd544ca3a4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ic314098e9c4f11d9bdd1cfdd544ca3a4) filed dissenting opinion in which the Chief Justice joined.

# \*\*UNITED STATES v. ROBINSON\*\*

#### United States Supreme Court 414 U.S. 218 (1973)

#### Rule of Law

**During a lawful arrest, it is reasonable under the Fourth Amendment to search the person being arrested.**

#### Facts

Robinson (defendant) was arrested for driving with an expired license. The arresting officer proceeded to search Robinson and during the pat-down, he felt something in Robinson’s breast pocket. After removing the object, the officer discovered it was a cigarette packet and upon opening the packet, the officer discovered capsules of heroin. The heroin was introduced as evidence at trial and Robinson was convicted. The court of appeals disagreed with the admission of the heroin holding that a search incident to arrest is only permissible if the officer seeks evidence related to the crime or if the officer undertakes a protective search to ensure the arrestee is not armed. Since no evidence of Robinson driving with an expired license would be found on his person, the court of appeals held that only a search for weapons was justified and the officer testified that he knew the object was not a weapon.

#### Issue

During a lawful arrest, is it reasonable to conduct a full search of the person being arrested?

#### Holding and Reasoning (Rehnquist, J.)

Yes. The authority to search an arrestee arises when the police make a custodial arrest. The police must ensure their own safety by checking for weapons, and they must preserve the integrity of the case by ensuring the arrestee does not have any evidence on his person that he may destroy. The precedent of the Court does not require a case-by-case determination to establish whether the arrestee likely possessed evidence related to the crime or whether he was likely to have been armed. Therefore, under the Fourth Amendment, it is reasonable to search a person under custodial arrest and the search and seizure of the heroin capsules was constitutional. Accordingly, the judgment of the court of appeals is reversed.

#### Concurrence (Powell, J.)

The main point of the Court’s holding here is that a search incident to a lawful arrest is reasonable under the Fourth Amendment because an arrestee’s privacy interest becomes secondary to the dual government concerns of officer safety and preservation of evidence.

#### Dissent (Marshall, J.)

The officer’s search of Robinson went far beyond that reasonably necessary to ensure his safety and to ensure the preservation of evidence. The precedent of the Court is that the reasonableness of a search must be determined on a case-by-case basis and the scope of the search must be justified by the surrounding circumstances; the lawful invasion of an individual’s privacy does not automatically mean that further invasion is permissible absent a valid warrant. A search incident to arrest must be justified by the need to preserve evidence or to ensure officer safety. While the pat-down of Robinson’s coat was reasonable to ensure he was not armed, the removal of the cigarette packet was unreasonable because the officer had no reason to believe, nor did he believe, that the packet was a weapon and no evidence of Robinson driving with an expired license would be found on his person. Furthermore, the search of the cigarette packet was unreasonable because even assuming it contained a weapon, once it was no longer in Robinson’s possession, it no longer posed a risk. Therefore, the heroin should have been inadmissible at trial because of the unconstitutional search and seizure.

***United States v. Robinson*** extended the search incident to arrest exception to minor offenses. It also clarified that arresting officers may open containers found during search, even without probable cause.

**Key Terms:**

**Fourth Amendment -** An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

***United States v. Robinson* 1973**

**During a lawful arrest, it is reasonable under the Fourth Amendment to search the person being arrested.**

# Weeks v. United States

#### United States Supreme Court 232 U.S. 383 (1914)

#### Rule of Law

**The United States and federal officials are prohibited from executing unreasonable searches and seizures upon people.**

# Terry v. Ohio

#### United States Supreme Court 392 U.S. 1 (1968)

#### Rule of Law

**When an officer observes unusual conduct that reasonably leads him to assume that criminal activity is afoot and that the people he is interacting with are armed, the police officer may conduct a limited search for weapons.**

# *Terry* was the first time the Court permitted a warrantless search for less than probable cause.

# Schmerber v. California

#### United States Supreme Court 384 U.S. 757 (1966)

#### Rule of Law

**(1) The admission of evidence gathered by forcing a suspect to submit to a blood test does not violate the Fifth Amendment privilege against self-incrimination.**

**(2) The exigent-circumstances exception to the Fourth Amendment's warrant requirement allows officers to withdraw a suspect's blood for testing without a warrant if officers reasonably believe that delaying the test to obtain a warrant could lead to the destruction of evidence.**

#### Facts

Armando Schmerber (defendant) crashed his car into a tree and injured both himself and his passenger. The police officer who responded to the scene smelled alcohol on Schmerber's breath and noticed that Schmerber's eyes looked bloodshot and glassy. Schmerber and his passenger were transported to the hospital for treatment. At the hospital, within two hours after the accident, the same officer saw Schmerber again and saw similar signs that Schermber was drunk. Schmerber refused to give a blood sample for chemical analysis, so the officer directed a doctor to take one anyway. The analysis showed that Schmerber was intoxicated at the time of the accident. Schmerber was tried for driving while under the influence of alcohol, and the analysis was entered into evidence. Schmerber objected, claiming that the forced withdrawal of his blood violated his Fifth Amendment privilege against self-incrimination and his Fourth Amendment right not to be subjected to unreasonable searches and seizures. Schmerber was convicted of driving under the influence of alcohol. The appellate court affirmed Schmerber's conviction, and the United States Supreme Court granted certiorari.

#### Issue

(1) Does the admission of evidence gathered by forcing a suspect to submit to a blood test violate the Fifth Amendment privilege against self-incrimination?

(2) Does the exigent-circumstances exception to the Fourth Amendment's warrant requirement allow officers to withdraw a suspect's blood for testing without a warrant if officers reasonably believe that delaying the test to obtain a warrant could lead to the destruction of evidence?

#### Holding and Reasoning (Brennan, J.)

(1) No. The Fifth Amendment privilege against self-incrimination applies only to testimonial evidence. Forcing a suspect to submit to a blood test, therefore, does not violate the privilege against self-incrimination. Taking a blood sample is an invasive procedure, and chemical analysis can provide proof of guilt. Thus, in forcibly subjecting an individual to blood analysis, the individual has not been treated as inviolable, and the government has failed to secure evidence of guilt through its own efforts. Nevertheless, precedent has consistently limited the privilege to evidence gained by forcing an individual to speak against himself. Physical evidence gathered from the individual, such as fingerprints or photographs, does not fall within the privilege. Rather, the privilege is limited to testimonial or communications evidence. This does not mean that testimonial evidence disguised as physical evidence, such as lie detector test results, would be admissible. In this case, it is true that when the officer had the doctor take the blood sample over Schmerber’s objections, the government compelled Schmerber to be subjected to testing that could yield evidence against him. However, Schmerber was in no way forced to speak or testify against himself. Thus, Schmerber’s Fifth Amendment privilege against self-incrimination was not violated.

(2) Yes. The bodily intrusion of a compelled blood test does not violate a suspect's Fifth Amendment privilege against self-incrimination, and so the purpose of the Fourth Amendment in this context is to guard against only unjustified compulsory blood testing or blood testing conducted in improper, unreasonable manner. In cases involving driving under the influence, the questions of whether a compelled blood test is justified and conducted in a reasonable manner will often arise in the context of an officer's warrantless arrest of a suspect. The exigent-circumstances exception to the Fourth Amendment's warrant requirement allows officers to withdraw a suspect's blood for testing without a warrant if officers reasonably believe that delaying the test to obtain a warrant could lead to the destruction of evidence. In this case, the officer who ordered the blood test had probable cause to arrest Schmerber for driving under the influence of alcohol. He observed Schmerber at both the scene of the accident and the hospital, and he noticed symptoms of drunkenness each time. Moreover, the officer might reasonably have believed that a warrantless blood test was necessary to secure evidence before it could be destroyed. A person's blood-alcohol content decreases over time after the person stops drinking, and by the time the officer saw Schmerber at the hospital, it had been nearly two hours since the accident. In these circumstances, the officer had no time to obtain a warrant from a magistrate. Thus, the compelled blood test was an appropriate incident to Schmerber's arrest. Additionally, the manner of drawing Schmerber's blood was reasonable, as the test was performed by a physician in a hospital setting pursuant to standard medical procedures. Accordingly, under the facts of this case, the compelled blood draw did not violate the Fourth Amendment. The lower court's judgment is affirmed.

#### Dissent (Black, J.)

The Court admits that Schmerber was forced to submit to an invasive procedure to provide the government with evidence that was later used against him in a criminal trial. The Court holds that Schmerber was not forced to be a witness against himself simply because the evidence was not testimonial. The Court’s overly restrictive reading of the Fifth Amendment limits the privilege in was unsupported by prior case law. The purpose of the blood test was to gather testimony for trial. That testimony was presented to the jury as a means of communicating Schmerber’s intoxication. Schmerber was denied his Fifth Amendment right, and it is unfortunate that the Court’s decision erodes the Bill of Rights’ protections for a free society.

**Key Terms:**

**Testimonial Evidence** - Oral or written evidence of an individual’s thoughts.

***Schmerber v. California* 1966**

**Exigency is created when suspect is in an accident because dissipating nature of blood plus safety concerns were enough. (also, not a 5th violation to require test)**

# Missouri v. McNeely

#### United States Supreme Court 569 U.S. 141 (2013)

#### Rule of Law

**In drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency that in every case is sufficient to justify conducting an involuntary blood test without a warrant.**

#### Facts

A Missouri police officer stopped Tyler McNeely (defendant) for possible drunk driving. McNeely failed field sobriety tests and declined to have his blood alcohol concentration (BAC) tested. The officer then arrested McNeely and drove him to a hospital. At the hospital, McNeely again refused to take a BAC test. Without obtaining a warrant, the officer ordered hospital staff to conduct an involuntary BAC test. The test showed that McNeely's BAC exceeded the legal limit. The State of Missouri (plaintiff) prosecuted McNeely for drunk driving. The trial judge acquitted McNeely because of the officer's failure to obtain a search warrant before ordering the involuntary BAC test. The Missouri Court of Appeals referred the state's appeal to the Missouri Supreme Court, which affirmed the trial judgment. The United States Supreme Court granted Missouri's petition for review.

#### Issue

In drunk-driving investigations, does the natural dissipation of alcohol in the bloodstream constitute an exigency that in every case is sufficient to justify conducting an involuntary blood test without a warrant?

#### Holding and Reasoning (Sotomayor, J.)

No. In drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency that in every case is sufficient to justify conducting an involuntary blood test without a warrant. Under the Fourth Amendment, subject to some exceptions, the invasive nature of such a test generally requires a neutral and detached magistrate to authorize the test by issuing a warrant. An exception may apply when an emergency creates a compelling need for official action and there is no time to secure a warrant. Such a compelling need arises when evidence is in imminent danger of destruction. To determine if an emergency exists, courts consider the totality of the circumstances. For example, in *Schmerber v. California*, 384 U.S. 757 (1966), this Court held an emergency existed when a police officer had to investigate the scene of an accident and transport the injured driver to a hospital for treatment. The consequent delay threatened the destruction of evidence because the driver's BAC decreased during his treatment. The Court held that, under these specific circumstances, the officer reasonably ordered the driver to undergo a warrantless and involuntary BAC test, conducted by hospital staff according to proper medical procedure. However, since *Schmerber*, states generally have adopted much more rapid procedures for obtaining warrants, and therefore the delay involved in transporting an injured driver to a hospital, by itself, no longer poses a significant risk to the timely collection of BAC evidence pursuant to a search warrant. Although the federal and state governments have a legitimate interest in curbing the public safety threat posed by drunk driving, there is no evidence that a *per se*rule authorizing warrantless BAC tests is necessary for achieving that end. There were no special reasons in McNeely's case why the officer could not have obtained a warrant within a reasonable time. The officer's failure to do so requires the Court to affirm the Missouri Supreme Court's judgment.

#### Concurrence (Kennedy, J.)

Governmental entities that enforce drunk-driving laws can and should adopt guidelines that satisfy Fourth Amendment concerns, while at the same time giving police officers practical instruction as to when warrantless BAC testing is legal.

#### Concurrence/Dissent (Roberts, C.J.)

A police officer's judgment need not be correct, but if the officer reasonably concludes there is no time to obtain a warrant, the officer may order a warrantless and involuntary BAC test.

#### Dissent (Thomas, J.)

The natural dissipation of alcohol in the blood, over time, automatically creates an exigent circumstance that entitles a police officer to order a warrantless and involuntary BAC test.

**Key Terms:**

**Exigent Circumstances Doctrine** - An exception to the warrant requirement of the Fourth Amendment allowing police to make a warrantless entry, search, or seizure in circumstances that demand immediate action, such as a threat to human safety, the likely escape of a suspect, or the likely destruction of evidence.

**Cupp v. Murphy**

93 S.Ct. 2000

Supreme Court of the United States

**Hoyt C. CUPP, Superintendent,**[**Oregon State Penitentiary**](https://1.next.westlaw.com/Search/Results.html?query=advanced%3a+OAID(5026338669)&saveJuris=False&contentType=BUSINESS-INVESTIGATOR&startIndex=1&contextData=(sc.Default)&categoryPageUrl=Home%2fCompanyInvestigator&originationContext=document&transitionType=DocumentItem)**, Petitioner,**

**v.**

[**Daniel P. MURPHY.**](https://1.next.westlaw.com/Search/Results.html?query=advanced%3a+OAID(5012570204)&saveJuris=False&contentType=BUSINESS-INVESTIGATOR&startIndex=1&contextData=(sc.Default)&categoryPageUrl=Home%2fCompanyInvestigator&originationContext=document&transitionType=DocumentItem)

No. 72—212.

Argued March 20, 1973.Decided May 29, 1973.

**Synopsis**

Proceeding on petition by state prisoner for habeas corpus. The United States District Court for the District of Oregon denied the petition and the Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I65c7568b8fdc11d98e8fb00d6c6a02dd&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[461 F.2d 1006,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972110436&pubNum=350&originatingDoc=I18d27ac79bea11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) reversed and remanded and certiorari was granted. The Supreme Court, Mr. Justice Stewart, held that where respondent voluntarily came to station house in connection with strangulation death of his wife and had not been arrested, although there was probable cause to believe he had committed the murder, and respondent refused when police asked if they could take a sample of scrapings from his fingernails, circumstances justified police, under protest and without warrant, in proceeding to take sample of scrapings from respondent's fingernails.

Reversed.

Mr. Justice White filed concurring statement.

Mr. Justice Marshall filed concurring opinion.

Mr. Justice Blackmun filed concurring opinion in which The Chief Justice joined.

Mr. Justice Powell filed a concurring opinion in which The Chief Justice and Mr. Justice Rehnquist joined.

Mr. Justice Douglas and Mr. Justice Brennan filed opinions dissenting in part.

**Rawlings v. Kentucky**

100 S.Ct. 2556

Supreme Court of the United States

**David RAWLINGS, Petitioner,**

**v.**

**Commonwealth of KENTUCKY.**

No. 79–5146.

Argued March 26, 1980.Decided June 25, 1980.

**Synopsis**

Petitioner was convicted by the Commonwealth of Kentucky on charges of trafficking in and possession of various controlled substances. Petitioner's conviction was affirmed by the [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I3f4d361dec6f11d9bf60c1d57ebc853e&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[Kentucky Court of Appeals and by the Kentucky Supreme Court, 581 S.W.2d 348.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979129681&pubNum=713&originatingDoc=I179685519c1f11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) Certiorari was granted, and the United States Supreme Court, Mr. Justice Rehnquist, held that: (1) the record, including petitioner's admission at the suppression hearing that he did not believe that a purse belonging to a female acquaintance would be free from governmental intrusion, supported the conclusion that petitioner did not meet his burden to prove that he had a legitimate expectation of privacy in the purse; (2) the mere fact that petitioner claimed ownership of certain drugs in the purse did not entitle him to challenge the search of the purse; (3) assuming that the police violated the Fourth and Fourteenth Amendments by detaining petitioner and his companions while a search warrant was obtained, inculpatory statements which petitioner made to the police during the detention were acts of free will and were unaffected by any illegality in the detention; and (4) the search of petitioner's person that uncovered certain money and a knife was lawful as incident to petitioner's formal arrest.

Judgment of the Kentucky Supreme Court affirmed.

Mr. Justice Blackmun concurred and filed opinion.

Mr. Justice White concurred in part and dissented in part and filed opinion in which Mr. Justice Stewart joined.

Mr. Justice Marshall dissented and filed opinion in which Mr. Justice Brennan joined.

# Illinois v. Lafayette

#### United States Supreme Court 462 U.S. 640 (1983)

#### Rule of Law

**Police may constitutionally perform an inventory search of the personal effects of an arrested person during booking.**

#### Facts

On September 1, 1980, a Kankakee City Police Officer arrested Lafayette (defendant) for disturbing the peace. During booking at the police station, the officer emptied the shoulder bag Lafayette was carrying and found drugs. Lafayette was also charged with violations of the Illinois Controlled Substances Act.

#### Issue

Does an inventory search of personal effects during the booking of an arrested person violate the Fourth Amendment?

#### Holding and Reasoning (Burger, C.J.)

No. The Fourth Amendment does not prohibit an inventory search of an arrested person’s effects during booking. *South Dakota v. Opperman*, 428 U.S. 364 (1976), makes clear that a warrant is not required for an inventory search. Thus, the issue is whether the search is reasonable. Reasonableness is assessed by balancing Lafayette’s privacy interests against the legitimate governmental goals advanced by the search. The reasons for performing an inventory search at booking are different than those justifying a search of a person or the area within the person’s control at the time of arrest. Inventory searches at the time of booking deter theft, protect police and jailors against false claims of loss or damage to property, reveal dangerous items, and sometimes help identify a suspect. As such, there is a substantial governmental interest in searching all of the personal effects of an arrested person, and reasonableness does not require that there be no “less intrusive” alternative to accomplish the same goals. Thus, police may perform an inventory search of an arrested person’s effects during booking as part of the standard intake procedure.

#### Concurrence (Marshall, J.)

The practical considerations involved in incarceration justify the search of a suspect’s personal effects during intake without a warrant or probable cause. Arrest alone, however, would not have justified the warrantless search of Lafayette’s bag.

**Key Terms:**

**Inventory Search** - A routine search performed by police before taking a person or property into custody, performed for administrative rather than investigative purposes.

**Go-Bart Importing Co. v. United States**

51 S.Ct. 153

Supreme Court of the United States

**GO-BART IMPORTING CO. et al.**

**v.**

**UNITED STATES.**

No. 111.

Argued Nov. 25, 1930.Decided Jan. 5, 1931.

**Synopsis**

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Motion by the Go-Bart Importing Company and by two individuals, Phillip D. Gowen and William Bartels, for an order directing restoration to them of documents and papers seized by prohibition agents, and for the suppression of such property as evidence. An order denying the motion was modified ([](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I4304d20e547011d9bf30d7fdf51b6bd4&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[40 F. (2d) 593),](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1930126363&pubNum=350&originatingDoc=I8209bb379cc011d9a707f4371c9c34f0&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) and movants bring certiorari.

Reversed.

# \*\*WHREN v. UNITED STATES\*\*

#### United States Supreme Court 517 U.S. 806 (1996)

#### Rule of Law

**Except with inventory searches and administrative inspections, when probable cause of illegal conduct exists, an officer’s true motive for searching or detaining a person does not negate the constitutionality of the search or seizure.**

#### Facts

Plainclothes police officers pulled over a car for traffic violations after witnessing the driver make a turn without signaling and then speed down the road. Prior to observing these traffic violations, the police observed the two men in the car from a distance and became suspicious that a drug deal was taking place. Whren (defendant) was a passenger in the car and when the police approached the car they observed plastic bags of cocaine in Whren’s hands. Whren and the driver were arrested for illegal drug possession and convicted in federal court after the trial judge, over Whren’s objections, permitted the cocaine to be introduced into evidence. The court of appeals affirmed the convictions.

#### Issue

When an officer has probable cause to believe a traffic violation has occurred, is the Fourth Amendment violated if his primary reason for pulling over and detaining the motorist is not to enforce the traffic laws?

#### Holding and Reasoning (Scalia, J.)

No. When there is probable cause that a traffic offense has occurred, the officer’s subjective motives for detaining the motorist do not invalidate the officer’s actions under the Fourth Amendment. If the defendant believes he has been targeted by the police because of his race, as Whren suggests, his remedy lies in the Equal Protection Clause, not the Fourth Amendment. Here, the driver of the car committed a traffic offense and the officers were entitled to pull the car over regardless of whether or not a reasonable officer who had not observed the suspicious activity would have taken the time or chosen to do so based solely on the traffic offenses. Such a “reasonable officer” standard is ineffective because it will differ from jurisdiction to jurisdiction depending on the specific policies in place. Whren further argues that a balancing test should be applied and that the confusion and anxiety to motorists caused by traffic enforcement by plainclothes police officers for minor infractions outweighs the minimal traffic safety interest of the state, and as such, it was unreasonable and unconstitutional for the officers to pull over the car. However, a balancing test need only be applied where a search or seizure is conducted in an extraordinary manner and this was not the case here. Therefore, the detention of the car was reasonable under the Fourth Amendment and the judgment is affirmed.

***Whren v. United States –*** If officers have probable cause for any traffic infraction, stopping the car is objectively reasonable under the fourth amendment.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

***Whren v. United States* 1996**

**Except with inventory searches and administrative inspections, when probable cause of illegal conduct exists, an officer’s true motive for searching or detaining a person does not negate the constitutionality of the search and seizure.**

**Whren v. United States 517 US 806 (1996)**

**Facts: Plainclothes police patrolling high drug area see African American youths in car which was being driven suspiciously. Officers pull up to car at red light and officer approaches driver window to warn driver about traffic violations and sees two large bags of cocaine in passenger’s hands. Driver and passenger arrested and convicted of drug offenses. Defendants moved to suppress, District Court denied, Defendants convicted. Court of Appeals affirmed. Defendants appeal here.**

**Issue: Was the search in violation of the fourth amendment?**

**No, Defendants concede that traffic violation occurred, and pretextual stops are not prohibited by the 4th amendment. The stop is a seizure, but a reasonable one. Balancing not in doubt when based upon probable cause. Where there is probable cause, the officers’ subjective motivations are not relevant.**

**Gustafson v. Florida**

94 S.Ct. 488

Supreme Court of the United States

**James E. GUSTAFSON, Petitioner,**

**v.**

**State of FLORIDA.**

No. 71—1669.

Argued Oct. 9, 1973.Decided Dec. 11, 1973.

## Synopsis

Petitioner was convicted in the Court of Record for Brevard County, Florida, of unlawful possession of marihuana. The District Court of Appeal, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I6efbe9400d2e11d99830b5efa1ded32a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[243 So.2d 615,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971133203&pubNum=735&originatingDoc=I5abc85de9be911d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))reversed and remanded and the [Florida Supreme Court, 258 So.2d 1,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972133931&pubNum=735&originatingDoc=I5abc85de9be911d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) quashed the district court's opinion in part and certiorari was granted. The Supreme Court, Mr. Justice Rehnquist, held that upon arresting petitioner for driving his automobile without a valid operator's license in his possession, and taking him into custody, officer was entitled to make full search of petitioner's person incident to that arrest even though officer had no subjective fear of petitioner or did not suspect that petitioner was armed, and having in course of the search come upon box of cigarettes, officer was entitled to inspect it, and when inspection revealed what officer believed to be marihuana cigarettes, officer was entitled to seize them as fruits, instrumentalities or contraband probative of criminal conduct.

Judgment of Florida Supreme Court affirmed.

Mr. Justice Stewart filed concurring opinion;

Mr. Justice Powell filed concurring opinion, see [94 S.Ct. 494](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1973205293&pubNum=708&originatingDoc=I5abc85de9be911d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

Mr. Justice Marshall, with whom Mr. Justice Douglas and Mr. Justice Brennan joined, filed dissenting opinion.

**Florida v. Wells**

110 S.Ct. 1632

Supreme Court of the United States

**FLORIDA, Petitioner**

**v.**

**Martin Leslie WELLS.**

No. 88–1835.

Argued Dec. 4, 1989.Decided April 18, 1990.

## Synopsis

Defendant was convicted, upon conditional plea of nolo contendere, before the Circuit Court, Putnam County, E.L. Eastmoore and Robert R. Perry, JJ., of possession of a controlled substance. Pursuant to his plea, he appealed from denial of his motion to suppress evidence. The District Court of Appeal, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I890bb8530da211d9821e9512eb7d7b26&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[492 So.2d 1375,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986142742&pubNum=735&originatingDoc=I5dfce9e99c9011d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) reversed, and State petitioned for review. The [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ice06fcb60c7d11d98220e6fa99ecd085&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[Florida Supreme Court, 539 So.2d 464,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989034393&pubNum=735&originatingDoc=I5dfce9e99c9011d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed. After granting the State's petition for certiorari, the Supreme Court, Chief Justice [Rehnquist](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0238463201&originatingDoc=I5dfce9e99c9011d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I5dfce9e99c9011d9bc61beebb95be672), held that absent a policy with respect to the opening of closed containers encountered during an inventory search, inventory search which involved the opening of a locked suitcase was not sufficiently regulated to satisfy the Fourth Amendment, and marijuana which was found in suitcase was subject to suppression.

Affirmed.

Justice Brennan filed an opinion concurring in the judgment, in which Justice [Marshall](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0336250901&originatingDoc=I5dfce9e99c9011d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I5dfce9e99c9011d9bc61beebb95be672) joined.

Justice [Blackmun](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0264439801&originatingDoc=I5dfce9e99c9011d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I5dfce9e99c9011d9bc61beebb95be672) and Justice [Stevens](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0156277701&originatingDoc=I5dfce9e99c9011d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I5dfce9e99c9011d9bc61beebb95be672) filed opinions concurring in the judgment.

# Colorado v. Bertine

#### United States Supreme Court 479 U.S. 367 (1987)

#### Rule of Law

**A police officer’s warrantless inventory search of closed containers inside an automobile, conducted pursuant to an established inventory policy, does not violate the Fourth Amendment to the U.S. Constitution.**

# New York v. Burger

#### United States Supreme Court 482 U.S. 691 (1987)

#### Rule of Law

**A business in a closely regulated industry may be searched without a warrant so long as the searches are necessary, there is a substantial government interest, and the authorizing statute serves the functions of a warrant.**

#### Facts

On November 17, 1982, police entered a junkyard in Brooklyn, New York owned by Joseph Burger (defendant) to inspect the premises. Burger did not have a license or a record book of his inventory, as required by New York law. Burger made no objection to the inspection. Police found stolen vehicles and arrested Burger. Burger was charged on multiple counts of possession of stolen property and operating a vehicle dismantler without a license. The United States Supreme Court granted certiorari.

#### Issue

Under the Fourth Amendment, may a business operating in a closely regulated industry be subjected to warrantless administrative searches?

#### Holding and Reasoning (Blackmun, J.)

Yes. Warrantless searches of businesses operating in heavily regulated industries are reasonable under certain conditions. The Fourth Amendment prohibits unreasonable searches and seizures of businesses. Although business owners do have a reasonable expectation of privacy, that expectation is not as great as that of private homeowners. Business owners operating businesses in heavily regulated industries have an even lesser expectation of privacy than other business owners. As a result, the balancing of interests required by the Fourth Amendment is shifted in favor of the special need of the government to regulate some industries. Therefore, warrantless inspections of businesses operating in heavily regulated industries are permitted under the following three conditions. First, the inspection program must serve a substantial governmental interest. Next, the inspections must be necessary to serve that interest. Finally, the authorizing statute must serve as a substitute for a warrant. This means that the statute must provide notice to business owners of the scope of the inspection scheme and specifically limit the authority of inspectors. The New York law in this case meets these requirements. Automobile dismantling businesses in New York and other states are required to maintain licenses and records, thus it is a heavily regulated industry where business owners have a reduced expectation of privacy. There is a substantial state interest in reducing auto theft, which is a major problem with serious repercussions in the state. Inspections of dismantlers are necessary to prevent the sale of stolen vehicles. Lastly, the statute provides adequate notice to business owners of the inspection scheme and appropriately limits the discretion of inspectors. Thus, warrantless searches under New York’s law are reasonable.

#### Dissent (Brennan, J.)

Although the general rule articulated by the Court is permissible under the Fourth Amendment, its application to this case is faulty. Vehicle dismantling is no more heavily regulated than any other business in New York. Further, the statute authorizing search in this case is too vague to substitute for a warrant. Warrantless searches of this business and others like it violate the Fourth Amendment.

**Key Terms:**

**Administrative Search** - A search of property for public health and safety, rather than investigative, purposes.

**Closely Regulated Industry** - A line of business that has historically been subject to a great degree of government oversight and regulation.

**Special Needs Doctrine** - Exception to the Fourth Amendment allowing searches without a warrant or probable cause generally for purposes other than law enforcement, like administrative inspections or drug screenings.

**U.S. v. Villamonte-Marquez**

103 S.Ct. 2573

Supreme Court of the United States

**UNITED STATES, Petitioner**

**v.**

**Jose Reynaldo VILLAMONTE–MARQUEZ et al.**

No. 81–1350.

Argued Feb. 23, 1983.Decided June 17, 1983.

## Synopsis

Defendants were convicted in the United States District Court for the Western District of Louisiana, Earl E. Veron, J., of conspiring to import marijuana, importing marijuana, conspiring to possess marijuana with intent to distribute and possessing marijuana with intent to distribute, and they appealed. The Court of Appeals for the Fifth Circuit, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I7300d3c7928511d9a707f4371c9c34f0&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[652 F.2d 481,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981131550&pubNum=350&originatingDoc=I64edc8f99c1d11d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) Skelton, Senior Circuit Judge, sitting by designation, reversed, and certiorari was granted. The Supreme Court, Justice Rehnquist, held that customs officials, acting pursuant to statute authorizing customs officers to board any vessel at any time and at any place in United States to examine vessel's manifest and other documents, and acting without any suspicion of wrongdoing, did not violate Fourth Amendment by boarding or inspection of documents of a vessel that was located in waters providing ready access to open sea.

Reversed.

Justice Brennan filed dissenting opinion in which Justice Marshall joined and Justice Stevens joined in part.

# United States v. Robinson

#### United States Supreme Court 414 U.S. 218 (1973)

#### Rule of Law

**During a lawful arrest, it is reasonable under the Fourth Amendment to search the person being arrested.**

**Scott v. United States**

98 S.Ct. 1717

Supreme Court of the United States

**Frank R. SCOTT, etc. and Bernis L. Thurmon, etc., Petitioners,**

**v.**

**UNITED STATES.**

No. 76–6767.

Argued March 1, 1978.Decided May 15, 1978.Rehearing Denied June 26, 1978.See [438 U.S. 908, 98 S.Ct. 3127](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1978231289&pubNum=708&originatingDoc=I72ee596c9c9a11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

**Synopsis**

Defendants' motion to suppress tape recordings of intercepted telephone conversations was granted by the district court for the District of Columbia, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I159d37db550611d997e0acd5cbb90d3f&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Search))[331 F.Supp. 233.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971106440&pubNum=345&originatingDoc=I72ee596c9c9a11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) The Court of Appeals, [164 U.S.App.D.C. 125, 504 F.2d 194,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1974112267&pubNum=350&originatingDoc=I72ee596c9c9a11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) reversed and remanded. The district court again suppressed and the Government appealed. The Court of Appeals, [170 U.S.App.D.C. 158, 516 F.2d 751,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1975110974&pubNum=350&originatingDoc=I72ee596c9c9a11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) again reversed and defendants were convicted on remand. Those convictions were affirmed by the Court of Appeals, [179 U.S.App.D.C. 281, 551 F.2d 467,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977208546&pubNum=350&originatingDoc=I72ee596c9c9a11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and certiorari was granted. The United States Supreme Court, Mr. Justice Rehnquist, held that: (1) proper approach for evaluating compliance with the minimization requirements of the Omnibus Crime Control and Safe Streets Act was to objectively assess the agents' or officers' actions in light of the facts and circumstances confronting him at the time without regard to his underlying intent or motive, and (2) the evidence presented in the instant case showed that the wiretap had been conducted so as to minimize interception of nonrelevant phone calls.

Affirmed.

Mr. Justice Brennan, dissented and filed an opinion in which Mr. Justice Marshall concurred.

# Ashcroft v. al-Kidd

#### United States Supreme Court 131 S. Ct 2074 (2011)

#### Rule of Law

**The subjective intent of an officer should not be considered when assessing the reasonableness of a Fourth Amendment seizure pursuant to a material-witness warrant.**

#### Facts

Federal statute 18 U.S.C. § 3144 authorizes a magistrate to issue a warrant to arrest someone as a material witness based on an affidavit showing that the testimony of the person is material in a criminal proceeding and that it would be impracticable to use a subpoena to secure his presence. In 2003, Abdullah al-Kidd (plaintiff), an American citizen, was at the airport on his way to study in Saudi Arabia on scholarship when he was arrested pursuant to a material-witness warrant (MWW). The warrant had been issued based on an affidavit from the Federal Bureau of Investigation (FBI), asserting that al-Kidd was suspected of having information linked to the prosecution of Sami Omar Al-Hussayen for various fraud-related charges. Al-Kidd was handcuffed, interrogated, and detained for over two weeks, during which time he claims he was treated harshly. Al-Kidd was never called as a witness, and there was no evidence he committed any crime himself. Al-Kidd brought suit against Attorney General Ashcroft and others (defendants) for injuries resulting from the claimed misuse of material-witness detention and the conditions of his confinement. The defendants moved to dismiss the case, claiming qualified immunity, and the district court denied the motion. The defendants then appealed, and the United States Court of Appeals for the Ninth Circuit affirmed. A rehearing en banc was denied, and the defendants petitioned for certiorari. The Supreme Court granted their petition.

#### Issue

Should the subjective intent of an officer be considered when assessing the reasonableness of a Fourth Amendment seizure pursuant to a material-witness warrant?

#### Holding and Reasoning (Scalia, J.)

No. When evaluating the reasonableness of a seizure under the Fourth Amendment with respect to a validly obtained MWW, a court should look to whether the arrest was objectively justified and not to the intentions of the arresting officer. Fourth Amendment reasonableness is almost always an objective question, in which the inquiry focuses on whether the factual circumstances warranted the action at issue. There are two narrow exceptions to this rule in special needs and administrative search cases, where actual motivations are relevant, and there is a heightened concern about pretext, because a judicial warrant and probable cause are not required. Beyond these two exceptions, the Court has almost exclusively refused to delve into an officer’s subjective intent. MWW cases do not fit within either of those categories precisely, because such cases are based on individualized suspicion, which is enough protection against the risk of abuse. Here, a warrant was issued by a neutral magistrate, authorizing al-Kidd’s arrest. The affidavit supporting the warrant application gave particularized reasons to believe al-Kidd was a material witness and would be leaving the country. As a result, the arrest was objectively reasonable under the Fourth Amendment. Also, at the time of the arrest, no judicial opinion had ever held that pretext could make an objectively reasonable arrest made pursuant to a valid MWW unconstitutional. Therefore, the qualified immunity defense would be available to Ashcroft even if there had been a Fourth Amendment violation. Because the objectively reasonable arrest and detention of al-Kidd pursuant to a validly obtained warrant cannot be challenged based on an allegedly improper motive of the arresting official, the judgment of the court of appeals denying the defendants’ motion to dismiss is reversed, and the case is remanded.

#### Concurrence (Sotomayor, J.)

The Court should not have answered the question of whether subjective intent can be considered in cases involving the detention of an individual in the absence of probable cause to suspect he committed a crime, if the case could have instead been dismissed on qualified immunity grounds, because Ashcroft did not violate clearly established law.

#### Concurrence (Ginsburg, J.)

The supporting affidavit was missing important information, and the Court therefore incorrectly assumed at the outset that the MWW was validly obtained.

#### Concurrence (Kennedy, J.)

A traditional arrest warrant is based on probable cause that the arrestee has committed a crime, which is not the standard for an MWW. This raises the question of whether MWWs qualify as Fourth Amendment warrants. The Court was correct not to further explore this difficult question in the context of this case.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

# 18 U.S.C. § 3144 - A federal statute allowing for the issuance of a warrant and arrest of a person if there is cause to believe he is a material witness in a criminal proceeding and that a subpoena will not be sufficient to secure his presence at trial.

**Abel v. United States**

80 S.Ct. 683

Supreme Court of the United States

**Rudolf Ivanovich ABEL, also known as ‘Mark’ and also known as**[**Martin Collins**](https://1.next.westlaw.com/Search/Results.html?query=advanced%3a+OAID(5025210820)&saveJuris=False&contentType=BUSINESS-INVESTIGATOR&startIndex=1&contextData=(sc.Default)&categoryPageUrl=Home%2fCompanyInvestigator&originationContext=document&transitionType=DocumentItem)**and Emil R. Goldfus, Petitioner,**

**v.**

**UNITED STATES of America.**

No. 2.

Argued Nov. 9, 1959.Decided March 28, 1960.

**Synopsis**

Prosecution for conspiracy to commit espionage. The United States District Court for the Eastern District of New York, [155 F.Supp. 8,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1957104227&pubNum=345&originatingDoc=I98c00a409c1c11d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) denied a motion to suppress certain items as evidence, and after a trial, a judgment of conviction was entered and defendant appealed. The Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I92d968078ed511d9bc61beebb95be672&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Search))[258 F.2d 485,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1958104684&pubNum=350&originatingDoc=I98c00a409c1c11d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed, and defendant was granted certiorari. The Supreme Court, Mr. Justice Frankfurter, held, inter alia, that an item consisting of a forged New York birth certificate for one of the false identities which defendant assumed in the country in order to keep his presence undetected, was seizable by immigration officers when come upon during a proper search of defendant's premises without a warrant, following his arrest under an administrative deportation warrant, not only as a forged official document by which defendant sought to evade his obligation to register as an alien, but also as a document which defendant was using as an alien in the commission of espionage.

Affirmed.

Mr. Justice Brennan, Chief Justice Warren, Mr. Justice Black, and Mr. Justice Douglas, dissented.

# Delaware v. Prouse

#### United States Supreme Court 440 U.S. 648 (1979)

#### Rule of Law

**Under the Fourth Amendment to the United States Constitution, the reasonableness of a warrantless seizure must be weighed against the public interest the seizure serves.**

#### Facts

A police officer stopped Prouse's (defendant) car to check Prouse's driver license and car registration. No policy or systematic roadblock required the officer to make the stop. Approaching the car, the officer smelled marijuana, saw marijuana in plain view, and seized it. Delaware (plaintiff) prosecuted Prouse for possessing illegal drugs. The trial court granted Prouse's motion to suppress the seized marijuana. The state appealed to the Delaware Supreme Court, which affirmed the trial court's ruling on Fourth Amendment grounds. The United States Supreme Court granted Delaware's petition for certiorari.

#### Issue

Under the Fourth Amendment to the United States Constitution, must the reasonableness of a warrantless seizure be weighed against the public interest the seizure serves?

#### Holding and Reasoning (White, J.)

Yes. Under the Fourth Amendment to the United States Constitution, the reasonableness of a warrantless seizure must be weighed against the public interest it serves. Warrantless seizures infringe on a person's privacy, expose the person to inconvenience, and may cause mental distress or other injury. These disadvantages must be balanced against the public benefit the seizure may provide. Here, the random stop of Prouse's vehicle was a Fourth Amendment seizure, intended to promote the public interest in highway safety. On balance, the importance of protecting Prouse's Fourth Amendment rights outweighed that of public interest. Stopping Prouse's vehicle could have had no more than marginal safety value, given the many highway safety tools Delaware had at its disposal, such as requiring vehicle inspections and inspection stickers. Delaware could have derived that same minimal value without giving the police officer unbridled discretion to invade Prouse's privacy. For example, Delaware could have set up a roadblock and briefly stopped each vehicle, which at least would have subjected Prouse's privacy to no greater invasion than that of every other motorist. Instead, Delaware permitted the officer to stop Prouse without any probable cause, or even an articulable reason, to suspect Prouse of violating the law. This unconstitutionally infringed on Prouse's Fourth Amendment rights. Therefore, the Delaware Supreme Court correctly upheld the trial court's ruling, which is affirmed.

#### Concurrence (Blackmun, J.)

In addition to roadblock checks of every vehicle, the Fourth Amendment also would permit roadblock checks of every tenth vehicle. It might also be permissible for a game warden to stop every hunter, or every tenth hunter, he encounters to see if the hunter possesses a valid hunting permit.

#### Dissent (Rehnquist, J.)

Apparently on the theory that misery loves company, the majority endorses spot checks only if all motorists are exposed to the same invasion of privacy. The police officer was justified in stopping Prouse unless the record shows he unreasonably discrimated against Prouse, thereby violating the Fourteenth Amendment's equal protection clause. The record does not do so, nor does the record support the majority's contention that random checks can only marginally improve highway safety.

**Key Terms:**

**Probable Cause** - A reasonable basis, amounting to more than mere suspicion, to believe that a person has committed a crime or is about to commit a crime, or that evidence relevant to a crime exists in a particular location.

# Tennessee v. Garner

#### United States Supreme Court 471 U.S. 1 (1985)

#### Rule of Law

**Under the Fourth Amendment, a police officer may not use deadly force to stop an unarmed suspect from fleeing unless the officer has probable cause to believe the suspect poses a significant threat of death or serious physical injury to the officer or others, and the deadly force is necessary to prevent the suspect's escape.**

#### Facts

In Memphis, Tennessee, police officers Elton Hymon and Leslie Wright responded to a nighttime home burglary. After the officers arrived at the residence, Wright radioed dispatch. Meanwhile Hymon went around to the rear of the house where he saw Edward Garner (defendant) running across the backyard. Garner stopped by a chain-link fence. Hymon called out, “Police, halt.” Hymon was able to see Garner and did not believe Garner had a weapon. Garner began to climb over the fence. Hymon fired his gun, and the bullet struck Garner in the back of the head. Garner later died at the hospital. A Tennessee statute provides that “if, after notice of the intention to arrest the defendant, [the defendant] either flee[s] or forcibly resist[s], the officer may use all the necessary means to effect the arrest.” Tenn. Code Ann. 40-7-108 (1982). The police review board and grand jury declined to take criminal or civil action against Hymon or the police department. Garner’s father sued Hymon, the police department, the director, the city, and the mayor in federal court, seeking damages under 42 U.S.C. § 1983 for violations of Garner’s civil rights. The district court found for the defendants, and Garner’s father appealed. The court of appeals reversed and remanded the case, reasoning that the killing of a fleeing suspect was a “seizure” under the Fourth Amendment and was constitutional only if “reasonable.” The State of Tennessee intervened in the action to defend its law, and the United States Supreme Court granted the state’s petition for certiorari.

#### Issue

Does the Fourth Amendment permit a police officer to use deadly force to stop an unarmed suspect from fleeing if the suspect poses no threat of death or serious physical injury to others?

#### Holding and Reasoning (White, J.)

No. An officer with probable cause to believe a suspect has committed a crime may arrest that suspect, but that does not necessarily mean that the officer may apprehend the suspect by killing him. A police officer’s use of deadly force is the ultimate “seizure” under the Fourth Amendment and must therefore be reasonable. An individual’s fundamental interest in life is obvious, and both the individual and society share an interest in ensuring a judicial determination of the suspect’s guilt or innocence. There is no justification warranting the use of deadly force against an unarmed suspect who poses no danger to others simply because the officer may not be able to immediately apprehend him. Tennessee’s statute is unconstitutional insofar as it authorizes the use of deadly force against this type of suspect. If, however, the officer has a reasonable belief that the suspect poses a threat of serious physical harm to others, then it would not be unreasonable for the officer to use deadly force to prevent the suspect’s escape. The common law rule allowing the use of deadly force to apprehend a fleeing felon is antiquated. Here, Hymon could not reasonably have believed that Garner posed any threat of injury or death. Although burglary is a serious offense, the suspect was clearly unarmed. The judgment of the court of appeals is affirmed, and the case is remanded for further proceedings on liability.

#### Dissent (O’Connor, J.)

Burglary is a serious and dangerous offense, and the public’s interest in preventing such crimes is of compelling importance. In view of the public’s interest, a police officer should be afforded the discretion to use deadly force to apprehend a fleeing burglary suspect if the officer has probable cause to arrest the suspect. The interests of a particular suspect are adequately accommodated by the state’s statute. The suspect merely has to obey the valid order of the police to avoid having deadly force thrust upon him. The majority provides police with no guidance to determine what constitutes a “significant threat of death or serious physical injury.” Here, the officer did not exceed the constitutional limits placed on his use of deadly force as a last resort to apprehend a fleeing suspect.

**Key Terms:**

**Burglary** - The crime of illegally breaking and entering a building with the purpose of committing a felony therein, often larceny.

**Deadly Force** - Force that an actor uses with the purpose of causing, or which he knows to create a substantial risk of causing, death or serious bodily harm.

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

# Wilson v. Arkansas

#### United States Supreme Court 514 U.S. 927 (1995)

#### Rule of Law

**The knock and announce rule is part of the reasonableness test required to assess whether a search was valid under the Fourth Amendment.**

# Welsh v. Wisconsin

#### United States Supreme Court 466 U.S. 740 (1984)

#### Rule of Law

**The exigent circumstances exception to the Fourth Amendment does not allow warrantless entry into a home to make an arrest for a minor offense.**

#### Facts

On April 24, 1978, Edward G. Welsh (defendant) was seen driving erratically. Welsh pulled off the road into an open field and walked home. When police arrived, a witness described Welsh as either drunk or sick. The officer checked the car’s registration and learned that Welsh lived nearby. At about 9:00 p.m., the officer arrived at Welsh’s house and was let in by Welsh’s stepdaughter. The officer found Welsh naked in bed and placed him under arrest for driving while intoxicated. At the station, Welsh refused to take a breathalyzer test, which was required under Wisconsin law for anyone arrested for driving while intoxicated.

#### Issue

Does the exigent circumstances exception to the Fourth Amendment allow warrantless entry into a home to arrest an individual for a minor traffic offense?

#### Holding and Reasoning (Brennan, J.)

No. The Fourth Amendment prohibition of unreasonable searches and seizures protects the home against warrantless entry. Warrantless entry to search a home or make an arrest is only permitted in cases of emergency, or exigent circumstances. Whether such an emergency exists depends largely upon the seriousness of the offense and the dangers posed by waiting until a warrant is secured. The exigent circumstances exception to the warrant requirement generally does not apply when only a minor crime has been committed. In this case, Welsh was arrested for a minor, nonjailable traffic offense. Further, the police were not in hot pursuit of Welsh at the time he was arrested. Finally, Welsh was at home in his bed and no longer a threat to the driving public. There were no exigent circumstances justifying warrantless entry and arrest in this case.

**Key Terms:**

**Exigent Circumstances Doctrine** - An exception to the warrant requirement of the Fourth Amendment allowing police to make a warrantless entry, search, or seizure in circumstances that demand immediate action, such as a threat to human safety, the likely escape of a suspect, or the likely destruction of evidence.

**Hot Pursuit Doctrine** - A subset of the exigent-circumstances exception to the warrant requirement that applies if an individual who has committed a serious crime (generally a dangerous felony) flees to evade capture and enters a home or other private place, requiring immediate law enforcement action to apprehend him. Officers may enter the premises without a warrant to search for and arrest the individual, but only while they are in immediate or continuous pursuit.

# Winston v. Lee

#### United States Supreme Court 470 U.S. 753 (1985)

#### Rule of Law

**A compelled surgical procedure under general anesthetic for the purpose of obtaining criminal evidence constitutes an unreasonable search under the Fourth Amendment.**

#### Facts

Winston (plaintiff) was involved in a brief gunfight with a shop owner. Winston was shot in the chest. After being identified by the shop owner in the emergency room, Winston was charged with various offenses, including attempted robbery. Prior to trial, the state (defendant) filed a motion seeking to force Winston to undergo surgery that would remove the bullet from his chest so that it could be used as evidence. The trial judge granted the state’s motion. Winston petitioned the state supreme court for writs of prohibition and habeas corpus. The state court denied Winston’s petitions. Winston filed suit in federal district court seeking an injunction on Fourth Amendment grounds. The district court concluded that the surgery would be unreasonable because the risks inherent in the surgery outweighed the state’s interest in obtaining evidence. Nonetheless, the state court declined to issue a preliminary injunction because it concluded that Wilson was unlikely to succeed in his efforts to obtain a permanent injunction. After the district court ruling, an X-ray revealed that the bullet was lodged deeper in Winston’s chest than previously thought. Winston appealed to the federal appellate court. The court of appeals affirmed the district court’s conclusion that the surgery would constitute an unreasonable seizure under the Fourth Amendment. The state petitioned the United States Supreme Court for review.

#### Issue

Does a compelled surgical procedure under general anesthetic for the purpose of obtaining criminal evidence constitute an unreasonable search under the Fourth Amendment?

#### Holding and Reasoning (Brennan, J.)

Yes. A compelled surgical procedure under general anesthetic for the purpose of obtaining criminal evidence constitutes an unreasonable search under the Fourth Amendment. When the public’s interest in obtaining evidence relevant to a criminal prosecution outweighs the individual Fourth Amendment right to security against the intrusions of government into private affairs, the public interest justifies a compelled intrusion into privacy. The measure of the interest that justifies intrusion is embodied in the standard of probable cause. The degree of intrusion must be reasonable by comparison to the importance of the public interest it purports to serve. A severe intrusion, such as a surgical procedure, may be unreasonable regardless of the probability that it will obtain evidence of a crime. Our decision in *Schmerber v. California*, 384 U.S. 757 (1966), sets forth the standards for testing the reasonableness of an intrusion into the human body. The baseline requirement of the *Schmerber*analysis is a determination of probable cause. When probable cause exists, we must assess the extent of risk an intrusive procedure poses to the individual. We also consider the extent to which the procedure derogates the individual’s dignity and sense of personal privacy. These considerations must be balanced against the public interest in obtaining a reliable conviction or acquittal. In *Schmerber*, we held that a compulsory blood draw under exigent circumstances was reasonable in light of the state’s interest in enforcing laws prohibiting drunk driving. The *Schmerber*test supports the conclusion of the court of appeals in this case. Probable cause existed and Winston was afforded appropriate procedural due process opportunities to contest compelled surgery. The remaining question is whether the particular surgical procedure being demanded is reasonable when the extent of intrusion is balanced against the interests of the public. In this case, the risks to Winston posed by the surgical procedure are the subject of conflicting testimony. However, the likelihood that the procedure would require general anesthesia effectively puts Winston at risk of having no ability to monitor or control the extent of the intrusion into his body. The state’s interest in obtaining evidence in the manner it demands is not so compelling as to justify the extent of the proposed intrusion. The testimonial evidence relied upon by the state to support a finding of probable cause demonstrates a probability of successfully prosecuting Winston without the additional evidence of the bullet lodged in his chest. The uncertainty over the risks posed by the surgery is sufficient to support a conclusion that the surgical intrusion is not reasonable. The state has not demonstrated a compelling need for the evidence that would be obtained through surgical removal. We hold that the proposed surgery constitutes an unreasonable search under the Fourth Amendment. The judgments of the lower courts are affirmed.

**Key Terms:**

**Writ of Habeas Corpus** - Enables a detainee or prisoner to challenge the legality of his detention by the government.

**Writ of Prohibition -** An order of an appellate court directing the lower court to refrain from further action in a legal matter owing to a lack of jurisdiction or the existence of procedural error.

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

# \*\*ATWATER v. CITY OF LAGO VISTA\*\*

#### United States Supreme Court 532 U.S. 318 (2001)

#### Rule of Law

**The Fourth Amendment does not prohibit a warrantless arrest for a minor offense.**

#### Facts

In March 1997, Gail Atwater (plaintiff) was pulled over for driving without a seatbelt and for failing to secure her two children in the front seat. Each violation is a misdemeanor carrying a fine of $25 to $50. Pursuant to Texas law, the officer arrested Atwater instead of issuing a citation. Atwater was booked into jail, brought before a magistrate, and released on bond. Atwater sued the officer, the police chief, and City of Lago Vista (defendants) under 42 U.S.C. § 1983 claiming that the arrest was an unreasonable seizure under the Fourth Amendment.

#### Issue

Does a warrantless arrest for a minor offense violate the Fourth Amendment?

#### Holding and Reasoning (Souter, J.)

No. The Fourth Amendment does not prohibit warrantless arrests for minor offenses. It is unclear whether the Framers of the amendment intended to prohibit warrantless arrests for misdemeanors that did not constitute a breach of the peace. The laws and legal commentary at common law indicate disagreement about the power. Further, the widespread practice from the common law era to date has been to permit such arrests. Atwater urges the creation of a new rule forbidding warrantless arrests for nonjailable offenses absent a “compelling need for immediate detention.” While such a rule would be fair in this case, it would be difficult for government officers to implement in practice and likely lead to increased litigation. Arresting officers may not know the specific penalty for every given offense and may not be able to discern the necessary facts. For example, an officer making a drug arrest may not know the exact weight of the drugs in question. The same can be said of traffic offenses. The goals of the Fourth Amendment are best advanced with simple rules that are easy to administer. An officer with probable cause to believe any crime has been committed in his presence may arrest the suspect without violating the Fourth Amendment. In this case, the officer had probable cause to believe Atwater had violated the seatbelt laws in his presence. Therefore, the arrest was constitutional.

#### Dissent (O’Connor, J.)

The majority rule authorizing custodial arrest where there is probable cause to believe a nonjailable offense has been committed is contrary to the Fourth Amendment prohibition against unreasonable searches and seizures. Since history is inconclusive, the question must be whether such seizures are reasonable. Even a short seizure is a very serious intrusion of privacy. While there may be legitimate government interests that may justify that intrusion in cases involving minor offenses, the officer should only make a custodial arrest in such cases if “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the additional] intrusion.” The Court acknowledges that no government interest in this case justified the intrusion Atwater experienced. The arrest was therefore unreasonable in violation of the Fourth Amendment. Further, the Court’s rule sets a dangerous precedent allowing not only arrests, but also searches incident to arrest, wherever probable cause exists to believe a fine-only offense has been committed, no matter how unreasonable.

***Atwater –*** The Fourth Amendment permits arrests for fine-only misdemeanors, including minor traffic infractions.

**Key Terms:**

**Probable Cause** - A reasonable basis, amounting to more than mere suspicion, to believe that a person has committed a crime or is about to commit a crime, or that evidence relevant to a crime exists in a particular location.

***Atwater v. City of Lago Vista* 2001**

**The Fourth Amendment does not prohibit a warrantless arrest for a minor offense.**

**Atwater v. City of Lago Vista, 532 US 318 (2001)**

**Facts: civil rights lawsuit against city. Officer observed seatbelt violation and stopped car. Officer made custodial arrest and Atwater was booked and made bond about an hour later. Later, she pleaded no contest to seatbelt violation and paid a $50 dollar fine. TX law requires front seat passengers to wear seatbelt if car is equipped with seatbelts. Violation of the law is a misdemeanor punishable by fine only and officer has discretion whether to issue a citation or make a custodial arrest. District Court granted summary judgment for City, Court of Appeals reversed, Court of Appeals then sitting en banc reversed again, Plaintiff appealed here.**

**Issue: whether 4th Amendment prohibits custodial arrest for minor offense where fine is the only punishment?**

**When an officer has probable cause to believe that an individual has committed even a minor offense in his presence, he may arrest the individual, because**

**Too hard to implement D’s proposal in the field – officers don’t know complex punishment / penalty schemes**

**Many states have statutes that set rules about citation v. custodial arrest and State level rather than constitutional level is appropriate.**

**Dissent: instead of a blanket rule allowing arrest, Court should engage in balancing test weighing the serious intrusion on liberty and privacy against the degree to which it is needed for promotion of legitimate government interests.**

**If government punishes offense by fine only then no legitimate interest in custodial arrest**

**If fine-only offense then rule should be citation and exceptions created to justify escalation to custodial arrest based on legitimate reasons.**

# Whren v. United States

#### United States Supreme Court 517 U.S. 806 (1996)

#### Rule of Law

**Except with inventory searches and administrative inspections, when probable cause of illegal conduct exists, an officer’s true motive for searching or detaining a person does not negate the constitutionality of the search or seizure.**

**Arkansas v. Sullivan**

121 S.Ct. 1876

Supreme Court of the United States

**ARKANSAS**

**v.**

**Kenneth Andrew SULLIVAN.**

No. 00–262.

Decided May 29, 2001.

**Synopsis**

Defendant charged with possession of methamphetamine with intent to deliver, attempt to manufacture methamphetamine, possession of drug paraphernalia, unlawful possession of weapon, and speeding moved to suppress evidence found in his vehicle. The Circuit Court, Faulkner County, [Charles Edward Clawson](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0318476201&originatingDoc=I318f05c99c2511d9bdd1cfdd544ca3a4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I318f05c99c2511d9bdd1cfdd544ca3a4), J., granted motion, and state appealed. The Arkansas Supreme Court, affirmed, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I400d5fbbe7b711d98ac8f235252e36df&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[340 Ark. 315, 11 S.W.3d 526,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000051541&pubNum=4644&originatingDoc=I318f05c99c2511d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) and denied petition for rehearing, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I5a0c3b2ee7b811d9b386b232635db992&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[16 S.W.3d 551.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000357381&pubNum=4644&originatingDoc=I318f05c99c2511d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) On grant of petition for writ of certiorari, the United States Supreme Court held that: (1) any improper subjective motivation of police officer for stopping defendant's vehicle did not render arrest violative of Fourth Amendment, and (2) Arkansas Supreme Court could not inquire into arresting officer's subjective motivation on theory that it could interpret United States Constitution more broadly than United States Supreme Court.

Reversed and remanded.

Justice [Ginsburg](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I318f05c99c2511d9bdd1cfdd544ca3a4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I318f05c99c2511d9bdd1cfdd544ca3a4) concurred and filed opinion in which Justices [Stevens](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0156277701&originatingDoc=I318f05c99c2511d9bdd1cfdd544ca3a4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I318f05c99c2511d9bdd1cfdd544ca3a4), [O'Connor](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0209675601&originatingDoc=I318f05c99c2511d9bdd1cfdd544ca3a4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I318f05c99c2511d9bdd1cfdd544ca3a4), and [Breyer](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I318f05c99c2511d9bdd1cfdd544ca3a4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I318f05c99c2511d9bdd1cfdd544ca3a4) joined.

**Procedural Posture(s):** On Appeal.

# Welsh v. Wisconsin

#### United States Supreme Court 466 U.S. 740 (1984)

#### Rule of Law

**The exigent circumstances exception to the Fourth Amendment does not allow warrantless entry into a home to make an arrest for a minor offense.**

# United States v. Robinson

#### United States Supreme Court 414 U.S. 218 (1973)

#### Rule of Law

**During a lawful arrest, it is reasonable under the Fourth Amendment to search the person being arrested.**

***United States v. Robinson*** extended the search incident to arrest exception to minor offenses. It also clarified that arresting officers may open containers found during search, even without probable cause.

# New York v. Belton

#### United States Supreme Court 453 U.S. 454 (1981)

#### Rule of Law

**Incident to a lawful arrest, the police may search the area within the arrestee’s immediate control.**

#### Facts

Belton (defendant) was in a car that was pulled over for speeding. When the officer smelled marijuana, he ordered Belton and the three other occupants out of the car and placed them under arrest. The officer then searched the passenger area of the car and, upon finding Belton’s jacket, searched the pocket and found cocaine. At trial, and over Belton’s objections, the cocaine was entered into evidence and Belton was convicted of possession of controlled substances. On appeal, the court disagreed with the trial judge and suppressed the evidence of the cocaine.

#### Issue

Where an officer has instructed the occupant of a car to step out of the automobile and has placed the occupant under arrest, is the passenger compartment of the car part of the area in the arrestee’s immediate control and therefore subject to search?

#### Holding and Reasoning (Stewart, J.)

Yes. The passenger area of the car is under the immediate control of a recent occupant now under arrest, and is subject to lawful search by the arresting officer. Furthermore, if the passenger area can be reached by the arrestee then so can those containers in the area and therefore, containers in the passenger area are subject to search as well. The Court comes to this bright-line rule because it recognizes the inconsistency of recent lower court decisions regarding this issue, and it emphasizes the importance of the police knowing the extent of their authority and of people knowing the extent of their rights. The officer’s search of Belton’s jacket was lawful and the cocaine evidence was properly admitted at trial. Accordingly, the judgment is reversed.

#### Dissent (White, J.)

The Court holds that luggage, briefcases and other containers in a car may be searched without probable cause or any sort of suspicion. Such a holding is dangerous and far too sweeping.

#### Dissent (Brennan, J.)

The Court here claims to follow *Chimel v. California*, 395 U.S. 752 (1969), where it held that officers may search the area in the immediate control of the person being arrested. However, the Court’s desire to create a bright-line rule is not at all consistent with the Fourth Amendment or with *Chimel*. The Court’s holding that the passenger area of a car will always be within the immediate control of the arrestee, ignores the case-by-case determination of what is in an arrestee’s area of control that was central to the *Chimel* holding. As a result, the Court’s holding is not consistent with the Fourth Amendment or the Court’s own jurisprudence.

**Key Terms:**

**Fourth Amendment -** An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

# Arizona v. Gant

#### United States Supreme Court 129 S.Ct. 1710 (2009)

#### Rule of Law

**Police may search a vehicle after a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe that crime-related evidence is located in the vehicle.**

# County of Riverside v. McLaughlin

#### United States Supreme Court 500 U.S. 44 (1991)

#### Rule of Law

**A judicial determination of probable cause made within 48 hours of arrest is generally sufficiently prompt.**

# Florence v. Board of Chosen Freeholders of the County of Burlington

#### United States Supreme Court 566 U.S. 318 (2012)

#### Rule of Law

**A strip search in jail for those who commit minor offenses does not require reasonable suspicion.**

#### Facts

In 2003, a bench warrant was issued for the arrest of Albert Florence (plaintiff), based on his failure to pay a fine imposed after a prior conviction for a minor offense. Florence paid the fine but the warrant was not removed from the statewide database. Consequently, Florence was arrested two years later and taken to the Burlington County Detention Center (Burlington County). After six days, Florence was transferred to Essex County Correctional Facility. At Burlington County, every arrestee was required to shower with a delousing agent. Correctional officers then examined the arrestees for identifying marks and contraband. Florence claims that he was required to open his mouth, lift his tongue, raise his arms, turn around, and lift his genitals. At Essex County Correctional Facility (Essex County), the largest county jail in New Jersey, the detainees were required to walk through a metal detector. Every inmate was then required to remove their clothing while a correctional officer examined their bodies for identifying marks and contraband. Florence claims that he was required to lift his genitals, turn around, and cough while squatting. Florence was then required to shower while officers inspected his clothing. Florence was released the day after arriving at Essex County. He brought suit against the governmental entities operating the jails, among other defendants, arguing that correctional officers should only be able to conduct strip searches in jail upon reasonable suspicion that the inmate carries contraband.

#### Issue

Does a strip search in jail for those who commit minor offenses require reasonable suspicion?

#### Holding and Reasoning (Kennedy, J.)

No. Given the legitimate penological interests of correctional officers in conducting strip searches, this Court gives deference to the judgment of correctional officials. In order to overcome the deference granted to correctional officials, there must be substantial evidence that demonstrates their policies are unnecessary or unjustified as a solution to jail security. Florence fails to show such substantial evidence. The practice of strip searching all inmates is justified, given the health and security risks attendant to admitting large numbers of inmates. Furthermore, the practice of observing all inmates for identifying marks is essential to preventing gang violence in the jails. To limit strip searches to only those who have committed more serious offenses would not be feasible, as those who have committed both serious and minor offenses have been found to be dangerous in the jail setting. In light of these considerations, this Court finds that the strip search policies of both Burlington County and Essex County reasonably balance their inmates’ right to privacy and the needs of those institutions.

#### Concurrence (Roberts, C.J.)

The Court announces a general rule but should leave open the possibility of finding exceptions in the future.

#### Concurrence (Alito, J.)

This decision should be limited to the specific context of inmates being admitted to the general population of a jail.

#### Dissent (Breyer, J.)

The types of strip searches at issue here constitute unreasonable searches conducted in violation of the Fourth Amendment absent reasonable suspicion. The defendants have failed to set forth justification for not requiring reasonable suspicion.

**Key Terms:**

**Fourth Amendment -** An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

# \*\*MARYLAND v. KING\*\*

#### United States Supreme Court 569 U.S. \_\_\_ (2013)

#### Rule of Law

**When officers make an arrest for a serious offense that is supported by probable cause and bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is a legitimate police-booking procedure that is reasonable under the Fourth Amendment.**

#### Facts

In 2003, a man broke into the victim's house and raped her. Police were unable to determine the man's identity from the woman's description, but police were able to get the man's DNA. In 2009, Alonzo King was arrested for an unrelated assault. During booking, as was standard practice for serious offenses under Maryland law, the police used a cotton swab to take a DNA sample from the inside of King's cheek. The DNA was run through a law enforcement database, and officers found that it matched the DNA of the perpetrator from the 2003 rape. The state court admitted the DNA evidence and convicted King of the rape. The Court of Appeals of Maryland reversed, holding that the cotton-swab procedure constituted an unreasonable search and seizure under the Fourth Amendment. The United States Supreme Court granted certiorari.

#### Issue

When officers make an arrest for a serious offense that is supported by probable cause and bring the suspect to the station to be detained in custody, is taking and analyzing a cheek swab of the arrestee's DNA a legitimate police-booking procedure that is reasonable under the Fourth Amendment?

#### Holding and Reasoning (Kennedy, J.)

Yes. Even when a warrantless search is legal, the search still must be reasonable in its scope. To be reasonable, the warrantless search must further a legitimate government interest that outweighs the search's intrusion upon the searched individual's privacy. When officers make an arrest for a serious offense that is supported by probable cause and bring the suspect to the station to be detained, taking and analyzing a cheek swab of the arrestee's DNA is a legitimate and reasonable police-booking procedure under the Fourth Amendment. DNA sampling is simply the 21st century version of fingerprinting, a well-established booking practice, and is much more accurate. The legitimate government interests in taking a DNA sample at booking are: accurate identification, ensuring the safety of law enforcement staff, determining with more accuracy whether and to what extent bail should be offered, and potentially freeing a person who has been wrongfully convicted of an arrestee's prior crime. In contrast, a cheek swab's intrusion to an arrestee, particularly incrementally above fingerprinting, is minimal. A DNA swab is easy, painless, and very quick. Moreover, an arrestee's expectation of privacy once in custody is severely reduced. In sum, the legitimate government interests outlined above, combined with the incredible accuracy of DNA sampling, outweigh any additional intrusion taking a DNA sample places on arrestees. As a result, DNA sampling from a suspect's cheek with a cotton swab during booking is reasonable under the Fourth Amendment. The DNA swabbing of King in this case was constitutional. The Court of Appeals of Maryland is reversed.

#### Dissent (Scalia, J.)

Under the Fourth Amendment, a search of an individual without reasonable suspicion that the individual committed the crime is not constitutional, unless it falls into the category of a special-needs search. In no cases, however, has the Court condoned a suspicionless search for the purpose of crime detection. The majority claims that the primary purpose of the DNA sampling is not crime solving. However, that premise does not hold up. The majority lists several government interests that are not crime solving, but there can be no doubt that crime solving is the true underlying purpose of DNA sampling. The majority thus engages in a reasonableness inquiry that it should not even have reached, because a suspicionless DNA search was not a special-needs search from the outset. Law enforcement's DNA sampling of King was an unconstitutional search. And, in addition to being legally flawed, this decision could have far-reaching and unwanted policy implications.

***Maryland v. King*** led to the increasing collection of DNA from arrested persons. Every state now collects DNA from some or all arrestees.

**Key Terms:**

**Special Needs Doctrine** - Exception to the Fourth Amendment allowing searches without a warrant or probable cause generally for purposes other than law enforcement, like administrative inspections or drug screenings.

***Maryland v. King* 2013**

**When officers make an arrest for a serious offense that is supported by probable cause and bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee’s DNA is a legitimate police booking procedure that is reasonable under the Fourth Amendment.**

**Maryland v. King, 569 US 435 (2013)**

**Facts: In 2009 King arrested for menacing a group with a shotgun. Routine booking procedure required buccal swab for DNA sample. Codis hit matched DNA to 2003 rape. All 50 States required the collection of DNA from felony convicts. Like Maryland, TN requires the collection of DNA from arrestees charged with violent felonies. Tried and convicted of the rape, Court of Appeals reversed.**

**Issue: Was the swabbing an unreasonable search?**

**Holding: No, balancing test of intrusion into privacy vs. govt’s legitimate interest. Here, privacy intrusion is minute. It’s just a swab. Govt interest is (1) identity of suspect, (2) which affects how jailers could treat him, (3) availability of the suspect (4) criminal history, which is critical to risk assessment, (5) freeing the innocent.**

**Dissent: The primary purpose here is discovering criminal activity. That is the very thing that should be subject to fourth amendment scrutiny. Also, if evidence they seek, special needs searches are usually justified by their eventual dissipation. Not here. Indeed, it took months to test. Finally, everybody agrees they could have gotten it subject to his conviction, as opposed to this way subject to arrest only.**

**Note: Frogge has TCA 30-35-321 (e) on the powerpoint immediately following the *King* case, though I did not see it listed on the syllabus.**

**Tenn. Code Ann. Section 40-35-321 (e)**

* + **(1)**  When a person is arrested on or after January 1, 2008, for the commission of a violent felony as defined in subdivision (e)(3), the person shall have a biological specimen taken for the purpose of DNA analysis to determine identification characteristics specific to the person as defined in subsection (a). After a determination by a magistrate or a grand jury that probable cause exists for the arrest, but prior to the person's release from custody, the arresting authority shall take the sample using a buccal swab collection kit for DNA testing. The biological specimen shall be collected by the arresting authority in accordance with the uniform procedures established by the Tennessee bureau of investigation, pursuant to [§ 38-6-113](https://advance.lexis.com/document/?pdmfid=1000516&crid=49816b98-608c-49da-9147-70186888907a&pddocfullpath=/shared/document/statutes-legislation/urn:contentItem:50JB-7980-R03N-T26X-00000-00&pddocid=urn:contentItem:50JB-7980-R03N-T26X-00000-00&pdcontentcomponentid=10650&pdteaserkey=sr0&ecomp=q85tk&earg=sr0&prid=298d7932-b4dd-4112-9cb3-a94367c0b3f8) and shall be forwarded by the arresting authority to the Tennessee bureau of investigation, which shall maintain the sample as provided in [§ 38-6-113](https://advance.lexis.com/document/?pdmfid=1000516&crid=49816b98-608c-49da-9147-70186888907a&pddocfullpath=/shared/document/statutes-legislation/urn:contentItem:50JB-7980-R03N-T26X-00000-00&pddocid=urn:contentItem:50JB-7980-R03N-T26X-00000-00&pdcontentcomponentid=10650&pdteaserkey=sr0&ecomp=q85tk&earg=sr0&prid=298d7932-b4dd-4112-9cb3-a94367c0b3f8). The court or magistrate shall make the provision of a specimen a condition of the person's release on bond or recognizance if bond or recognizance is granted.
  + **(2)**  The clerk of the court in which the charges against a person described in subdivision (e)(1) are disposed of shall notify the Tennessee bureau of investigation of final disposition of the criminal proceedings. If the charge for which the sample was taken is dismissed or the defendant is acquitted at trial, then the bureau shall destroy the sample and all records of the sample; provided, that there is no other pending qualifying warrant or capias for an arrest or felony conviction that would otherwise require that the sample remain in the data

**United States v. Kelly**

55 F.2d 67

Circuit Court of Appeals, Second Circuit.

**UNITED STATES**

**v.**

**KELLY.**

No. 135.

Jan. 18, 1932.

**Synopsis**

Appeal from the District Court of the United States for the Eastern District of New York.

Criminal prosecution by the United States of America against Mortimer Kelly. The defendant filed a petition praying that certain finger prints taken by Prohibition Agents at the time of his arrest for the sale of a quarter of intoxicating liquor be returned to him. From an order ([](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I343597c2547311d9a99c85a9e6023ffa&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Search))[51 F.(2d) 263)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1931127603&pubNum=350&originatingDoc=Iffb55147547511d997e0acd5cbb90d3f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) directing the United States Attorney to return the finger prints, the United States appeals.

Order reversed with directions.

# United States v. Robinson

#### United States Supreme Court 414 U.S. 218 (1973)

#### Rule of Law

**During a lawful arrest, it is reasonable under the Fourth Amendment to search the person being arrested.**

***United States v. Robinson*** extended the search incident to arrest exception to minor offenses. It also clarified that arresting officers may open containers found during search, even without probable cause.

# Florence v. Board of Chosen Freeholders of the County of Burlington

#### United States Supreme Court 566 U.S. 318 (2012)

#### Rule of Law

**A strip search in jail for those who commit minor offenses does not require reasonable suspicion.**

# City of Indianapolis v. Edmond

#### United States Supreme Court 531 U.S. 32 (2000)

#### Rule of Law

**A suspicionless roadside checkpoint established for the purpose of deterring general criminal activity is unlawful under the Fourth Amendment.**

#### Facts

In order to interdict illegal drugs, the city of Indianapolis began to set up vehicle checkpoints in 1998. The city had six such checkpoints, and between August and November of 1998 it stopped 1,161 vehicles and arrested 104 motorists. Fifty five of the arrests were for drug related offenses, while forty nine were unrelated to drugs. The procedure is as follows: At each checkpoint the police stop a predetermined number of vehicles, and the driver is asked for a license and the car registration. The driver in each case is inspected for signs of impairment. The directives authorize that the police can conduct a search only by consent or if they have “particularized suspicion.” The officers must stop each car in a particular sequence, and they cannot stop vehicles out of sequence. A dog was used to sniff around the car. Moreover, officers have no discretion to vary the predetermined plan for the checkpoint search. Edmond (plaintiff) and Palmer (plaintiff) were stopped at such a checkpoint in September 1998. They filed a class action lawsuit on behalf of all motorists who were, or would be, stopped. Edmond and Palmer claimed the roadblocks violated the Fourth Amendment. The court of appeals held that the roadblocks did violate the amendment. The United States Supreme Court granted certiorari.

#### Issue

Is a suspicionless roadside checkpoint established for the purpose of deterring general criminal activity unlawful under the Fourth Amendment?

#### Holding and Reasoning (O’Connor, J.)

Yes. A suspicionless roadside checkpoint established for the purpose of deterring general criminal activity is unlawful under the Fourth Amendment. We proceed under the assumption that stopping a vehicle represents a seizure. We must determine whether such seizure is constitutional under the Fourth Amendment. In *Michigan Department of State Police v. Sitz*, 496 U.S. 444 (1990), we ruled that a roadside checkpoint was constitutional because the primary purpose of the program was to ensure highway safety by stopping and arresting motorists who might be impaired by alcohol. In *Sitz*, there was an obvious connection between the need for highway safety and the means employed to effect such safety. While such a roadblock would pass constitutional muster, we have not allowed roadblocks for the general purpose of fighting crime. In fact, those roadblock programs that we have allowed have served purposes closely related to the problems of guarding the border (see *United States v. Martinez-Fuerte*, 428 U.S. 543 [1976]), or ensuring roadway safety, as in *Sitz*. The primary purpose of the Indianapolis checkpoint program is to interdict illegal drugs, as plaintiffs have conceded. Since its purpose is to uncover evidence of ordinary criminal wrongdoing, the Indianapolis checkpoints violate the Fourth Amendment. The plaintiffs urge us to consider that interdicting drugs is a task of the first magnitude and will contribute to increased highway safety. But even if the threat is grave, that does not mean that we should not scrutinize the means employed to reach the sought-after end. We do not lightly depart from the ordinary rule, articulated in *Chandler v. Miller*, 520 U.S. 305 (1997), that a search of seizure is ordinarily unreasonable “in the absence of individualized suspicion of wrongdoing.” Nor does the instant case present a situation where there are “special needs” that might allow a different standard. The City of Indianapolis uses the roadside stops as a means to fight ordinary crime, and this it cannot do. Absent some quantum of individualized suspicion, which would justify a stop, such roadblocks are unconstitutional. Even if the plaintiffs claim that a legitimate secondary purpose of the program is to keep impaired motorists off the road and verify licenses and registration, we cannot give sanction to the program. For it would be easy to institute all manner of illegal searches as long as license verifications were included, just to make the search “legal.” For the foregoing reasons, we affirm the decision of the court of appeals.

#### Dissent (Rehnquist, C.J.)

There is essentially no difference between this case and *Sitz*, where we allowed the roadside stops. The success rate of Indianapolis’s program confirms that it serves the state’s legitimate interests in keeping drunken or otherwise impaired drivers off the road and verifying that motorists have a valid license and registration. These roadblocks should be allowed because they are conducted in a neutral way that limits the officers’ discretion. The majority today creates a new test, the “primary purpose test,” but this is unnecessary under the Fourth Amendment, and in the future it will prove difficult to determine the “purpose” of a given seizure, adding confusion to the analysis.

#### Dissent (Thomas, J.)

We have decided that the suspicionless searches at issue in *Sitz* and *Martinez-Fuerte*were constitutional because they were executed in a neutral way that limited police officers’ discretion.I do not think that those cases were decided properly or that the Framers would think random stops “reasonable” without suspicion of wrongdoing. Overruling those decisions requires more analysis, however, and for that reason I join the opinion of Chief Justice Rehnquist.

**Key Terms:**

**Fourth Amendment -** An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Injunctive Relief** - An equitable remedy whereby the court does not order damages but instead instructs a party to do something or refrain from doing something.

**Declaratroy Relief** - Court-issued relief in the form of a declaration of the parties’ legal rights and/or obligations in a particular situation.

# Samson v. California

#### United States Supreme Court 126 S. Ct. 2193 (2006)

#### Rule of Law

**The suspicionless search of a parolee does not violate the Fourth Amendment.**

#### Facts

On September 6, 2002, a San Bruno Police Officer stopped parolee Donald Curtis Samson (defendant). The officer believed that there was an outstanding warrant on Samson, but the radio dispatcher confirmed that there was no warrant. The officer then searched Samson and found drugs. Before trial, Samson moved to suppress the evidence found during the search. The trial court denied the motion, and Samson was convicted by a jury and sentenced to seven years incarceration. The United States Supreme Court granted certiorari.

#### Issue

Under the Fourth Amendment, may a parolee be searched without a warrant, probable cause, or suspicion?

#### Holding and Reasoning (Thomas, J.)

Yes. The Fourth Amendment does not prohibit the suspicionless search of a parolee whose release was conditioned on agreement to submit to search or seizure without cause. Reasonableness under the Fourth Amendment requires considering the totality of the circumstances and balancing an individual’s privacy interests against legitimate governmental goals. Parolees are legally in the custody of the state for the duration of parole. Because parole is analogous to prison, a parolee’s diminished privacy rights are more like those of a prisoner than a probationer. The state’s interest in protecting the public and rehabilitating the offender are substantial. Under California law, a parolee must consent to search or seizure with or without cause as a condition of release. The officer’s suspicionless search of Samson was permitted by statute and reasonable under the Fourth Amendment. Therefore, the suspicionless search of a parolee is constitutional.

#### Dissent (Stevens, J.)

Case law recognizes the reduced right to privacy enjoyed by probationers and parolees and gives wide discretion to probation officers to tailor supervision to the needs of each probationer. Nevertheless, prior precedent does not support allowing any law enforcement officer to search parolees without cause. The Court falsely equates parolees with prisoners and permits searches of parolees without any cause whatsoever. This ruling is directly contrary to the purposes of the Fourth Amendment.

**Key Terms:**

**Parole** - The release of a prisoner from jail for the remainder of his sentence if certain conditions are met (e.g., regular meetings with a parole officer).

# \*\*MITCHELL v. WISCONSIN\*\*

#### United States Supreme Court 139 S. Ct. 2525 (2019)

#### Rule of Law

**Police may almost always obtain warrantless blood tests of an unconscious drunk-driving suspect.**

#### Facts

A witness reported that Gerald Mitchell (defendant) was driving drunk to police. Officers found Mitchell slurring and stumbling. A portable breathalyzer registered his blood-alcohol content (BAC) at triple the legal limit. Police transported Mitchell to the station to administer an evidence-grade breathalyzer, but Mitchell had become too lethargic. Officers transported Mitchell to the hospital, but he passed out on the way. An officer read Mitchell the standard prefatory statement required before administering blood tests in Wisconsin, heard no reply, and directed hospital staff to draw a blood sample. The test showed that Mitchell’s blood-alcohol level remained almost triple the legal limit 90 minutes after his arrest. The trial court admitted the blood-test evidence over Mitchell’s objection, and the jury convicted him. Mitchell appealed on the ground that the blood test constituted an unreasonable search without a warrant in violation of the Fourth Amendment. The Wisconsin Supreme Court affirmed his conviction, but the United States Supreme Court granted review.

#### Issue

May police almost always obtain warrantless blood tests of an unconscious drunk-driving suspect?

#### Holding and Reasoning (Alito, J.)

Yes. Police may almost always obtain warrantless blood tests of an unconscious drunk-driving suspect. The Fourth Amendment protects against unreasonable searches and seizures. Because a blood test is a search for incriminating evidence, it requires a warrant or consent. Exceptions apply under the exigent-circumstances rule and for searches performed incident to arrest. The exigent-circumstances rule almost always allows warrantless blood testing of unconscious drivers. Enforcing drunk-driving laws depends on administering blood testing if a breath test is impossible. Police often deal with circumstances that take priority over obtaining a warrant. An unconscious driver is usually taken to the hospital and blood-tested for diagnostic purposes anyway. Like most states, Wisconsin has an implied-consent law that deems drivers to have consented to testing if police suspect impaired driving. Police must read a standard statement explaining the right to withdraw consent for blood testing. Unconscious drivers are considered to have not withdrawn that consent. The Court held that blood testing does not violate constitutional rights against self-incrimination in *Schmerber v. California*, 384 U.S. 757 (1966). The Court also upheld warrantless breath testing of conscious drunk-driving suspects incident to arrest, but not more intrusive blood testing in*Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016). The Court confirmed that the exigent-circumstances rule allows warrantless blood testing if justified by pressing circumstances coupled with the fleeting nature of blood-alcohol evidencein *Missouri v. McNeely,*569 U.S. 141 (2013). Blood-alcohol testing is necessary to enforce life-saving laws. BAC evidence literally disappears by the minute as the body processes it. Exigency exists if BAC evidence is dissipating and some other circumstance creates a pressing need. An unconscious drunk-driving suspect presents a compelling need. Here, Mitchell’s stupor eliminated any reasonable opportunity for police to perform a breath test using evidence-grade equipment. Police transported him quickly to the station, but his condition made breath testing impossible. Mitchell passing out created not just a compelling need but a medical emergency, making it reasonable to take him to the hospital and request blood testing without the delay of getting a warrant. However, in rare cases, a driver may be able to show that police would not have obtained a blood sample unless they were seeking BAC evidence and that no pressing need made it unreasonable to obtain a warrant beforehand. Because the trial court did not give Mitchell an opportunity to make that showing, the Court remands to allow him to attempt to do so.

#### Concurrence (Thomas, J.)

The plurality adopts a rule too difficult to apply. Dissipation of blood-alcohol evidence alone is an exigent circumstance that justifies warrantless blood-testing, without showing an additional compelling need.

#### Dissent (Gorsuch, J.)

The Court should not have reviewed this case because it did not properly present the exigent-circumstances question.

#### Dissent (Sotomayor, J.)

Wisconsin did not raise or brief the exigent-circumstances argument. This Court should not volunteer grounds that Wisconsin affirmatively waived. Unconsciousness does not necessarily mean police cannot get a warrant in time to obtain blood-alcohol evidence before it dissipates. Today police can request warrants electronically, and judges can issue them in five to fifteen minutes. The Fourth Amendment requires police to get a warrant before drawing blood from an unconscious drunk-driving suspect.

**Key Terms:**

**Fourth Amendment -** An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Search Incident to Arrest** - An exception to the Fourth Amendment prohibition of unreasonable searches and seizures that allows a police officer making a lawful arrest to perform a search of a suspect or the area under the suspect’s control, without a warrant or probable cause

**Exigent Circumstances Doctrine** - An exception to the warrant requirement of the Fourth Amendment allowing police to make a warrantless entry, search, or seizure in circumstances that demand immediate action, such as a threat to human safety, the likely escape of a suspect, or the likely destruction of evidence.

***Mitchell v. Wisconsin* 2019**

**Police may almost always obtain warrantless blood tests of an unconscious drunk-driving suspect. Exigent circumstances should justify all DUI blood draws.**

**Mitchell v. Wisconsin, 588 US \_\_\_\_\_ (2019)**

**Facts: Police received a report that Mitchell had been driving drunk. Police found Mitchell wandering near a lake, and he appeared so impaired that he could barely stand. Police administered a breathalyzer which indicated impairment, and they arrested him, intending to obtain a more accurate breath test (or blood test) at the police station. He passed out on the way, and police took him to a local hospital. Despite his unconsciousness, police read Mitchell the implied consent allowing refusal of the blood test. When the unconscious defendant did not respond, police ordered hospital staff to draw Mitchell’s blood and test it. It registered .22, and Mitchell was charged with DUI. He filed a motion to suppress which was denied and he was convicted. The Wisconsin Supreme Court affirmed, and he appealed here.**

**Issue: Was the forced blood draw of an incapacitated Defendant a violation of his 4th Amendment rights?**

**Holding: No, because exigent circumstances, an exception to the warrant requirement, allow the search. IN Mo. V. McNeely, we agreed that exigent circumstances do not justify a blood draw in every DUI case because the destruction of evidence alone was not compelling enough, but that the public safety concerns in Scmerber v. California were enough to push it over the line where a car accident had occurred. Now, rule is (1) where BAC is dissipating, and (2) other health welfare or safety reason should take priority over a warrant, EC applies.**

**BUT in an unusual case,” the rule would not apply – for example, if the suspect could show “that his blood would not have been drawn if police had not been seeking” blood-alcohol information, and that police didn’t have any reason to believe that they couldn’t have gotten a warrant. Because Mitchell had not had a chance to meet this standard, Alito concluded, his case would go back to the Wisconsin courts to give him a chance to do so.**

**Concurrence: Exigent circumstances should justify all DUI blood draws**

**Dissent: (Sotomayor) Police could get a warrant. Also, Wisconsin waived the issue. (Gorsuch): This wasn’t argued.**

# Schmerber v. California

#### United States Supreme Court 384 U.S. 757 (1966)

#### Rule of Law

**(1) The admission of evidence gathered by forcing a suspect to submit to a blood test does not violate the Fifth Amendment privilege against self-incrimination.**

**(2) The exigent-circumstances exception to the Fourth Amendment's warrant requirement allows officers to withdraw a suspect's blood for testing without a warrant if officers reasonably believe that delaying the test to obtain a warrant could lead to the destruction of evidence.**

**South Dakota v. Neville**

103 S.Ct. 916

Supreme Court of the United States

**SOUTH DAKOTA, Petitioner**

**v.**

**Mason Henry NEVILLE**

No. 81–1453.

Argued Dec. 8, 1982.Decided Feb. 22, 1983.

**Synopsis**

State appealed from order entered by the Circuit Court, Fourth Judicial District, Lake County, Marshall Gerken, J., suppressing evidence of defendant's refusal to submit to blood-alcohol test. [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I2d14a58cfeaf11d99439b076ef9ec4de&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[The Supreme Court of South Dakota, 312 N.W.2d 723](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981150541&pubNum=0000595&originatingDoc=I178e47e89c1f11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), Dunn, J., affirmed, and certiorari was granted. The Supreme Court, Justice O'Connor, held that: (1) admission into evidence of defendant's refusal to submit to blood-alcohol test does not offend his privilege against self-incrimination, and (2) it would not be fundamentally unfair in violation of due process to use defendant's refusal to take blood-alcohol test as evidence of guilt, even though police failed to warn him that refusal could be used against him at trial.

Reversed and remanded.

Justice Stevens filed dissenting opinion in which Justice Marshall joined.

**Mackey v. Montrym**

99 S.Ct. 2612

Supreme Court of the United States

**Alan MACKEY, Registrar of Motor Vehicles of Massachusetts, Appellant,**

**v.**

**Donald E. MONTRYM, etc.**

No. 77–69.

Argued Nov. 29, 1978.Decided June 25, 1979.

## Synopsis

Driver's licensee brought a class action challenging the constitutionality of the Massachusetts Implied Consent Law. A three-judge panel of the United States District Court for the District of Massachusetts, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I3de78339551f11d9a99c85a9e6023ffa&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[429 F.Supp. 393,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977106220&pubNum=345&originatingDoc=Id4be34879c1d11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))declared the statute unconstitutional, enjoined its enforcement and, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I3db80ec1551f11d9a99c85a9e6023ffa&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[438 F.Supp. 1157,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977126527&pubNum=345&originatingDoc=Id4be34879c1d11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) denied a motion for reconsideration. Massachusetts Registrar of Motor Vehicles appealed. The Supreme Court, Mr. Chief Justice Burger, held that the statute, which mandated suspension of a driver's license because of a licensee's refusal to take a breath-analysis test upon arrest for driving while under the influence of intoxicating liquor, did not violate the due process clause.

Reversed and remanded.

Mr. Justice Stewart filed a dissenting opinion in which Mr. Justice Brennan, Mr. Justice Marshall, and Mr. Justice Stevens joined.

**Procedural Posture(s):** On Appeal.

# Birchfield v. North Dakota

#### United States Supreme Court 136 S. Ct. 2160 (2016)

#### Rule of Law

**A law requiring a motorist to submit to a blood-alcohol-concentration breath test after being lawfully arrested for driving while impaired does not violate the Fourth Amendment’s prohibition against unreasonable searches.**

#### Facts

Birchfield, Bernard, and Beylund (defendants) were each arrested for drunk driving. Birchfield refused a warrantless blood-alcohol-concentration (BAC) blood test and was charged with a crime for doing so. Bernard refused a warrantless BAC breath test and was charged with a crime for doing so. Beylund was convicted of drunk driving and had his license suspended after he submitted to a warrantless BAC blood test. Beylund agreed to the test because the administering police officer told him that the law required him to do so. The United States Supreme Court consolidated the cases and granted certiorari to determine the applicability of the Fourth Amendment to these charges.

#### Issue

Does a law requiring a motorist to submit to a blood-alcohol-concentration breath test after being lawfully arrested for driving while impaired violate the Fourth Amendment’s prohibition against unreasonable searches?

#### Holding and Reasoning (Alito, J.)

No. A law requiring a motorist to submit to a BAC breath test after being lawfully arrested for driving while impaired does not violate the Fourth Amendment’s prohibition against unreasonable searches. Accordingly, a state law making it a crime to refuse a BAC breath test is constitutional. A breath test is minimally intrusive on an individual’s privacy. A breath test involves very little physical intrusion and does not reveal any personal information other than the individual’s blood-alcohol concentration. Additionally, undergoing a breath test will not increase the embarrassment already inherent in an arrest for driving while impaired. In sum, the privacy intrusion of a breath test is minimal, particularly when compared to the government’s compelling interest in protecting the safety of people on the roadways. As a result, a warrantless BAC breath test incident to a driving-while-impaired arrest does not violate the Fourth Amendment. However, a law making it a crime for a motorist to refuse a BAC blood test after being lawfully arrested for driving while impaired does violate the Fourth Amendment. The difference between a breath test and a blood test is that a blood test is much more intrusive, and the necessity of a blood test is diminished due to the availability of the less-intrusive breath test. In this case, Birchfield’s conviction for refusing a warrantless blood test is reversed because the law making such refusal a crime violates the Fourth Amendment. Bernard’s conviction for refusing a warrantless breath test is affirmed because the law making such refusal a crime is constitutional. Beylund’s conviction after submitting to a warrantless blood test is reversed because the state court must evaluate Beylund’s consent to the test in light of the rule announced in this opinion that a warrantless blood test violates the Fourth Amendment.

#### Concurrence/Dissent (Thomas, J.)

BAC tests administered after a lawful arrest for driving while impaired fall within the exigent-circumstances exception to the Fourth Amendment.

#### Concurrence/Dissent (Sotomayor, J.)

Drunk driving can still be combated effectively if search warrants are required for BAC breath tests. These breath tests do not fit within the search-incident-to-arrest exception to the Fourth Amendment.

**Key Terms:**

**Search Incident to Arrest** - An exception to the Fourth Amendment prohibition of unreasonable searches and seizures that allows a police officer making a lawful arrest to perform a search of a suspect or the area under the suspect’s control, without a warrant or probable cause

**Exigent Circumstances Doctrine** - An exception to the warrant requirement of the Fourth Amendment allowing police to make a warrantless entry, search, or seizure in circumstances that demand immediate action, such as a threat to human safety, the likely escape of a suspect, or the likely destruction of evidence.

***Birchfield v. North Dakota* 2016**

**BAC tests are “searches” within the meaning of the 4th Amendment. Breath tests are permissible as SIA, blood not because too invasive.**

# Missouri v. McNeely

#### United States Supreme Court 569 U.S. 141 (2013)

#### Rule of Law

In drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency that in every case is sufficient to justify conducting an involuntary blood test without a warrant.

# Birchfield v. North Dakota

#### United States Supreme Court 136 S. Ct. 2160 (2016)

#### Rule of Law

**A law requiring a motorist to submit to a blood-alcohol-concentration breath test after being lawfully arrested for driving while impaired does not violate the Fourth Amendment’s prohibition against unreasonable searches.**

# Missouri v. McNeely

#### United States Supreme Court 569 U.S. 141 (2013)

#### Rule of Law

**In drunk-driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency that in every case is sufficient to justify conducting an involuntary blood test without a warrant.**

***Missouri v. McNelly* 2013**

**Blood draws cannot be justified as an exigency exception to the warrant requirement, because dissipation of blood standing alone does not outweigh the privacy concern.**

# Illinois v. McArthur

#### United States Supreme Court 531 U.S. 326 (2001)

#### Rule of Law

**A temporary seizure is lawful if it is supported by probable cause, limited in nature, and tailored reasonably to secure law enforcement needs while also protecting privacy interests.**

#### Facts

On April 2, 1997, McArthur asked two police officers to accompany her back to her trailer home so that she could remove her belongings. She needed the officers to help her keep the peace with her estranged husband, Charles (defendant). When they arrived at the trailer, the husband was at home. The officers remained outside while McArthur went inside. When she came out McArthur spoke to one of the officers, Chief Love, and suggested that he search the trailer because she said Charles had “dope” inside. She told him that her husband kept it under the couch. When Love knocked on the trailer door and told Charles what the wife had said, asking whether he could come in, the husband said no. Love then sent the other officer and McArthur to get a search warrant. When Charles was with Love on the porch, Love told the husband that he could not reenter the trailer unless a police officer went with him. The husband went inside the trailer two or three times (for cigarettes and to make a phone call), and each time, Love stood just inside the door to observe what the husband was doing. The second officer returned two hours later with the search warrant, and they and other officers searched the trailer home. They found a marijuana pipe under the sofa as well as marijuana itself. They arrested Charles. At trial, Charles tried to suppress the pipe and other drug-related objects as the “fruits” of an unlawful search. The trial court granted the husband’s motion. The Appellate Court of Illinois affirmed, and the Supreme Court of Illinois denied the state’s petition of leave to appeal. The United States Supreme Court granted certiorari.

#### Issue

Is a temporary seizure lawful if it is supported by probable cause, limited in nature, and tailored reasonably to secure law enforcement needs while also protecting privacy interests?

#### Holding and Reasoning (Breyer, J.)

Yes. A temporary seizure is lawful if it is supported by probable cause, limited in nature, and tailored reasonably to secure law enforcement needs while also protecting privacy interests. Since they were informed by the wife about the nature and location of the drugs, the police had probable cause to believe that the husband had illegal drugs in the house. Certainly, the police, who told the husband what the wife had said about his possessing drugs, had good reason to believe that the husband might try to destroy the evidence before a search warrant could be procured. Moreover, the police acted reasonably in neither searching the house nor arresting the husband, but only restraining the husband from entering until the search warrant could be delivered. Such a compromise represents a reasonable balance of law enforcement needs and privacy interests under the Fourth Amendment. In reviewing our case law, we noted previous cases where the police effected seizures lasting 19 hours or more. Compared with these, the seizure in question, which lasted a mere two hours, seems limited in nature and negligible in effect. Importantly, the temporary seizure was reasonably tailored to the situation, since the police did not remove anything or arrest the husband. The police even let the husband enter the trailer, but observed him accordingly so that he would not remove any evidence. For the foregoing reasons we find the temporary seizure reasonable under the Fourth Amendment. We reverse the decision of the Appellate Court of Illinois and remand.

**Key Terms:**

**Fourth Amendment -** An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

# Welsh v. Wisconsin

#### United States Supreme Court 466 U.S. 740 (1984)

#### Rule of Law

**The exigent circumstances exception to the Fourth Amendment does not allow warrantless entry into a home to make an arrest for a minor offense.**

# Coolidge v. New Hampshire

#### United States Supreme Court 403 U.S. 443 (1971)

#### Rule of Law

**Under the plain-view doctrine, police may not conduct a warrantless search of an automobile if they expected in advance to find evidence and failed to secure a warrant.**

#### Facts

Pamela Mason was murdered. Police questioned Edward Coolidge (defendant). Coolidge was cooperative. While Coolidge was taking a lie-detector test, police arrived at his home, questioned his wife, and obtained evidence from her. Police presented the evidence to the state attorney general, who was in charge of the prosecution. Police applied to the attorney general for arrest and search warrants, including a warrant to search Coolidge’s Pontiac. The attorney general, in his capacity as a justice of the peace, granted the warrant. Police arrested Coolidge. Police told Coolidge’s wife to leave, placed the house under guard, and had the Coolidges’ cars towed to the station. Microscopic evidence gathered from the Pontiac was presented against Coolidge at trial, over his motions to suppress, and a jury convicted him. The state supreme court affirmed, and Coolidge petitioned the United States Supreme Court for certiorari, contending the warrantless search of the Pontiac was unconstitutional.

#### Issue

Under the plain-view doctrine, may police conduct a warrantless search of an automobile if they expected in advance to find evidence and failed to secure a warrant?

#### Holding and Reasoning (Stewart, J.)

No. Under the Fourth Amendment, a warrant must be issued by a “neutral and detached magistrate.” A warrant issued by a government enforcement agent is per se invalid. Any search or seizure made under such a warrant is unconstitutional, unless it falls within one of the recognized exceptions to the warrant requirement. First, police may search the area in the possession or under the control of a person arrested incident to that lawful arrest. The search must be contemporaneous with the arrest and limited to the “immediate vicinity.” Next, a police officer may search an automobile if he stopped the car on the highway and had probable cause to believe the car had contraband concealed inside. Lastly, the plain-view doctrine allows police who are somewhere they are lawfully permitted to be to legitimately seize inadvertently found evidence of another crime, which comes within plain view. This is true whether the officer is in “hot pursuit” of a suspect, conducting a search incident to arrest, or otherwise in a lawful vantage. The invasion of privacy must have been authorized on other grounds. The doctrine only applies to evidence found inadvertently and will not justify seizure of evidence police expected to be found in advance. The plain-view doctrine may not be used to circumvent the prohibition of general searches. The Warrant Clause requires probable cause and specificity about the persons or property to be searched or seized to protect against unnecessary government intrusions. If the plain-view doctrine applies, the intrusion has already occurred. The accidental discovery of evidence does not turn a legitimate search into a general one. The substantial benefit to law enforcement outweighs the relatively small threat to privacy. Requiring police to obtain a warrant for accidentally found evidence would be unduly burdensome. Here, the official prosecuting Coolidge issued the warrant. Thus, it was invalid. The car was not in the vicinity of Coolidge’s arrest, and the search did not occur until later. Therefore, this was not a search incident to arrest. Next, the car was not on the highway. The automobile exception does not authorize the search. Lastly, the plain-view doctrine does not apply, because the police knew in advance they needed to search the car. The search was invalid.

**Key Terms:**

**Fourth Amendment -** An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Warrant Clause** - A portion of the Fourth Amendment to the United States Constitution, incorporated in the Bill of Rights, that prohibits the search of private property in the absence of a warrant supported by sworn statements and a finding of probable cause.

**Plain-view Doctrine** - An exception to the warrant requirement allowing the warrantless seizure of items if (1) it is immediately apparent that there is probable cause to believe an item is evidence of a crime, without the need for touching or further investigation, and (2) law enforcement officers are lawfully in a position to see and obtain the item.

**Chapter 3, Section 6 – Seizure and Search of Premises**

Chapter 3 Section 6 Search and Seizure of Premises Dec 17

**Warrant is usually required for all in-premises arrests**.

***Chimel v California*** – permits only a limited search of the premises incident to an arrest therein

***Kentucky v King*** – a search warrant is excused only in the event of exigent circumstances

***Payton v. New York*** - 445 U.S. 573, 100 S. Ct. 1371 (1980)

**PowerPoint Slides from Frogge:**

**ENTRY INTO HOME TO MAKE ARREST**

**If police have an arrest warrant they may forcibly enter the home to serve it.**

**If police do not have an arrest warrant they may NOT enter the home to arrest a person UNLESS exigent circumstances exist.**

**If police arrest a person outside the home they may not enter the home to search incident to arrest or even if they have probable cause to believe evidence of a crime is inside UNLESS exigent circumstances exist.**

**Police may enter a home without a search warrant or arrest warrant if they have probable cause to believe evidence of a crime is inside AND exigent circumstances exist.**

**Police may not enter a 3rd person’s home to serve an arrest warrant unless they have a search warrant for the 3rd person’s home or exigent circumstances exist**

# \*\*PAYTON v. NEW YORK\*\*

#### United States Supreme Court 445 U.S. 573 (1980)

#### Rule of Law

**Absent exigent circumstances, the police may not enter a person’s home to make an arrest without a warrant.**

#### Facts

Police believed they had probable cause that Payton (defendant) was guilty of murder. Without obtaining a warrant, the police went to his apartment at 7:30 in the morning to arrest him. When he did not answer the door, they broke into the home. Payton was not at home but the police found a gun shell casing in plain view that was entered into evidence at trial over Payton’s objections. The trial judge held the evidence admissible because the police were authorized to break into Payton’s home under New York law. In the companion case, Riddick was arrested for armed robbery. Without a warrant, the police went to his home at noon to arrest him. Riddick’s 3-year old son answered the door and, before Riddick invited the police in, they entered the home, arrested him and seized drugs they found in a dresser. The trial judge upheld the entry into the home and the search incident to arrest as permissible under New York law.

#### Issue

Can the police enter a suspect’s home without a warrant to make a routine felony arrest?

#### Holding and Reasoning (Stevens, J.)

No. The Fourth Amendment, incorporated to the states through the Fourteenth Amendment, prohibits unreasonable searches and seizures of tangible things, as well as people. Such indiscriminate searches and abuses of police authority were the driving force behind the protections offered by the Fourth Amendment. Not only is there is no firm common-law rule that a warrantless arrest in one’s home is permissible, but there is no clear consensus among the states as to the legality of warrantless arrests in a suspect’s own home, and congress has never determined that entering a private home for the purpose of arresting the owner without a warrant is reasonable. Therefore, it is presumptively unreasonable for the police to enter a home without a warrant for the purpose of searching the premises and seizing certain items. Likewise, it is unreasonable for the police to enter a home without a warrant for the purpose of arresting the owner. As a result, the warrantless entry into Payton’s home, the warrantless entry and arrest in Riddick’s home, and the accompanying searches and seizure, are a clear violation of the Fourth Amendment right to privacy and are unconstitutional. Accordingly, the judgments of both cases are reversed and both cases are remanded.

#### Dissent (White, J.)

The rule the Court adopts here will not only hamper effective law enforcement, but it has little support in the history of the Fourth Amendment or in common law. In addition, at common law there were four restrictions placed on unwarranted arrests. The arrest had to be for a felony, the police had to knock and announce their presence, the arrest had to occur during the day, and the police had to have probable cause. Therefore, people’s privacy interest in their homes is already adequately protected and the Court need not create the new constitutional standard it imposes here.

***Peyton v. New York* –** without a warrant or an exception to the warrant requirement, such as exigent circumstances, officers may not enter a suspect’s home to make an arrest.

**Key Terms:**

**14th Amendment Due Process** **Clause** - The provision set forth at Amendment XIV, Section 1 of the United States Constitution prohibiting states from depriving any person of life, liberty, or property by means that are arbitrary or fundamentally unfair.

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Payton v. New York** - 445 U.S. 573, 100 S. Ct. 1371 (1980)

**RULE:**

It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable. Yet it is also well settled that objects such as weapons or contraband found in a public place may be seized by the police without a warrant. The seizure of property in plain view involves no invasion of privacy and is presumptively reasonable, assuming that there is probable cause to associate the property with criminal activity.

**FACTS:**

Two cases questioned the constitutionality of New York statutes authorizing police officers to enter a private residence without a warrant and with force, if necessary, to make a routine felony arrest. In the first case, police officers established probable cause against defendant in a murder case, and went to defendant's apartment to arrest him. Police officers entered without a warrant and found incriminating evidence in plain view that was admitted at defendant's trial. In the second case, police officers entered defendant's house to arrest him without a search warrant and found narcotics in the dresser. In both cases, defendant's sought the suppression of evidence seized without a valid warrant. In both cases, the New York trial judge held that the warrantless entry was authorized by New York statutes and refused to suppress evidence that was seized upon the entry. Treating both cases as involving routine arrests in which there was ample time to obtain a warrant, the New York Court of Appeals, in a single opinion, ultimately affirmed the convictions.

**ISSUE:** Were the warrantless entries valid?

**ANSWER:** No.

**CONCLUSION:**

The Supreme Court of the United States reversed and remanded the cases for further proceedings. It held that the Fourth and Fourteenth Amendments prohibited the police from making a warrantless and nonconsensual entry into a suspect's home in order to make a routine felony arrest. The Court further held that to be arrested in the home involved not only the invasion attendant to all arrests, but also an invasion of the sanctity of the home, which was too substantial, absent exigent circumstances, even when it was accomplished under statutory authority and when probable cause was present.

These four restrictions on home arrests – felony, knock and announce, daytime, and stringent probable cause – constitute powerful and complementary protections for the privacy interests associated with the home.

Felony requirement guards against abusive or arbitrary enforcement and ensure that invasions occur only in the most serious of crimes.

Knock and Announce and Daytime – protect individuals against fear and embarrassment of being aroused from their beds in states of partial or complete undress.

The Strict Probable cause requirement would help ensure against the possibility that the police would enter when the suspect was not home, frightening family or ransacking parts of the home.

***Payton***- The fourth amendment prohibits the police from affecting a warrantless and non-consensual entry into a suspect’s home in order to make a routine felony arrest. The holding stemmed from the overriding respect for the sanctity of the home. Drew a line with the entrance of the home... this is the chief evil against which the wording of the fourth amendment is directed.

-A warrantless entry will lead to suppression of any evidence found or statements taken inside the home.

***Payton v. New York*, 445 US 573 (1980)**

**Facts: New York police had some evidence that Defendant Payton murdered a victim. Two days after the murder, six officers without a warrant forced entry into Payton’s apartment. Upon entering, they saw a shell casing in plain view that would later be admitted into evidence. In an apparently unrelated case, New York police, again without a warrant, entered a home and arrested Defendant Riddick for robberies they believed he committed years earlier. They found narcotics and paraphernalia in the home pursuant to the arrest. Both defendants convicted and affirmed by NY’s highest court.**

**Issue: Can police enter a home in order to effectuate an arrest without a warrant, without exigent circumstances, when they have probable cause?**

**Holding: No, a home is unique. “The fourth amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, the threshold may not reasonably crossed without a warrant.”**

**Dissent: Common law handled this fine. Exceptions to this bright line were felony, knock and announce, daytime, and stringent probable cause would all allay the majority’s privacy concerns.**

# Dorman v. United States

#### United States Court of Appeals for the District of Columbia Circuit 860 F.3d 675 (2017)

#### Rule of Law

**A conviction for the constructive possession of illegal drugs requires proof that the defendant knew of and was in a position to exercise dominion and control over the contraband.**

#### Facts

The federal government (plaintiff) charged Harold A. Dorman (defendant) with unlawful gun possession in violation of 18 U.S.C. § 922(g)(1), possession with intent to distribute phencyclidine (PCP), in violation of 21 U.S.C. § 841, and possessing a gun during a drug-trafficking offense, in violation of 18 U.S.C. § 924(c)(1). The trial evidence established that police investigating a jewelry store robbery searched a house owned by Dorman's mother and frequented by many individuals. Dorman usually slept in the house's basement bedroom, and had done so the night before the robbery, but the house was not Dorman's only residence. Dorman was not present when the police entered the house. Upstairs in the living room, the police found a handgun and a one-ounce vial of PCP. Both items were concealed from plain view. Downstairs, the police found a bottle containing more than 15 ounces of PCP next to the laundry-room washing machine, where a passerby might not notice it. The police noticed a handle protruding from the bed in Dorman's bedroom, and found a pistol wedged under the mattress. On the basement steps, hidden under a blanket, the police found a trash bag containing empty vials that could be used for packaging PCP. The police found no direct evidence of the jewelry store robbery. Additional trial evidence connected Dorman to the PCP, but it was equivocal or contradicted by other evidence. The jury convicted Dorman on all charges, and he appealed to the District of Columbia Circuit Court of Appeals. After affirming Dorman's convictions on the gun-possession charge, the court turned its attention to the two drug-related charges.

#### Issue

Does a conviction for the constructive possession of illegal drugs require proof that the defendant knew of and was in a position to exercise dominion and control over the contraband?

#### Holding and Reasoning (Rogers, J.)

Yes. A conviction for the constructive possession of illegal drugs requires proof that the defendant knew of and was in a position to exercise dominion and control over the contraband. The concept of constructive possession is potentially so expansive that it could ensnare an innocent bystander who happened to be in the wrong place at the wrong time, and therefore courts must carefully limit the concept's application. If the drugs were found in a space that the defendant shared with others, the jury can infer constructive possession only if the drugs were in plain view, or if other evidence links the defendant to the drugs. Here, Dorman was not present when the police searched his mother's house. None of the PCP was found in plain view. Like many drug traffickers, Dorman was found in constructive possession of a gun. However, it would take the piling of inference upon inference to treat the gun as evidence that Dorman also constructively possessed the PCP, which was found in common areas of the house beyond Dorman's presence or control. Any other evidence connecting Dorman to the PCP was equivocal at best. Therefore, the government did not prove that Dorman possessed PCP, and if Dorman did not possess the PCP, he cannot convicted for possessing a gun while trafficking the PCP. Dorman's convictions on the drug-related charges are reversed.

**Key Terms:**

**Constructive Possession** - The power to control an item without physical possession of it. Constructive possession can be used in criminal contexts, as when a person has power over an item and the intent to exercise control over it, or in civil cases, as when a buyer has received title to property but not yet physically occupied it.

**Possession with Intent to Distribute** - The crime of possessing illegal substances with the intention of giving or selling those substances to others.

**Drug Trafficking** - The illegal sale or other distribution of a prohibited or regulated substance.

# United States v. Watson

#### United States Supreme Court 423 U.S. 411 (1976)

#### Rule of Law

**A warrantless arrest is permitted if there is probable cause to believe the person has committed a felony.**

***Watson***- A warrantless arrest in a public place is permissible as long as the arresting officer has probable cause.

# Steagald v. United States

#### United States Supreme Court 451 U.S. 204 (1981)

#### Rule of Law

**Absent consent or exigent circumstances, the Fourth Amendment prohibits law enforcement from searching for the subject of an arrest warrant in a third party’s home without first obtaining a search warrant.**

#### Facts

Law enforcement obtained an arrest warrant for Ricky Lyons. The Drug Enforcement Agency (DEA) received a confidential tip that Lyons would be at a particular address, which was the home of Gary Steagald (defendant). When DEA agents arrived at the address, they encountered two men, including Steagald, outside. Upon determining that neither man was Lyons, the agents went into Steagald’s home to search for Lyons. During their search, the agents found what they believed to be cocaine. Later, they obtained a search warrant and found 43 pounds of cocaine in the home. Steagald was convicted of drug crimes related to the cocaine. Steagald appealed, arguing that the initial search of his home was warrantless and unreasonable. The court of appeals affirmed the conviction. The United States Supreme Court granted certiorari.

#### Issue

Absent consent or exigent circumstances, does the Fourth Amendment prohibit law enforcement from searching for the subject of an arrest warrant in a third party’s home without first obtaining a search warrant?

#### Holding and Reasoning (Marshall, J.)

Yes. Absent consent or exigent circumstances, the Fourth Amendment prohibits law enforcement from searching for the subject of an arrest warrant in a third party’s home without first obtaining a search warrant. The arrest warrant in such a case strictly applies to the person named in the warrant and does not protect the Fourth Amendment rights of a third party not named in the warrant. Accordingly, a search of a third party’s home purportedly pursuant to someone else’s arrest warrant is no more reasonable than if there were no warrant issued at all. Generally, a warrantless search of a home for an object is unreasonable absent consent or exigent circumstances. Similarly, a warrantless entry into a person’s home for the purpose of arresting that person is unreasonable absent consent or exigent circumstances. There is no reason not to extend these maxims to the warrantless search of a third party’s home for the purpose of arresting someone else. From a policy perspective, this holding will not severely hamper law enforcement’s duties in apprehending someone subject to an arrest warrant. Law enforcement will still be able to make an arrest of the fugitive in public places, *i.e.*, upon exiting the home of another person. In this case, the initial search of Steagald’s home was unreasonable under the Fourth Amendment. The DEA had only an arrest warrant, for the arrest of Lyons. Steagald was not named in the warrant. The arrest warrant thus applied only to the arrest of Lyons and did not permit the agents to search for him in the home of someone else, even if they had a reasonable belief that Lyons would be in that home. The reasonableness of the agents’ belief is irrelevant because the belief was not scrutinized by a neutral judicial officer. The search of Steagald’s home was warrantless and unreasonable. The judgment of the court of appeals is reversed, and the case is remanded.

#### Dissent (Rehnquist, J.)

Law enforcement had probable cause to believe that Lyons was in Steagald’s home. The arrest warrant for Lyons is thus not as irrelevant to the search of Steagald’s home as the majority states. Incidental violations of Fourth Amendment rights may be constitutionally permissible if the violations occur during the execution of a valid warrant for another purpose. The Court’s holding will not only add uncertainty for law enforcement, but also, given the mobility of fugitives—an important distinction between people and objects subject to a search—will render making an arrest a much more difficult proposition.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Arrest Warrant** - An order issued by a judge that is based upon probable cause and authorizes and directs law enforcement to arrest a particular person.

# \*\*CHIMEL v. CALIFORNIA\*\*

#### United States Supreme Court 395 U.S. 752 (1969)

#### Rule of Law

**Incident to a lawful arrest, a warrantless search of the area in possession and control of the person under arrest is permissible under the Fourth Amendment.**

#### Facts

Pursuant to a valid arrest warrant, the police went to Chimel’s (defendant) home to arrest him for the burglary of a coin shop. Chimel’s wife let the police inside and when Chimel returned home they arrested him. Without a search warrant and without permission, the police then conducted a complete search of Chimel’s home. The police instructed Chimel’s wife to remove items from drawers and eventually the police found and seized a number of coins, medals and tokens. Over Chimel’s objection, these items were introduced at trial. The appellate courts affirmed the decision holding that the search of Chimel’s home was valid as a search incident to a lawful arrest.

#### Issue

Is a warrantless search of an entire home permissible when the search is incident to a lawful arrest that takes place in the home?

#### Holding and Reasoning (Stewart, J.)

No. A warrantless search incident to a lawful arrest can only cover the area in possession or control of the person being arrested. When an arrest occurs, it is reasonable for the police to search the person being arrested to insure he is not armed and to ensure no evidence is destroyed. This rule is easily extended to include a search of the area that the person under arrest may access. However, a search of the area outside of the suspect’s immediate control cannot be similarly justified and is therefore not reasonable. The warrantless search of private homes was what the Fourth Amendment requirements of warrants and probable cause were intended to prevent. Furthermore, allowing warrantless searches of an entire home would encourage the police to make all arrests in suspects’ homes since they could then legally undertake a search even where probable cause is lacking. Because the coins introduced at trial were not found in an area under Chimel’s immediate control, the search and seizure was unconstitutional and the conviction is overturned.

#### Dissent (White, J.)

There is no need to overrule earlier precedent and hold that searches of entire homes incident to arrest are per-se unreasonable. Rather, an arrest creates exigent circumstances allowing for a warrantless search when there is probable cause to believe that delay would result in the destruction of evidence. In this case, if the police had not immediately searched the home for the coins, Chimel’s wife would have likely removed the coins from the home in the time it took the police to secure a search warrant. Therefore, the search was reasonable.

In ***Chimel***, the Supreme Court clarified the permissible scope of a search incident to arrest.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Chimel v. California** - 395 U.S. 752, 89 S. Ct. 2034 (1969)

**RULE:**

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that could be used in order to resist arrest or effect escape. 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 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."

**FACTS:**

Police came to petitioner's home with an arrest warrant to arrest him for an alleged burglary. When petitioner returned from work, police arrested him. Police then asked for permission to "look around." Even though petitioner objected, the officers conducted a search. They looked through the entire house and had petitioner's wife open drawers and physically remove contents of the drawers so they could view items. Police seized a number of coins and medals, among other things, that respondent State later used to convict petitioner of burglary.

**ISSUE:** Was the warrantless search by the police lawful?

**ANSWER:** No

**CONCLUSION:**

The court held that the search was "unreasonable." It found that there was no justification for searching any room other than that in which the arrest occurred. Even searching through desk drawers or other closed or concealed areas of the room where the arrest occurred was not appropriate. Extending the search to the entire house was not proper, and the court overturned the conviction.

***Chimel v. California* 395 US 752 (1969)**

**Facts: Three California Police Officers went to Defendant Chimel’s home with an arrest warrant. When they arrived, Defendant’s wife let them wait in the house for the Defendant. When he arrived, police asked to search, and he refused. They searched the entire house anyway, digging through dressers and the like, and found evidence used against him in a burglary prosecution. Charged, convicted of burglary, affirmed on appeal.**

**Issue: When police serve a valid arrest warrant against a defendant in his/her home, may they search the premises subject to the arrest?**

**No, Only the “grab area,” that is, only the area under the arrestee’s immediate control, is permissible to search absent some other reason.**

**The rationale underlying the “grab area” exception is based on two reasons (a) Officer safety, and (b) Collect evidence that otherwise D might conceal or destroy**

**Also, this is getting dangerously close to a “general warrant” that forced US to fight a revolution.**

**Concurrence: I would not hesitate to rule this way, but Mapp makes this applicable to the States!**

**Dissent: It is unreasonable to require police to go get a warrant. I mean, they are already there. Also, probable cause should be enough.**

# Weeks v. United States

#### United States Supreme Court 232 U.S. 383 (1914)

#### Rule of Law

**The United States and federal officials are prohibited from executing unreasonable searches and seizures upon people.**

# Carroll v. United States

**Rule**

**Where the facts and circumstances within police officers' knowledge and of which they** **had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor is being transported in the automobile which the officers stop and search, the officers are justified in conducting the search.**

**Facts**

Cronenwett and Scully, federal prohibition agents, where in an operation where they met three men to buy three cases of whiskey, including defendants George Carroll and John Kiro. The three men said they had to go to the east end of Grand Rapids, Michigan, to get the liquor and that they would be back in 30-45 minutes. They returned in an automobile known as an Oldsmobile Roadster but without the whiskey. Two months later, Cronenwett and other agents were patrolling the road leading from Detroit to Grand Rapids, looking for violations of the Prohibition Act. The officers were not anticipating that defendants would be coming through on the highway at that particular time, but when they met them there they believed they were carrying liquor. They stopped the car and searched it. They found behind 68 bottles of liquor hidden in the car seats. Defendants were arrested and later convicted in federal district court for transporting intoxicating spirituous liquor in a vehicle, in violation of § 26 of the National Prohibition Act. Defendants sought a writ of error, asserting that the warrantless search of the vehicle violated U.S. Const. amend. IV and that the liquor discovered as a result of the search should not have been admitted into evidence.

**Issue**

Was the warrantless search and seizure valid?

**Answer**

Yes

**Conclusion**

The Supreme Court of the United States affirmed the district court's judgment. The Court found that the main purpose of § 26 of the National Prohibition Act was seizure and forfeiture, and that the right to search and the validity of the seizure were not dependent on the right to arrest, but were dependent on the reasonable cause the seizing liquor agents had for their belief that the contents of defendant's automobile were illegal. The evidence showed that the agents had ample reason to believe defendants' vehicle contained illegal liquor because defendants were known to transport liquor in that vehicle, were recognized by the agents, and were on a route known for illegal liquor traffic. Those circumstances provided sufficient probable cause to search the vehicle.

45 S.Ct. 280

Supreme Court of the **United** **States**.

**CARROLL et al.**

**v.**

**UNITED STATES.**

No. 15.

Reargued and Submitted March 14, 1924.Decided March 2, **1925**.

**Synopsis**

Error to the District Court of the **United** **States** for the Western District of Michigan.

George **Carroll** and John Kiro were convicted of transporting intoxicating liquor, and they bring error. Affirmed.

This is a writ of error to the District Court under section 238 of the Judicial Code (Comp. St. § 1215). The plaintiffs in error, hereafter to be called the defendants, George **Carroll** and John Kiro, were indicted and convicted for transporting in an automobile intoxicating spirituous liquor, to wit, 68 quarts of socalled bonded whisky and gin, in violation of the National Prohibition Act (Comp. St. Ann. Supp. 1923, § 10138 ¼ et seq.). The ground on which they assail the conviction is that the trial court admitted in evidence two of the 68 bottles, one of whisky and one of gin, found by searching the automobile. It is contended that the search and seizure were in violation of the Fourth Amendment, and therefore that use of the liquor as evidence was not proper. Before the trial a motion was made by the defendants that all the liquor seized be returned to the defendant **Carroll**, who owned the automobile. This motion was denied.

The search and seizure were made by Cronenwett, Scully, and Thayer, federal prohibition agents, and one Peterson, a state officer, in December, 1921, as the car was going westward on the highway between Detroit and Grand Rapids at a point 16 miles outside of Grand Rapids. The facts leading to the search and seizure were as follows: On September 29th, Cronenwett and Scully were in an apartment in Grand Rapids. Three men came to that apartment, a man named Kurska, and the two defendants, **Carroll** and Kiro. Cronenwett was introduced to them as one Stafford working in the Michigan Chair Company in Grand Rapids, who wished to buy three cases of whisky. The price was fixed at $130 a case. The three men said they had to go to the east end of Grand Rapids to get the liquor and that they would be back in half or three-quarters of an hour. They went away, and in a short time Kruska came back and said they could not get it that night, that the man who had it was not in, but that they would deliver it the next day. They had come to the apartment in an automobile known as an Oldsmobile roadster, the number of which Cronenwett then identified, as did Scully. The proposed vendors did not return the next day, and the evidence disclosed no explanation of their failure to do so. One may surmise that it was suspicion of the real character of the proposed purchaser, whom **Carroll** subsequently called by his first name when arrested in December following. Cronenwett and his subordinates were engaged in patrolling the road leading from Detroit to Grand Rapids, looking for violations of the Prohibition Act. This seems to have been their regular tour of duty. On the 6th of October, **Carroll** and Kiro going eastward from Grand Rapids in the same Oldsmobile roadster, passed Cronenwett and Scully some distance out from Grand Rapids. Cronenwett called to Scully, who was taking lunch, that the **Carroll** boys had passed them going toward Detroit, and sought with Scully to catch up with them to see where they were going. The officers followed as far as East Lansing, half way to Detroit, but there lost trace of them. On the 15th of December, some two months later, Scully and Cronenwett, on their regular tour of duty with Peterson, the state officer, were going from Grand Rapids to Ionia, on the road to Detroit, when Kiro and **Carroll** met and passed them in the same automobile, coming from the direction of Detroit to Grand Rapids. The government agents turned their car and followed the defendants to a point some 16 miles east of Grand Rapids, where they stopped them and searched the car. They found behind the upholstering of the seats, the filling of which had been removed, 68 bottles. These had labels on them, part purporting to be certificates of English chemists that the contents were blended Scotch whiskies, and the rest that the contents were Gordon gin made in London. When an expert witness was called to prove the contents, defendants admitted the nature of them to be whisky and gin. When the defendants were arrested, **carroll** said to Cronenwett, ‘Take the liquor and give **us** one more chance, and I will make it right with you,’ and he pulled out a roll of bills, of which one was for $10. Peterson and another took the two defendants and the liquor and the car to Grand Rapids, while Cronenwett, Thayer, and Scully remained on the road looking for other cars, of whose coming they had information. The officers were not anticipating that the defendants would be coming through on the highway at that particular time, but when they met them there they believed they were carrying liquor, and hence the search, seizure, and arrest.

***Carroll v. United States***, 267 U.S. 132 (1925), was a decision by the [United States Supreme Court](https://en.wikipedia.org/wiki/United_States_Supreme_Court) that upheld the [warrantless searches](https://en.wikipedia.org/wiki/Warrantless_searches_in_the_United_States) of an automobile, which is known as the [automobile exception](https://en.wikipedia.org/wiki/Motor_vehicle_exception). The case has also been cited as widening the scope of warrantless search.

**Background**

During [prohibition](https://en.wikipedia.org/wiki/Prohibition_in_the_United_States), officers arranged an undercover purchase of liquor from George Carroll, an illicit dealer under investigation, but the transaction was not completed. They later saw Carroll and John Kiro driving on the highway from [Detroit](https://en.wikipedia.org/wiki/Detroit) to [Grand Rapids](https://en.wikipedia.org/wiki/Grand_Rapids), [Michigan](https://en.wikipedia.org/wiki/Michigan), which they regularly patrolled. They pursued them, pulled them over, and searched the car, finding illegal liquor behind the rear seat.

The [National Prohibition Act](https://en.wikipedia.org/wiki/Volstead_Act) provided that officers could make warrantless searches of vehicles, boats, or airplanes when they had reason to believe illegal liquor was being transported and that law enforced the [Eighteenth Amendment](https://en.wikipedia.org/wiki/Eighteenth_Amendment_to_the_United_States_Constitution).[[1]](https://en.wikipedia.org/wiki/Carroll_v._United_States#cite_note-1)

**Decision**

The Court noted that Congress early observed the need for a [search warrant](https://en.wikipedia.org/wiki/Search_warrant) in non-border search situations,[[2]](https://en.wikipedia.org/wiki/Carroll_v._United_States#cite_note-2) and Congress always recognized "a necessary difference" between searches of buildings and vehicles "for contraband goods, where it is not practical to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought."[[3]](https://en.wikipedia.org/wiki/Carroll_v._United_States#cite_note-3) The warrantless search was thus valid.

The Court held, however,

It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor, and thus subject all persons lawfully using the highways to the inconvenience and indignity of such a search.... [T]hose lawfully within the country, entitled to use the public highways, have a right to free passage without interruption or search unless there is known to a competent official, authorized to search, probable cause for believing that their vehicles are carrying contraband or illegal merchandise.[[4]](https://en.wikipedia.org/wiki/Carroll_v._United_States#cite_note-4)

The Court added that *where the securing of a warrant is reasonably practicable, it must be used.*[[5]](https://en.wikipedia.org/wiki/Carroll_v._United_States#cite_note-5)

That became known as the *Carroll* doctrine: a vehicle could be searched without a search warrant if there was [probable cause](https://en.wikipedia.org/wiki/Probable_cause) to believe that evidence is present in the vehicle, coupled with [exigent circumstances](https://en.wikipedia.org/wiki/Exigent_circumstance_in_United_States_law) to believe that the vehicle could be removed from the area before a warrant could be obtained.[[6]](https://en.wikipedia.org/wiki/Carroll_v._United_States#cite_note-6)

Underneath their opinion, the majority included a note that Justice [Joseph McKenna](https://en.wikipedia.org/wiki/Joseph_McKenna) concurred with them before his retirement earlier in the year.[[7]](https://en.wikipedia.org/wiki/Carroll_v._United_States#cite_note-7)

Justices [James Clark McReynolds](https://en.wikipedia.org/wiki/James_Clark_McReynolds) and [George Sutherland](https://en.wikipedia.org/wiki/George_Sutherland) filed a dissenting opinion. In brief, they believed that the fact that the case involved bootleggers was prejudicial yet not a justification for creating a broad exception to unreasonable search doctrine.[[8]](https://en.wikipedia.org/wiki/Carroll_v._United_States#cite_note-8)

# Agnello v. United States

46 S.Ct. 4

Supreme Court of the **United** **States**.

**AGNELLO et al.**

**v.**

**UNITED STATES.**

No. 6.

Argued April 23, **1925**.Decided October 12, **1925**.

**Synopsis**

Writ of Certiorari to Circuit Court of Appeals, Second Circuit.

Thomas Agnello and Frank Agnello and others were convicted of conspiracy to violate the Harrison Act. To review the judgment of the Circuit Court of Appeals ([](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic6cb9f83545f11d9a99c85a9e6023ffa&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=b253afcc72de41cbbe954bdd5ac14a67&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[290 F. 671),](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1923124603&pubNum=348&originatingDoc=If23c4e889cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirming judgment of conviction, defendants bring certiorari. Judgment as to Frank Agnello reversed, and as to the other defendants affirmed.

# Marron v. United States

48 S.Ct. 74

Supreme Court of the **United** **States**

**MARRON**

**v.**

**UNITED STATES.**[**\***](https://1.next.westlaw.com/Document/I821d91589cc011d9a707f4371c9c34f0/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad604ab00000176e341f454804ce5e5%3FNav%3DCASE%26fragmentIdentifier%3DI821d91589cc011d9a707f4371c9c34f0%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=c64d907e2332b7d4573ec1b07cd13391&list=CASE&rank=1&sessionScopeId=8b542dd89a5bd6adac922590e13c5339a93f95128bfea8a8b2dab3ed056fff6b&originationContext=Smart%20Answer&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B0011927124108)

No. 185.

Argued Oct. 12, **1927**.Decided Nov. 21, **1927**.

**Synopsis**

On Writ of Certiorari to the **United** **States** Circuit Court of Appeals for the Ninth Circuit.

Joseph E. **Marron** was convicted of conspiring to maintain a nuisance and commit other offenses against the National Prohibition Act, and to review a judgment of affirmance by the Circuit Court of Appeals ([18 F.(2d) 218),](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1927126877&pubNum=350&originatingDoc=I821d91589cc011d9a707f4371c9c34f0&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) he brings certiorari. Affirmed.

See, also, [274 U. S. 727, 47 S. Ct. 574, 71 L. Ed. 1313](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1927201968&pubNum=708&originatingDoc=I821d91589cc011d9a707f4371c9c34f0&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

# Go-Bart Importing Co. v. United States

51 S.Ct. 153

Supreme Court of the United States

**GO-BART IMPORTING CO. et al.**

**v.**

**UNITED STATES.**

No. 111.

Argued Nov. 25, 1930.Decided Jan. 5, 1931.

**Synopsis**

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

Motion by the Go-Bart Importing Company and by two individuals, Phillip D. Gowen and William Bartels, for an order directing restoration to them of documents and papers seized by prohibition agents, and for the suppression of such property as evidence. An order denying the motion was modified ([](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I4304d20e547011d9bf30d7fdf51b6bd4&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[40 F. (2d) 593),](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1930126363&pubNum=350&originatingDoc=I8209bb379cc011d9a707f4371c9c34f0&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) and movants bring certiorari.

Reversed.

**United States v. Lefkowitz**

52 S.Ct. 420

Supreme Court of the **United** **States**.

**UNITED STATES**

**v.**

**LEFKOWITZ et al.**

No. 466.

Argued Feb. 19-23, **1932**.Decided April 11, **1932**.

**Synopsis**

On Writ of Certiorari to the **United** **States** Circuit Court of Appeals for the Second Circuit.

Application by Daniel M. **Lefkowitz** and another for the suppression of evidence and the return of books and papers seized. Order of the District Court [(47 F. (2d) 921)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1931126131&pubNum=350&originatingDoc=I85d9c0e79cbe11d9a707f4371c9c34f0&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) in favor of the **United** **States** Attorney denying the application was reversed in part by the Circuit Court of Appeals ([52 F.(2d) 52),](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1931126133&pubNum=350&originatingDoc=I85d9c0e79cbe11d9a707f4371c9c34f0&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and the **UnitedStates** brings certiorari.

Affirmed.

**Harris v. United States**

67 S.Ct. 1098

Supreme Court of the **United** **States**

**HARRIS**

**v.**

**UNITED STATES.**

No. 34.

Argued Dec. 12, 13, 1946.Decided May 5, **1947**.Rehearing Denied June 9, **1947**.See [**331** **U.S**. 867, 67 S.Ct. 1527.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1947201215&pubNum=708&originatingDoc=Iab9168789bf011d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))

**Synopsis**

George **Harris** was convicted under an indictment charging unlawful possession, concealment and alteration of certain notice of classification cards and registration certificates. The conviction was affirmed, [151 F.2d 837,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1946113831&pubNum=350&originatingDoc=Iab9168789bf011d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and defendant brings certiorari.

Affirmed.

Mr. Justice JACKSON, Mr. Justice MURPHY, Mr. Justice FRANKFURTER and Mr. Justice RUTLEDGE dissenting.

On Writ of Certiorari to the **United** **States** Circuit Court of Appeals for the Tenth Circuit.

**Trupiano v. United States**

68 S.Ct. 1229

Supreme Court of the United States

**TRUPIANO et al.**

**v.**

**UNITED STATES.**

No. 427.

Argued March 9, 1948.Decided June 14, 1948.

**Synopsis**

Jack Trupiano, Romildo Riccardelli, Anthony Antoniole, and Riordan J. A. Roett, Jr., were charged with violations of the Internal Revenue Code arising out of the ownership and operation of a distillery, and they filed a motion to suppress evidence against them on the ground that it had been obtained illegally. From a judgment of the Circuit Court of Appeals, [163 F.2d 828,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&pubNum=350&cite=163FE2D828&originatingDoc=Id38d05299be911d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirming a judgment of the District Court [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Id2f4cf2c54a011d997e0acd5cbb90d3f&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[70 F.Supp. 764](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1947117416&pubNum=345&originatingDoc=Id38d05299be911d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) denying the motion, the defendants bring certiorari.

Judgment reversed.

Mr. Chief Justice [VINSON](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0206173701&originatingDoc=Id38d05299be911d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Id38d05299be911d993e6d35cc61aab4a), Mr. Justice BLACK, Mr. Justice [REED](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0393013901&originatingDoc=Id38d05299be911d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Id38d05299be911d993e6d35cc61aab4a) and Mr. Justice BURTON, dissenting.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

**United States v. Rabinowitz**

70 S.Ct. 430

Supreme Court of the **United** **States**

**UNITED STATES**

**v.**

**RABINOWITZ.**

No. 293.

Argued Jan. 11, **1950**.Decided Feb. 20, **1950**.

**Synopsis**

Albert J. **Rabinowitz** was convicted in the District Court for the Southern District of New York of the possession and sale of postage stamps bearing forged overprints.

Judgment of conviction was reversed by the Court of Appeals, Second Circuit, L. Hand, Chief Judge, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I84ad2c248e3611d9bc61beebb95be672&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=aa88da8d617c4aa787283fffbb5a6e17&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[176 F.2d 732,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1949119227&pubNum=350&originatingDoc=I2228b6129bf011d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and the **United** **States** brought certiorari.

The Supreme Court, Mr. Justice Minton, held that a search without warrant, as an incident of defendant's arrest, of the small one-room office constituting the defendant's place of business was reasonable and was valid even if the officers had had time to procure a search warrant prior to the arrest and search.

Judgment of the Court of Appeals reversed.

Mr. Justice Frankfurter, Mr. Justice Black, and Mr. Justice Jackson, dissented.

# Maryland v. Buie

#### United States Supreme Court 494 U.S. 325 (1990)

#### Rule of Law

**Incident to an arrest, the police may conduct a protective sweep of a premises based on reasonable suspicion that other people who pose a threat are in the building, provided the search is limited to those areas where a person may be hiding.**

# Mapp v. Ohio

#### United States Supreme Court 367 U.S. 643 (1961)

#### Rule of Law

**Evidence obtained through an unreasonable search and seizure in violation of the Fourth Amendment is inadmissible in state criminal proceedings.**

# \*\*KENTUCKY v. KING\*\*

#### United States Supreme Court 563 U.S. 452 (2011)

#### Rule of Law

**The exigent circumstances exception to the Fourth Amendment's warrant requirement applies to an officer-created exigency if the exigency does not arise from the officer's unreasonable or unconstitutional conduct.**

#### Facts

During a drug sting operation at a Lexington, Kentucky, apartment complex, police officers mistakenly went to the wrong apartment to arrest a suspect who had purchased crack cocaine. After smelling burnt marijuana emanating from the apartment, the officers knocked loudly on the door and announced their presence. After hearing the apartment’s occupants hurriedly moving around inside and on the belief that evidence might be destroyed, officers kicked down the apartment door and took three individuals into custody, including Hollis King (defendant). King and the others were charged with various drug-related offenses unrelated to the original operation. Prior to trial, King filed a motion to suppress the evidence seized at his apartment, arguing that the contraband was obtained in violation of the Fourth Amendment. The trial court denied King’s motion and held that the “exigent circumstances” rule to the Fourth Amendment justified the officers’ warrantless entry into the apartment. The Kentucky Supreme Court reversed, noting that the “exigent circumstances” rule did not apply because the police officers’ conduct impermissibly created the exigency which led to entry into the apartment. The U.S. Supreme Court granted certiorari to review.

#### Issue

Does exigent circumstances exception to the Fourth Amendment's warrant requirement apply to an officer-created exigency if the exigency does not arise from the officer's unreasonable or unconstitutional conduct?

#### Holding and Reasoning (Alito, J.)

Yes. The exigent circumstances exception to the Fourth Amendment's warrant requirement applies to an officer-created exigency if the exigency does not arise from the officer's unreasonable or unconstitutional conduct. Under the exigent circumstances doctrine, officers may enter a home without a warrant to deliver emergency aid to an individual, pursue a fleeing suspect, or to prevent the imminent destruction of evidence. A prerequisite to gaining entry into a residence without a warrant under the doctrine is that the officers must have probable cause to believe that dangerous or suspicious activity is currently taking place. Some courts criticize the doctrine and note that law enforcement may create the “urgent” circumstances, or exigency, in order to gain entry into a residence without a warrant. Here, King argues that the officers created the exigency by requesting entry into the apartment after they forcefully banged on the door and yelled that law enforcement was outside. However, an officer is free to knock on a door as is any other private citizen. A rule that would dictate to police officers how forcefully to knock on a door and how loudly to announce their presence is unreasonable. The court below assumed, without deciding, that the officers did not engage in or threaten unconstitutional conduct before entering King's apartment, and that exigent circumstances existed in this case. Those questions, however, must be answered on remand. The judgment of the Kentucky Supreme Court is reversed and the matter is remanded for further proceedings consistent with the opinion.

#### Dissent (Ginsburg, J.)

The Court mistakenly finds that law enforcement did not create the exigency which led to their entry into the apartment. Circumstances are “exigent” when there is imminent risk of death or serious injury, or danger that evidence will be immediately destroyed. The exigency must exist when the police come on the scene, not subsequent to their arrival. The police may not, by their conduct, create the exigency allowing for warrantless entry into a residence. Here, there was little risk that drug-related evidence would have been destroyed had the police obtained a warrant prior to knocking on the apartment door. There is nothing in the record to suggest that King and the other occupants were concerned that the police were nearby and that they should destroy evidence.

***Kentucky v. King –*** Reasonable officer created exigencies fall within the exigent-circumstances exception to the Fourth Amendment.

***Kentucky v. King* 563 US 452 (2011)**

**Facts: Kentucky police participated in, and observed, a controlled buy of cocaine. The observing officer alerted other officers that the buy was complete, and officers moved in to apprehend the suspect. The suspect fled into one of two apartments. Officers smelled marijuana smoke and heard movement in one of the apartments, knocked and announced, and forcibly entered, finding King, drugs, paraphernalia, and money. (The suspect was actually in the other apartment). D was convicted, and the Kentucky Supreme Court reversed, holding that police could not benefit from an exigency they created.**

**Issue: Is it legal to search based on an exigent circumstances when the exigency is created by the police themselves?**

**Holding: Yes; the test is whether there were exigent circumstances. Not who created them. Here, the Court assumed exigency, so we will too.**

**Dissent: Now police don’t need magistrates. They can just knock, listen, and break the door down. Also, could’ve gotten a warrant.**

# Whren v. United States

#### United States Supreme Court 517 U.S. 806 (1996)

#### Rule of Law

**Except with inventory searches and administrative inspections, when probable cause of illegal conduct exists, an officer’s true motive for searching or detaining a person does not negate the constitutionality of the search or seizure.**

# Brigham City, Utah v. Stuart

#### United States Supreme Court 547 U.S. 398 (2006)

#### Rule of Law

**Police may enter a home without a warrant if there is an objectively reasonable basis for believing an occupant is injured or in immediate danger.**

#### Facts

At 3:00 a.m. on July 23, 2000, police in Brigham City, Utah were called to a home for a loud party. The officers saw teens drinking alcohol in the backyard and a fight taking place inside the home. Several people were involved in the fight, and at least one person was injured. An officer opened the door and announced himself, but no one heard. The officer then entered the home and yelled, at which point the fight stopped. Stuart and other partygoers (defendants) were arrested on charges of disorderly conduct, intoxication, and contributing to the delinquency of a minor. The defendants argued that the officers’ entry into the home without a warrant violated the Fourth Amendment and moved to suppress evidence gathered after entry. The trial court granted the motion. The Utah Court of Appeals then affirmed.

#### Issue

Under the Fourth Amendment, may police enter a home without a warrant if an occupant is injured or in immediate danger?

#### Holding and Reasoning (Roberts, C.J.)

Yes. The Fourth Amendment does not forbid warrantless entry into a home if there is an objectively reasonable basis for believing an occupant is injured or in immediate danger. Generally, warrantless entry into a home for a search or seizure is considered unreasonable and forbidden by the Fourth Amendment. Nevertheless, warrantless entry into a home may be reasonable if there are exigent circumstances. Thus, police may enter into a home without a warrant to help an occupant who is seriously injured or in immediate danger of injury. This is an objective standard, and the subjective intentions of the police do not render such entry unreasonable. In this case, the officer’s entry was objectively reasonable. The officers observed an altercation involving several people and at least one injury. There was an objectively reasonable basis for believing that the injured person needed assistance and that there was an ongoing risk of injury to others in the home. Contrary to the defendants’ claims, the ruling in *Welsh v. Wisconsin*, 466 U.S. 740 (1984), does not control this case. In addition, the officer’s efforts to announce police presence were reasonable in this situation. Therefore, the warrantless entry into the home was reasonable and did not violate the Fourth Amendment. The ruling of the lower court is reversed.

**Key Terms:**

**Exigent Circumstances Doctrine** - An exception to the warrant requirement of the Fourth Amendment allowing police to make a warrantless entry, search, or seizure in circumstances that demand immediate action, such as a threat to human safety, the likely escape of a suspect, or the likely destruction of evidence.

# Michigan v. Fisher

#### United States Supreme Court 558 U.S. 45 (2009)

#### Rule of Law

**A warrantless search of a home is permissible where there is an objectively reasonable basis for believing someone within the house is in need of immediate aid.**

#### Facts

Jeremy Fisher (defendant) was observed inside his house, screaming and throwing objects. The police were notified. Officer Christopher Goolsby and other officers approached the home and found blood on the hood of a damaged pickup truck outside the home. The officers observed Fisher in the home with a cut on his hand. They knocked on the door of the home but Fisher refused them entry and told them to get a search warrant. Goolsby opened the door and entered the home until he saw that Fisher was pointing a long gun at him. Fisher was later charged with assault with a dangerous weapon and possession of a firearm during a felony. Fisher moved to suppress Goolsby’s statement that Fisher had pointed a long gun at him. The trial court found that Goolsby violated the Fourth Amendment by entering the home and, as a result, evidence that Fisher pointed a long gun at Goolsby had to be excluded. The Michigan Court of Appeals affirmed.

#### Issue

Is a warrantless search of a home permissible where there is an objectively reasonable basis for believing someone within the house is in need of immediate aid?

#### Holding and Reasoning (Per curiam)

Yes. Under the Fourth Amendment, a warrantless search inside a home is presumptively unreasonable. However, this presumption is overcome if there is an exigency that renders a warrantless search reasonable. One example of such an exigency is the need to help someone seriously injured or threatened with serious injury. Thus, a warrantless search of a home is permissible where there is an objectively reasonable basis for believing someone within the house needs immediate aid. Here, when police arrived, they found indications that there had been some kind of accident, as evidenced by the damaged car and the blood. They also observed Fisher inside his home screaming and throwing objects. It was objectively reasonable for the officers to believe that someone else inside the home might be in danger or that Fisher might have hurt himself. Thus, it was reasonable for Goolsby to enter the home under the circumstances. The judgment of the Michigan Court of Appeals is reversed.

#### Dissent (Stevens, J.)

At issue is whether Goolsby had an objectively reasonable basis for believing Fisher was in need of immediate aid. The trial judge heard all relevant testimony and deemed Goolsby’s entry unlawful. The Michigan Court of Appeals affirmed this decision. This Court, having heard no testimony on this matter, should not take the place of the fact finder in deciding that Goolsby’s actions were reasonable.

**Key Terms:**

**Exigent Circumstances Doctrine** - An exception to the warrant requirement of the Fourth Amendment allowing police to make a warrantless entry, search, or seizure in circumstances that demand immediate action, such as a threat to human safety, the likely escape of a suspect, or the likely destruction of evidence.

# Horton v. California

#### United States Supreme Court 496 U.S. 128 (1990)

#### Rule of Law

**When the police have a legal right to be where they are and they find incriminating evidence and the incriminating character is immediately apparent, the police may seize the evidence without a warrant under the plain view doctrine.**

#### Facts

The police obtained probable cause that Horton (defendant) was the one responsible for an armed robbery. The police obtained a warrant to search Horton’s home only for the proceeds of the robbery, though the affidavit for the warrant also described the weapons used in the robbery and not just the proceeds. Pursuant to the warrant, the police searched Horton’s home where they did not find the proceeds of the robbery but they did find the weapons used in the robbery lying in plain view. At trial, a police officer testified that he was interested in finding the weapons while he searched Horton’s home, so the weapons were not found “inadvertently.” The trial court allowed the evidence of the weapons to be admitted at trial and Horton was convicted.

#### Issue

Under the plain view doctrine, must the discovery of an item be inadvertent for police to make a warrantless seizure of the item?

#### Holding and Reasoning (Stevens, J.)

No. Under the Fourth Amendment the police can seize an item that is in plain view without a warrant, even if finding the item was not inadvertent, so long as the police have the legal right to be where the item is found. *Coolidge v. New Hampshire*, 403 U.S. 443 (1971), held that an item must be found inadvertently for the plain view doctrine to apply. However, this requirement is not crucial to the plain view doctrine because a person’s Fourth Amendment rights are fully protected without it. First, including an additional item in the affidavit expands the scope of a search, creating a greater intrusion on an individual’s privacy. Second, when the police keep their search within the scope of the warrant, no significant invasion of privacy occurs when an item not mentioned in the warrant is found. Also, if the officer suspects to find an item but his suspicions do not rise to probable cause, there is no reason that his suspicion should prevent the item from being seized if it is in fact found. Furthermore, the Fourth Amendment already requires that a warrant specifically state the things to be searched and seized. This insures that the police will not turn a specific warrant into a general warrant under the guise of the plain view doctrine because their search must be confined to the specifications of the warrant. Finally, an item need not be found inadvertently because this would require knowing the subjective state of mind of the officer who comes across incriminating evidence. In this case, while the police did hope to find evidence of the weapons used in the robbery, their search was confined to looking for the proceeds of the robbery when they came across the weapons and the seizure of the weapons is therefore constitutional. The judgment is affirmed.

#### Dissent (Brennan, J.)

The plain view doctrine must only apply to items discovered inadvertently. While requiring a search warrant before a person’s privacy may be intruded upon by the police, the Fourth Amendment also requires that a valid warrant specifically list the items to be seized. Thus, under the Constitution, people’s privacy interests and possessory interests are valued equally. As a result, the unwarranted intrusion on one’s possessory interest is per se unreasonable absent exigent circumstances.

**Key Terms:**

**Per Se Rule/Exception** - A rule that is applied uniformly without consideration of the specific situation or circumstance.

**Plain-view Doctrine** - An exception to the warrant requirement allowing the warrantless seizure of items if (1) it is immediately apparent that there is probable cause to believe an item is evidence of a crime, without the need for touching or further investigation, and (2) law enforcement officers are lawfully in a position to see and obtain the item.

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

# Vale v. Louisiana

#### United States Supreme Court 399 U.S. 30 (1970)

#### Rule of Law

**An arrest on the street, without more, does not provide justification for a warrantless search of the arrestee’s house.**

#### Facts

Police obtained arrest warrants for Vale (defendant) and sat outside of his house for purposes of surveillance. The officers witnessed Vale come outside and conduct what they believed to be a drug deal in the driveway. The officers arrested Vale on the front steps of his house. The arresting officer then searched the house and found narcotics. At trial, Vale argued that the search of his house violated his Fourth Amendment rights. The Louisiana Supreme Court held that the search was justifiable under the Fourth Amendment. The United States Supreme Court granted certiorari.

#### Issue

Does an arrest on the street generally provide justification for a warrantless search of the arrestee’s house?

#### Holding and Reasoning (Stewart, J.)

No. There are only “a few specifically established and well delineated” situations where law enforcement may conduct a warrantless search of a house and the prosecution has the burden to prove the necessity. An arrest on the street, without more, does not provide its own exigent circumstance to justify such a search. In the present case, the record is devoid of any justification for the search of the house other than the mere arrest of Vale. There is no reason that the arresting officers could not have obtained a search warrant for the house after making the arrest. The prosecution has not met its burden to justify the search of Vale’s house and the search violated Vale’s Fourth Amendment rights. The Louisiana Supreme Court is reversed.

#### Dissent (Black, J.)

The arresting officers witnessed Vale conduct what they had probable cause to believe was a drug deal in his driveway. It was thus reasonable for the officers to assume that there drugs inside of Vale’s house, and, in turn, that the drugs may be destroyed if they did not search the house right away. The officers’ search of Vale’s house was not unreasonable.

**Key Terms:**

**Probable Cause** - A reasonable basis, amounting to more than mere suspicion, to believe that a person has committed a crime or is about to commit a crime, or that evidence relevant to a crime exists in a particular location.

# Segura v. United States

#### United States Supreme Court 468 U.S. 796 (1984)

#### Rule of Law

**Criminal evidence will not be suppressed pursuant to the exclusionary rule if law enforcement officers had an independent source of information justifying a valid search and seizure of the evidence.**

#### Facts

Drug enforcement agents suspected that Andres Segura and Luz Marina Colon (the couple) (defendants) were involved in an illegal drug operation based on an informant's tips and their own surveillance. Before obtaining a search warrant, the agents entered the couple's apartment, arrested the couple, and sent them to jail. While in the apartment, the agents observed incriminating evidence but did not conduct a search. The agents remained in the apartment to prevent the destruction of evidence. Nineteen hours later, the agents obtained a warrant, searched the premises, and found additional incriminating evidence. The agents seized that evidence, as well as the evidence they observed the day before. The United States government (plaintiff) charged the couple with drug offenses. The United States District Court for the Eastern District of New York found the agents' initial entry illegal and granted the couple's pretrial motion to suppress all seized evidence. The government appealed this ruling to the United States Court of Appeals for the Second Circuit. The appellate court affirmed the trial court as to evidence observed before the warrant was obtained but overruled the trial court as to evidence found during the search under warrant. The couple was convicted in trial court, and the court of appeals affirmed the convictions. The couple appealed to the United States Supreme Court, which granted certiorari.

#### Issue

Will criminal evidence be suppressed pursuant to the exclusionary rule if law enforcement officers had an independent source of information justifying a valid search and seizure of the evidence?

#### Holding and Reasoning (Burger, C.J.)

No. Criminal evidence will not be suppressed pursuant to the exclusionary rule if law enforcement officers had an independent source of information justifying a valid search and seizure of the evidence. The exclusionary rule is intended to deter police conduct that violates the Fourth Amendment by suppressing evidence the police find as a result of such conduct. However, whenever the rule is applied, the public's interest in punishing crime suffers. Therefore, the rule must be applied only when evidentiary suppression will deter future police misconduct. That is not the case when the police have an independent source of information leading them to the evidence. In such circumstances, the connection between the Fourth Amendment violation and the discovery and seizure of evidence is so attenuated that the violation does not taint the evidence. In this case, the agents suspected the couple's illegal drug activity based on an informant's tips and their own surveillance. The agents’ suspicion was independent of anything the agents may have learned when they illegally entered the couple's apartment. The circumstances gave the agents probable cause to obtain a search warrant and to remain in the apartment, pending arrival of the warrant, to prevent the destruction of evidence. In these circumstances, it was proper to apply the exclusionary rule to the evidence observed before the agents obtained the warrant, but improper to apply the rule to evidence discovered and seized once the warrant had been obtained. The appellate court's ruling is affirmed.

#### Dissent (Stevens, J.)

The agents committed two Fourth Amendment violations: (1) the initial entry into the couple's apartment and (2) the unreasonably long delay in obtaining a warrant, which facilitated the agents' lengthy and unauthorized occupation of the premises. Neither violation was justified by any exigent circumstance, and the exclusionary rule should be applied if the agents committed those violations to prevent the apartment's other occupants from destroying evidence. The case should be remanded for further findings on that point.

**Key Terms:**

**Exclusionary Rule** - A rule that excludes or suppresses evidence in a criminal proceeding where that evidence was obtained in violation of an individual’s constitutional rights.

**Exigent Circumstances Doctrine** - An exception to the warrant requirement of the Fourth Amendment allowing police to make a warrantless entry, search, or seizure in circumstances that demand immediate action, such as a threat to human safety, the likely escape of a suspect, or the likely destruction of evidence.

# Illinois v. McArthur

#### United States Supreme Court 531 U.S. 326 (2001)

#### Rule of Law

**A temporary seizure is lawful if it is supported by probable cause, limited in nature, and tailored reasonably to secure law enforcement needs while also protecting privacy interests.**

# January 7, 2021

# Chapter 3, Section 7 – Seizure and Search of Vehicles and Effects

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**Funk, Chapter 3 Section 7 page 233-277**

**Seizure and Search of Vehicles and Effects**

**Thursday, January 7th, 2021**

Page 233

Motor Vehicles receive substantially less Fourth Amendment protection than premises.

Burger said in Carney that “besides the element of mobility, less rigorous warrant requirement s govern because the expectation of privacy with respect to one’s automobile is essentially less than that relating to one’s home or office.”

**Personal Effects**:

Luggage ranks somewhere between premises and vehicles in the Fourth Amendment hierarchy

***California v. Carney*** permits probable cause searches of vehicles without a warrant.

***Arizona v. Gant***sometimes allows a broad search of incident to arrest of an “occupant” or “recent occupant”

***California v. Bertine*** authorizes a warrantless inventory of lawfully seized vehicles.

***California v. Acevedo*** addresses the issue of what rules should control when personal effects are located inside a vehicle

***Wyoming v. Houghton***looks at searches that are directed at a nonimplicated passenger and the differing privacy expectations as to passengers effects as compared to his or her person

***Riley v. California*** has to do with the search of a cell phone found on the person of an arrestee. In this case, the Court’s analysis makes a wider array of serach-incident-to-arrest jurisprudence covering also search of premises and search of vehicles

***Welsh v. Wisconsin***holding that police could not enter a home without a warrant in order to prevent the loss of evidence —the defendant’s blood alcohol level –of the “nonjailable traffic offense” of DWI, the McArthur majority distinguished Welsh because

1. the offense involved here was punishable by up to 30 days in jail
2. “the restriction at issue here is less serious” (Justice Stevens concluded otherwise as to the Welsh doctrine). Justice Souter concurred in McArthur reasoning that had the D remained inside the trailer then the” probability of destruction” of the marijuana “in anticipation of a warrant” would have justified the police in entering the trailer to make a lawful, warrantless search, but once he came outside it was reasonable for the police to keep him from reentering not because not “because the law officiously insists on safeguarding a suspect’s privacy from search” but rather because “the law’s strong preference for warrants, which underlies the rule that a search with a warrant has a stronger claim to justification on later, judicial review than a search without one.”

“The law can hardly raise incentives to obtain a warrant without giving the police a fair chance to take their probable cause to a magistrate and get one.

***Illinois v. McArthur***

The Court concluded that “the restriction at issue was reasonable and lawful in light of 4 enumerated circumstances:

1. the police had probable cause to believe that McArthur’s trailer home contained evidence of a crime and contraband (unlawful drugs)
2. the police had good reason to fear that, unless restrained, McArthur would destroy the drugs before they could return with a warrant (he had realized his angry wife had informed the police about the drugs)
3. the police made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy by imposing a “significantly less restrictive restraint” than a warrantless search of the premises
4. the police imposed the restraint for a limited period of time – 2 hours

***Carroll v. United States***

Police arrested Leon Carroll and Daniel Stewart on warrants for violating local lottery laws and conspiring to run a lottery. Each filed a pre-trial motion to suppress evidence found at the time of arrest. The district court granted the motions, citing a lack of probable cause. The U.S. Court of Appeals for the District of Columbia Circuit reversed, holding that the order for suppression of evidence was appealable.

**Question:**

Was the order for suppression of evidence appealable?

**Answer:** No. In a unanimous decision, Chief Justice Earl Warren wrote the majority opinion, reversing the court of appeals. The Supreme Court held that the United States had no right to appeal the suppression order. The order was sufficiently separate from the criminal trial to be final and not appealable under statutes relating to criminal cases.

***California v. Carney*** *-* Justice Burger delivered the opinion

DEA agent Williams watched Charles Carney approach a youth in downtown San Diego. The youth went with Mr. Carney to a trailer in a motor home park nearby. They entered, closed the shades. The agent had heard (uncorroborated) that the same motor home was being used by someone else to exchange marijuana for sex. The agent watched the motor home for 1¼ hours while the 2 were inside. When the youth left, the agent stopped him talked to him. The youth said he had exchanged sex for marijuana. As per the request of the agent, the youth knocked on the door of the motor home and Carney stepped out. The agents identified themselves. Without a warrant or consent, the one agent entered the home and saw marijuana, plastic bags, and scales. Agent Williams took Mr. Carney into custody and possession of the home. Later the police found more marijuana in the refrigerator and cupboards of the home.

Mr. Carney was charged with possession of marijuana for sale.

Mr. Carney asked the court to distinguish his vehicle from other vehicles within the exception *because it was capable of functioning as a home*. *But the court said to distinguish between Mr. Carney’s motor home and a regular sedan would require applying the exception depending on the size of the vehicle and the quality of its appointments.*

D moved to suppress the evidence discovered in the motorhome.

Magistrate denied the motion (but later the State SC **reversed** the conviction HOLDING the search was unreasonable because no warrant was obtained).

**Chief Justice Warren E. Burger delivered the opinion of the 6-3 majority.** The Supreme Court held that the Fourth Amendment applied a lesser degree of protection to motor vehicles based on the ability to easily and quickly move them before a warrant can be obtained. Also, the regulation surrounding automobiles affords them a lesser expectation of privacy and therefore less protection under the Fourth Amendment. Since Carney’s motor home was not in an area traditionally used for residence and was licensed to operate as a vehicle on public streets, the Court held that it should receive the level of constitutional protection of a motor vehicle rather than a residence. The Court also held that the officers had probable cause and that the search itself was reasonable. Justice Burger “the search was not unreasonable; it was plainly one that the magistrate could authorize if presented with these facts.”

THE JUDGMENT OF THE CALIFORNIA SUPREME COURT IS REVERSED.

**Justice John Paul Stevens wrote a dissent** where he argued that the Court should have relied on the ruling of the California Supreme Court to establish precedent for that state. He also argued that the majority’s decision overemphasized the exceptions to the Fourth Amendment. Since the motor home was neither in motion nor was there any indication that Carney would quickly move it, there were no circumstances to prevent the officers from obtaining a warrant. Justice William J. Brennan, Jr. and Justice Thurgood Marshall joined the dissent.

**The actual DISSENT**: **JUSTICE STEVENS** ALONG WITH JUSTICE BRENNAN, JUSTICE MARSHALL

Page 237-238

Justice Stevens said the motorhome was parked just a few blocks from the courthouse and magistrates were available to entertain a warrant application. The motorhome showed no indication of immediate departure. The officers had the element of surprise, probable cause, and had time to get a warrant. This court has held that mobility of the place to be searched is not a sufficient justification for abandoning the warrant requirement.

“It is perfectly obvious that the citizen has a much greater expectation of privacy concerning the interior of a mobile home than a piece of luggage such as a footlocker…Photographs in the record indicate that its height, length and beam provided substantial living space inside…In my opinion, a warrantless search of living quarters in a motorhome is “presumptively unreasonable absent exigent circumstances.”

Stevens cited *Chadwick* (1977) where the court held squarely that mobility of the place to be searched is not a sufficient justification for abandoning the warrant requirement. In *Chadwick*, the Court held that a warrantless search of a footlocker violated the 4th Amendment even though there was ample probably cause to believe it contained contraband. The dissent rejected the argument that there are greater privacy interests associated with containers than with automobiles.

Justice Stevens ended by saying motor homes are the equivalent of a hotel room, hunting or fishing cabin, or humble cottage and should demand the “highest and most legitimate expectations of privacy…[and] command the respect of this Court.

…[a] warrantless search of living quarters in a motor home is “presumptively unreasonable absent exigent circumstances.” I respectfully dissent.

Exceptions to general rule is the so-called “AUTOMOBILE EXCEPTION” set forth in 1925

(Prohibition was from January 17, 1920 to 1933) in *Carroll v. United States*. The court said that privacy interests in a automobile are protected but that because of the mobility of the auto justifies a lesser degree of protection. There is a difference between stationary structures versus vehicles. The court said a ship, boat, wagon or auto can be moved quickly out of the locality or jurisdiction.

BUT there are other reasons for the vehicle exception:

1. the expectation of privacy to one’s automobile is significantly less that one’s home/office
2. because the passenger compartment us relatively open to plain view in an auto, there are lesser expectations of privacy. The exception also includes a locked car trunk, a sealed package in a car trunk, a closed compartment in the dashboard, the interior of the upholstery, or sealed packages inside a covered pickup truck.

This is because of pervasive regulations of vehicles on public highways. Autos are subjected to pervasive and continuing governmental regulation and controls, including inspection and licensing requirements. Everyday police stop cars for inspired inspection stickers, exhaust fumes, headlights not working, etc. People expect this kind of regulation because there is a compelling need for regulation.

**The pervasive schemes of regulation, which necessarily lead to reduced expectations of privacy, and the exigencies attendant (exigency = an urgent need or demand) to ready mobility justify searches without prior recourse to the authority of a magistrate as long as the overriding standard of probable cause is met.**

1. **A vehicle is obviously readily mobile by the turn of a switch key, if not actually moving**
2. **There is a reduced expectation of privacy stemming from its use as a licensed motor vehicle subject to a range of police regulation inapplicable to a fixed dwelling.**

**The overriding societal interests in effective law enforcement justify an immediate search before the vehicle and its occupants become unavailable.**

The decision was that the motor home possessed some of the attributes of a home, like the readily mobile home in *Carroll*. The vehicle was situated where it looked to an observer to being used as a vehicle and not a residence. Courts said a motor home lends itself easily to use as an instrument of illicit drug and other illegal activity.

A motorhome can be used for transportation and is readily mobile.

**(Footnotes: page 236)**

*Maryland v. Dyson* reversed a state court decision holding “that in order for the automobile exception to the warrant requirement to apply, there must not only be probable cause to believe that evidence of a crime is contained in the automobile but also a separate finding of exigency (ek-suh-gen-cy – emphasis on the first syllable) precluding the police from obtaining a warrany.” The court said this holding rests upon an incorrect interpretation of the automobile exception to the Fourth Amendment which “does not have a separate exigency requirement.”

***Florida v. White***

Upheld the warrantless seizure of a car on probable cause that the car was contraband under the state forfeiture law, the Court took note of “the special considerations recognized in the context of movable items” in the *Carroll-Carney* line of cases*.* The court said “our Fourth Amendment jurisprudence has consistently accorded law enforcement officials greater latitude in exercising their duties in public places.”

Two dissenters in White objected (1) that an exigent circumstances rational had no application “when the seizure is based on a belief that the automobile may have been used at some time in the past to assist in illegal activity and the owner is already in custody and (2) that a warrant requirement is “bolstered by the inherent risks of hindsight or post-seizure hearings w/law enforcement agencies’ pecuniary (relating to or consisting of money) interest in the seizure of such property.

**Relevant to determining whether a warrant would be required in such circumstances is: (footnotes page 237)**

1. its location, whether the vehicle is readily mobile or on blocks
2. whether the vehicle is licensed
3. whether it is connected to utilities
4. whether it has convenient access to a public road

**G. M. Leasing Corp. v. United States, 429 U.S. 338 (1977)**

**U.S. Supreme Court**

**Upheld the warrantless seizure from a public area of automobiles in partial satisfaction of income tax assessments.**

The Internal Revenue Service (IRS), having investigated the income tax liability of a taxpayer who was a fugitive from justice, determined deficiencies for two taxable years, and because of the taxpayer's failure to file proper returns and his fugitive status, made jeopardy assessments pursuant to § 6861(a) of the Internal Revenue Code of 1954. Petitioner corporation was determined to be the alter ego of the taxpayer. Thereafter, pursuant to a decision to levy upon and seize automobiles registered in petitioner's name in partial satisfaction of the assessments invalid, and that the seizures of the automobiles and the contents of the office violated the Fourth Amendment, instituted this suit, seeking return of the automobiles, suppression of evidence obtained from the seized documents, and damages from the IRS agents. The District Court entered judgment for petitioner against the taxpayer, agents made warrantless seizures of several such automobiles from property in which petitioner had no interest. For the purpose of levying on other property subject to seizure, they also went to petitioner's office, a cottage-type building, and made a warrantless forced entry. Pending further information as to whether the cottage was an office or a residence, the agents made no initial seizures, but two days later they again entered the cottage without a warrant and seized books, records, and other property. Thereafter petitioner, claiming that it was not the taxpayer's alter ego, that the assessment was, finding that the IRS agents had committed illegal searches and seizures in violation of the Fourth Amendment. The Court of Appeals for the most part reversed, ruling that the assessments were valid, that the evidence conclusively established that petitioner was the taxpayer's alter ego, and that the warrantless searches and seizures were not unconstitutional. Section 6331(a) of the 1954 Code authorizes the IRS to collect taxes "by levy upon all property and rights to property" belonging to a person who "neglects or refuses to pay" any tax, and § 6331(b) defines "levy" as including "the power of distraint and seizure by any means."

Held: 1. This Court granted certiorari limited to the Fourth Amendment issue, and thus accepts the Court of Appeals' determinations that the assessments and levies were valid and that petitioner was the taxpayer's

BLACKMUN, J., delivered the opinion for a unanimous Court. BURGER, C.J., filed a concurring opinion, *post,* p. [429 U. S. 361](https://supreme.justia.com/cases/federal/us/429/338/case.html#361).

***United States v. Chadwick*** (Chimel exception)

Amtrak officials reasonably suspected that a man and a woman were traveling from California to Massachusetts with a trunk full of marijuana and notified the police, who in turn notified the officials in Boston. Federal officials greeted the train upon its arrival in Boston and released a police dog who indicated that there were in fact drugs in the trunk. Chadwick (defendant) arrived at the train station to pick up the trunk, and he and the two traveling with the trunk were arrested as they were placing the trunk in the back of Chadwick’s car. The trunk was brought back to the federal building where it was searched without a warrant one hour and a half after the arrests had been made. The trial court granted Chadwick’s motion to suppress the marijuana that was found in the trunk on the grounds that the search was unreasonable, as it did not qualify as a search incident to arrest or a valid search under the automobile exception.

#### Issue: Is a warrantless search of a locked trunk unreasonable where probable cause exists that the trunk contains drugs and the trunk was seized during a lawful arrest, but the police have the trunk in their control for over an hour before they search it?

#### Holding and Reasoning (Burger, C.J.)

Yes. A warrantless search of a locked trunk that is not searched until the police have exclusive control of the container is unconstitutional. The Fourth Amendment protects people, not places (*Katz v. United States*, 389 U.S. 347 (1967)), and was not drafted solely to protect people from warrantless searches of their homes as the government here argues.

#### Dissent (Blackmun, J.)

The proper ***bright-line rule*** ought to be that police need not obtain a warrant to search and seize moveable property that an arrestee has in his possession at the time of his arrest if the arrest is made in a public place. This rule would clarify any confusion regarding what items on an arrestee’s person may be searched. Furthermore, the rule is constitutional because in such situations a warrant will almost always be issued, so there will be no practical effect on the arrestee’s Fourth Amendment rights. Finally, in this case, the search was reasonable because to hold otherwise gives constitutional significance to minor details in timing and “fortuitous circumstances.”

Page 238

***Arizona v. Gant* (Justice Stevens with Justice Scalia concurring)**

**Facts**:

Rodney Gant (defendant) was arrested for driving with a suspended license shortly after getting out of his car. He was handcuffed and then put in the back of a police car. With Gant secured in the police car, officers proceeded to search the passenger compartment of his vehicle and found cocaine in a pocket of a jacket in the backseat. At a preliminary hearing, Gant moved to suppress the drug evidence because he felt that the decision in *New York v. Belton*, 453 U.S. 454 (1981), did not allow police to search his vehicle after he was secured in the police car, since he posed no threat to the officers and he was arrested for an offense for which no evidence could be found in his car. (*New York v. Belton* = Understood to permit automatic searches of a car in conjunction with an arrest, regardless of whether the driver was secured at the time of the search.

An officer may search a secured driver’s car only if the officer has reason to believe that the car contains evidence of the specific crime of arrest. Belton was pulled over for speeding. He was with three other people. The officer smelled marijuana and had them all out of the car, split them up and placed them in 4 different areas (without of reach of the car) and under arrest. The officer searched the car and found Belton’s jacket with cocaine in the pocket. Belton was convicted of possession of a controlled substance. On appeal, the court disagreed with the trial judge and suppressed the evidence of the cocaine. The New York Court of Appeals found the search unconstitutional. It went to the Supreme Court where the judgment was reversed with Justice Stewart saying the search was lawful. The BRIGHT LINE rule is if the passenger area can be reached by the arrestee than so can those containers in the area and therefore, containers in the passenger area subject to search as well.)

The Arizona Supreme Court held that the search-incident-to-arrest exception did not justify the search. We agree with this conclusion.

*(Search Incident to Arrest = allows officers to search a suspect’s person or the surrounding area during a lawful arrest.*

*This is an exception to the 4th Amendment – this includes visible parts of the room in which the suspect is arrested including closed drawers or other containers within the suspect’s easy reach. It does NOT include closed drawers or containers in other parts of the room, home or building.)*

to the 4th Amendment’s warrant requirement *(as defined in Chimel v. California - In Chimel v. California, the Supreme Court clarified the permissible scope of a search incident to arrest.)*

did not justify the search.

**Issue:**

May police undertake a search of an individual’s vehicle when the arrestee is not within reaching distance of the passenger compartment at the time of the search?

**Holding and Reasoning – Justice Stevens, Scalia concurring**

No. Police may search a vehicle after a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe that crime-related evidence is located in the vehicle.

In ***Chime****l*, the basic rule that applies in these cases is: the **search incident to an arrest includes the area of the arrestee’s person and the area within his immediate control.** In ***Belton*, the court held that after a lawful arrest the police can search the arrestee’s person and conduct a contemporaneous search of a passenger compartment of the car, including containers in it.**

Stevens said despite other’s interpretations of Belton, their decision does not authorize a vehicle search after a recent arrest. “We hold that police can search a vehicle after the occupant’s recent arrest ONLY when the arrestee is unrestrained and within reach of the passenger compartment, and objects within it.” Police can only search for evidence when it is “reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.” In this case, Gant was securely handcuffed and placed in a squad car, deprived of the ability to reach for a weapon, and police could not reasonably believe that it was possible to find evidence related to the crime of arrest in his car. In allowing a bright line rule that would allow automobile searches regardless of the whether the arrestee is restrained or not, …seriously undermines the privacy interests of the 4th Amendment …*We do not think it is reasonable to give the police unbridled discretion to search a car in all circumstances*….we do not believe…expansive vehicle searches for minor offenses such as a traffic infraction…trumps the constitutional rights that all individuals possess. Nor does stare decisis require us to read *Belton* as broadly as the state would suggest.

We reject the reading of *Belton* and hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant’s arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search. Gant was arrested for driving with a suspended license – and offense for which police could not expect to find evidence in the passenger compartment of Gant’s car. Page 241

We reject the State’s argument because 1.) the State undervalues the privacy interests at stake and 2.) it exaggerates the clarity that its reading of *Belton* provides. Courts are at odds regarding how close in time to the arrest and how proximate to the arrestee’s vehicle an officer’s first contact with the arrestee must be…**The rule has generated a great deal of uncertainty, particularly for a rule touted as providing a “bright line.”**

**(**refers to *Michigan v. Long*, *United States v. Ross, Maryland v. Buie*

**Scalia: ‘history cannot tell us what the Framer’s thought of reasonableness in the vehicle-stop search so we must apply traditional notions of reasonableness…**it would be better to overrule *Belton* and Thornton and adopt the rule that it is reasonable to search a vehicle only when the object of the search is evidence of the crime for which the arrest was made, or another crime for which there is probable cause.”

**DISSENT: Justice Breyer**

I agree (with Alito) that we should read Belton as recommending a bright-line rule that would allow a warrantless search of the passenger compartment of a vehicle regardless of the threat that the individual poses. But I also agree with Justice Stevens that such a rule potentially runs afoul of the 4th Amendment. Stare decisis requires that we follow the traditional interpretation of *Belton,* which has been relied on by other courts.

**DISSENT**: **Justice Alito**

**…**the Court today is overruling its decision in *Belton,* which has proved a workable and clear-cut solution to vehicle searches at the same time that it has protected law enforcement officers. Belton provides a test that is easier to apply than that provided by today’s decision. The police can search the passenger compartment of a vehicle after a lawful custodial arrest, whether or not the arrestee is within reaching distance of the compartment….

… *Belton* represents a part of *Chimel*…if we overrule Belton, we should re-examine Chimel. It makes more sense to think that the *Chimel* ruling was intended to use the time of arrest. The majority prefers its confused reading of *Chimel* and an unworkable 2-part test. Also, the Court **inexplicably uses** “**reason to believe” instead of probable cause as the standard for this type of evidence-gathering search.**

***Michigan v. Long* = permits an officer to search a vehicle’s passenger compartment when he has reasonable suspicion that an individual . whether or not the arrestee, is “dangerous” and might access the vehicle to gain immediate control of weapons.**

***United States v. Ross* = If there is probable cause to believe a vehicle contains evidence of criminal activity, it authorizes a search of any area of the vehicle in which the evidence might be found. Ross allows searches for evidence relevant to offenses other than the offense of arrest, and the scope of the search is broader.**

***Maryland v. Buie* = holding, that incident to arrest, an officer may conduct a limited protective sweep of those areas of a house in which he reasonably suspects a dangerous person may be hiding.**

**Footnotes page 240**

***United States v. Rabinowitz =*** *upheld a search of the suspect’s place of business and did not restrict the officer’s search authority*

FBI agents arrested Rabinowitz in his one-room office. Rabinowitz was charged with selling and possessing forged government stamps. The officers searched his office without a search warrant and seized the stamps. The stamps were introduced as evidence. Rabinowitz was convicted. He appealed

Did the search violate the Fourth Amendment warrant requirement?

The Fourth Amendment permits a warrantless search incident to a lawful arrest. The search may be of the person arrested and of the premises where the arrest occurs.

***Entick v. Carrington =*** disapproving search of P’s private papers under general warrant, despite arrest

# \*\*CALIFORNIA v. CARNEY\*\*

#### United States Supreme Court 471 U.S. 386 (1985)

#### Rule of Law

**Under the Fourth Amendment, a vehicle that can be readily moved and that has a reduced expectation of privacy due to its use as a licensed motor vehicle may be searched without a warrant provided probable cause exists.**

#### Facts

Drug Enforcement Agency (DEA) agents received a tip that Carney (defendant) was selling marijuana out of his mobile home. The mobile home was relatively large, it was parked in a public lot just a few blocks from the court house, and the windows, including the front windshield, were covered by shades or curtains. The DEA kept Carney under surveillance and watched as he entered the mobile home with another man. When the other man exited the mobile home, the police questioned him and he told them that Carney had given him marijuana in exchange for sex. The police then had the man knock on Carney’s door and when Carney answered the police entered the home and found evidence of drugs. Over Carney’s objections, the trial judge allowed the admission of the evidence found in Carney’s mobile home and the superior court also rejected Carney’s claim when he renewed his motion to suppress. Carney pleaded nolo contendere and the Supreme Court granted certiorari.

#### Issue

Is it permissible under the Fourth Amendment for law enforcement agents to search a mobile home that can be readily moved, is licensed as a motor vehicle and is parked in a public place, based on probable cause but without a warrant?

#### Holding and Reasoning (Burger, C.J.)

Yes. A mobile home that can be quickly moved and that is licensed with the state as an operating vehicle can be searched without a warrant when probable cause exists. While a home is due a heightened level of constitutional protection, the government has a compelling need to regulate vehicles used on public roads. Therefore, there is a reduced level of privacy in an automobile which, coupled with the exigency that the vehicle may be quickly moved, justifies a warrantless police search when probable cause exists. It is true that a motor home can function as a home and not merely as a vehicle. However, to avoid drawing arbitrary distinctions among different types of moveable vehicles, it is preferable to treat motor homes as vehicles for Fourth Amendment purposes. Here, Carney’s motor home was readily moveable; it was parked in a public lot and not in an area regularly used for residential purposes; and it was licensed as a vehicle operating in California. Accordingly, the police were entitled to search it when they obtained probable cause of illegal activity. Therefore, the judgment of the state supreme court is reversed.

#### Dissent (Stevens, J.)

The warrantless search of Carney’s motor home was unreasonable. While motor homes can function as vehicles on public roads, when they are parked and not traveling on the streets they afford the occupants the increased expectation of privacy that a home provides and can only be searched without a warrant when exigent circumstances are present. Here, the search was unconstitutional because the police could determine by the size and shape of the mobile home that it was Carney’s dwelling, there was no threat that the mobile home would be quickly moved because the front window was covered by curtains, and the mobile home was parked in a parking lot just steps from the courthouse where a warrant could have been easily issued.

***California v. Carney –*** the automobile exception applies to warrantless searches of publicly-located, readily mobile motor homes.

**Key Terms:**

**Nolo Contendere** - A plea of no contest in which the defendant neither admits nor denies the charges against him, but the immediate effect of the plea is the same as if the defendant had pleaded guilty.

**Fourth Amendment -** An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

***California v. Carney***

Rule: Police can search a “motor home” without a warrant based on probable cause.

Police suspected Carney of selling drugs and exchanging sex for drugs out of his mobile home. It was parked in a public lot, not attached to utilities. The US SC ruled the motor home was considered more of a car than a home in this case. Because it was easily moveable (even though all the curtains were closed and engine was off), the vehicle exception applied and the search was not unreasonable. The evidence recovered was admissible. Vehicle exception: (1) mobility & (2) regulation.

***California v. Carney* 471 US 386 (1985)**

**Facts: DEA Agents were surveilling a motor home where they believed people were exchanging money for sex. They saw the Defendant Carney and a young person go into the mobile home where they stayed for over an hour. Agents stopped the young person as they left. The youth told agents they had received marijuana in exchange for sex. Agents went to the mobile home, knocked and identified themselves. Defendant Carney stepped out. One agent went in without consent or a warrant and observed drugs and paraphernalia. Agents arrested Defendant Carney and further searched the motor home finding additional marijuana. Carney was convicted at trial, but the California Supreme Court overturned finding the warrantless search illegal.**

**Is a warrantless search of a motorhome permissible?**

**Yes, where probable cause exists, pursuant to the automobile exception to the warrant requirement.**

**BECAUSE:**

**(1) automobiles are mobile, and thus evidence may be lost**

**(2) automobiles are heavily regulated, so the expectation of privacy is diminished.**

**Dissent: We have previously held that the mobility of a footlocker did not justify a warrantless search. Clearly more of an expectation of privacy here. Also, this is more like a home.**

# Carroll v. United States

***Carroll v. United States***, 267 U.S. 132 (1925), was a decision by the [United States Supreme Court](https://en.wikipedia.org/wiki/United_States_Supreme_Court) that upheld the [warrantless searches](https://en.wikipedia.org/wiki/Warrantless_searches_in_the_United_States) of an automobile, which is known as the [automobile exception](https://en.wikipedia.org/wiki/Motor_vehicle_exception). The case has also been cited as widening the scope of warrantless search.

# Maryland v. Dyson

#### United States Supreme Court 527 U.S. 465 (1999)

#### Rule of Law

**The warrantless search of a vehicle is not unreasonable under the Fourth Amendment when the search is based on probable cause.**

#### Facts

Dyson (defendant) was a known drug dealer. Police received a tip from an informant that Dyson was carrying illegal drugs. The informant described the vehicle and gave police the license plate number. Police stopped and searched the vehicle. After finding drugs, the police arrested Dyson. Dyson was convicted at trial. Dyson appealed arguing that the search violated his Fourth Amendment rights. The Maryland Court of Special Appeals reversed Dyson’s convictions because it concluded that police could only conduct a constitutionally permissible warrantless vehicle search under exigent circumstances. The state of Maryland (plaintiff) appealed the ruling in state court, but was denied certiorari. The state appealed to the United States Supreme Court.

#### Issue

Is the warrantless search of a vehicle unreasonable under the Fourth Amendment when the search is based on probable cause?

#### Holding and Reasoning (Per Curiam)

No. The warrantless search of a vehicle is not unreasonable under the Fourth Amendment when the search is based on probable cause. As a general rule, the Fourth Amendment requires police officers to obtain a warrant before conducting a search of private property unless the search is justified by exigent circumstances. We have long recognized that the warrantless search of an automobile, when supported by probable cause, is constitutionally permissible even in the absence of exigent circumstances. When the circumstances afford sufficient probable cause to support the issuance of a warrant, police need not wait for a warrant to initiate a vehicle search. The state court found that probable cause for the search existed, but excluded search evidence because it concluded that the Fourth Amendment exigency requirement applied. The probable cause determination alone rendered the search constitutionally permissible under the automobile exception. The judgment below is reversed.

**Key Terms:**

**Fourth Amendment -** An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

# Florida v. White

119 S.Ct. 1555

Supreme Court of the United States

**FLORIDA, Petitioner,**

**v.**

**Tyvessel Tyvorus WHITE.**

No. 98–223.

Argued March 23, 1999.Decided May 17, 1999.

**Synopsis**

Defendant was convicted in the Circuit Court, Bay County, Clinton Foster, J., of possession of cocaine, which was found during inventory search of his automobile following its warrantless seizure pursuant to Florida Contraband Forfeiture Act. Defendant appealed. The District Court of Appeal, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I233ae0090e6f11d998cacb08b39c0d39&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[680 So.2d 550,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996170094&pubNum=735&originatingDoc=Ibdde5d5a9c2511d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed, but certified question as to whether, absent exigent circumstances, a warrantless seizure of an automobile under the Forfeiture Act violated the Fourth Amendment. The Florida Supreme Court, [Anstead](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0230197001&originatingDoc=Ibdde5d5a9c2511d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ibdde5d5a9c2511d9bc61beebb95be672), J., [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I2ec537f50c8911d98220e6fa99ecd085&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[710 So.2d 949,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1998059992&pubNum=735&originatingDoc=Ibdde5d5a9c2511d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) answered question in the affirmative, quashed lower court opinion, and remanded. Certiorari was granted. The United States Supreme Court, Justice [Thomas](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=Ibdde5d5a9c2511d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ibdde5d5a9c2511d9bc61beebb95be672), held that Fourth Amendment did not require police to obtain warrant before seizing automobile from public place when they had probable cause to believe that it was forfeitable contraband; abrogating [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I73ab803496fa11d9bdd1cfdd544ca3a4&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[*U.S. v. Dixon*, 1 F.3d 1080 (C.A.10 1993)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1993153781&pubNum=506&originatingDoc=Ibdde5d5a9c2511d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)); [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic8ff6d9894d811d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[*U.S. v. Lasanta*, 978 F.2d 1300 (C.A.2 1992)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992183215&pubNum=350&originatingDoc=Ibdde5d5a9c2511d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)); [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I9383aa87971411d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[*U.S. v. Linn*, 880 F.2d 209 (C.A.9 1989).](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989108639&pubNum=350&originatingDoc=Ibdde5d5a9c2511d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))

Reversed and remanded.

Justice [Souter](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0263202201&originatingDoc=Ibdde5d5a9c2511d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ibdde5d5a9c2511d9bc61beebb95be672) filed concurring opinion, in which Justice [Breyer](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=Ibdde5d5a9c2511d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ibdde5d5a9c2511d9bc61beebb95be672) joined.

Justice [Stevens](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0156277701&originatingDoc=Ibdde5d5a9c2511d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ibdde5d5a9c2511d9bc61beebb95be672) filed dissenting opinion, in which Justice [Ginsburg](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=Ibdde5d5a9c2511d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ibdde5d5a9c2511d9bc61beebb95be672) joined.

# G.M. Leasing Corp. v. U.S.

97 S.Ct. 619

Supreme Court of the United States

**G. M. LEASING CORP., Petitioner,**

**v.**

**UNITED STATES et al.**

No. 75-235.

Argued Oct. 4, 1976.Decided Jan. 12, 1977.

**Synopsis**

Corporation filed suit against the United States and certain federal employees, seeking return or destruction of photocopies of documents seized, return of seized automobiles, release of levy against its property, and damages arising out of levy and seizure by internal revenue agents of its assets to satisfy the income tax liability of an individual taxpayer who was the corporation's general manager. The United States District Court for the District of Utah, Central Division, entered judgment for petitioner, and defendants appealed. The Court of Appeals, Tenth Circuit, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ibed82ccc909711d98e8fb00d6c6a02dd&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[514 F.2d 935,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1975110600&pubNum=350&originatingDoc=Ic1dc914b9c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) for the most part reversed, and certiorari was granted. The Supreme Court, Mr. Justice Blackmun, held, inter alia, that warrantless automobile seizures, which occurred in public streets, parking lots or other open areas, involved no invasion of privacy and were not unconstitutional; that the warrantless entry into the privacy of petitioner's office, however, violated the Fourth Amendment; that the case did not fall under the “exigent circumstances” exception to the warrant requirement; and that the issue whether petitioner was entitled to money damages if the internal revenue agents acted in good faith was to be considered by the courts below in light of all the facts.

Affirmed in part, reversed in part, and remanded.

Mr. Chief Justice Burger filed a concurring opinion.

Opinion on remand, [560 F.2d 1011](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977123458&pubNum=350&originatingDoc=Ic1dc914b9c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

# United States v. Chadwick

#### United States Supreme Court 433 U.S. 1 (1977)

#### Rule of Law

**The Fourth Amendment protects a person’s reasonable expectations of privacy and requires that the police obtain a warrant before executing a search unless a relevant exception applies.**

#### Facts

Amtrak officials reasonably suspected that a man and a woman were traveling from California to Massachusetts with a trunk full of marijuana and notified the police, who in turn notified the officials in Boston. Federal officials greeted the train upon its arrival in Boston and released a police dog who indicated that there were in fact drugs in the trunk. Chadwick (defendant) arrived at the train station to pick up the trunk, and he and the two traveling with the trunk were arrested as they were placing the trunk in the back of Chadwick’s car. The trunk was brought back to the federal building where it was searched without a warrant one hour and a half after the arrests had been made. The trial court granted Chadwick’s motion to suppress the marijuana that was found in the trunk on the grounds that the search was unreasonable, as it did not qualify as a search incident to arrest or a valid search under the automobile exception.

#### Issue

Is a warrantless search of a locked trunk unreasonable where probable cause exists that the trunk contains drugs and the trunk was seized during a lawful arrest, but the police have the trunk in their control for over an hour before they search it?

#### Holding and Reasoning (Burger, C.J.)

Yes. A warrantless search of a locked trunk that is not searched until the police have exclusive control of the container is unconstitutional. The Fourth Amendment protects people, not places (*Katz v. United States*, 389 U.S. 347 (1967)), and was not drafted solely to protect people from warrantless searches of their homes as the government here argues. Instead, the Fourth Amendment requires the authorities to obtain a search warrant before they conduct a search of an area or item in which a person has a reasonable expectation of privacy. While the government does not argue that the search is reasonable as an automobile search, the government does argue that because containers in a lawfully stopped car are subject to search where probable cause exists, the search of the trunk is reasonable. This is not so. Unlike an automobile, and containers inside an automobile, where there is a diminished expectation of privacy, by locking the trunk Chadwick not only had the expectation that the contents would remain private but this expectation was reasonable because the contents of personal luggage typically stay private. Finally, the government argues that the search is reasonable as a search incident to arrest. This argument also fails. No exigency existed to immediately search the trunk, and the actual search took place over an hour after the trunk had been seized and after the trunk was under the exclusive authority of the police. Therefore, the police should have obtained a warrant before they searched the trunk because there was no threat that the evidence would be destroyed and Chadwick had a reasonable expectation of privacy in the contents of the trunk. The search was unconstitutional.

#### Concurrence (Brennan, J.)

It is unclear whether the trunk could have been lawfully searched under the automobile exception had the police permitted Chadwick to drive off and then pull him over. It is also unclear whether the trunk could have been lawfully searched at the time Chadwick was arrested because the trunk would not have been under Chadwick’s immediate control. It is unlikely Chadwick could have accessed the contents to obtain a weapon or destroy evidence.

#### Dissent (Blackmun, J.)

The proper bright-line rule ought to be that police need not obtain a warrant to search and seize moveable property that an arrestee has in his possession at the time of his arrest if the arrest is made in a public place. This rule would clarify any confusion regarding what items on an arrestee’s person may be searched. Furthermore, the rule is constitutional because in such situations a warrant will almost always be issued, so there will be no practical effect on the arrestee’s Fourth Amendment rights. Finally, in this case, the search was reasonable because to hold otherwise gives constitutional significance to minor details in timing and “fortuitous circumstances.”

**Key Terms:**

**Fourth Amendment -** An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

# \*\*ARIZONA v. GANT\*\*

#### United States Supreme Court 129 S.Ct. 1710 (2009)

#### Rule of Law

**Police may search a vehicle after a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe that crime-related evidence is located in the vehicle.**

#### Facts

Gant (defendant) was arrested for driving with a suspended license shortly after getting out of his car. He was handcuffed and then put in the back of a police car. With Gant secured in the police car, officers proceeded to search the passenger compartment of his vehicle and found a gun and cocaine. Gant was charged with possession of a narcotic drug and drug paraphernalia. At a preliminary hearing, Gant moved to suppress the drug evidence because he felt that the decision in *New York v. Belton*, 453 U.S. 454 (1981), did not allow police to search his vehicle after he was secured in the police car, since he posed no threat to the officers and he was arrested for an offense for which no evidence could be found in his car. At trial, his motion to suppress was denied and he was convicted. The Supreme Court of Arizona, however, upheld the motion, claiming the search violated the Fourth Amendment. The United States Supreme Court granted certiorari.

#### Issue

May police undertake a search of an individual’s vehicle when the arrestee is not within reaching distance of the passenger compartment at the time of the search?

#### Holding and Reasoning (Stevens, J.)

No. Police may search a vehicle after a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe that crime-related evidence is located in the vehicle. In *Chimel v. California*, 395 U.S. 752 (1969), we stated the basic rule that applies in these cases: the search incident to an arrest includes the areas of the arrestee’s person and the area within his immediate control. In *New York v. Belton*, 453 U.S. 454 (1981), we considered the case of an arrestee in his automobile and held that after a lawful arrest the police can search the arrestee’s person and conduct a contemporaneous search of the passenger compartment of the car, including containers in it. Despite others’ interpretation of *Belton*, our decision in *Belton* does not authorize a vehicle search after a recent arrest, for to do so would undermine the logic of *Chimel*. Considering *Chimel* and *Belton* together, we hold that police can search a vehicle after the occupant’s recent arrest only when arrestee is unrestrained and within reach of the passenger compartment, and objects within it. Following *Thornton v. United States*, 541 U.S. 615 (2004), we also affirm that police, having stopped a vehicle, can search for evidence only when it is “reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.” In this case, Gant was arrested for driving with a suspended license, and he was securely handcuffed and placed in a squad car before officers undertook a search of his car. Thus the arrestee was securely restrained, deprived of the ability to reach for a weapon, and police could not reasonably believe that it was possible to find evidence related to the crime of arrest in his car. Both reasons make the subsequent search of Gant’s car unreasonable. Reading *Belton* broadly, the state wants a bright-line rule that would allow automobile searches regardless of whether the arrestee is restrained or not. We feel, however, that the state in so doing seriously undermines the privacy interests that the Fourth Amendment is designed to protect. Although our jurisprudence recognizes a lesser privacy interest in one’s vehicle, as opposed to one’s residence, we do not think it is reasonable to give the police unbridled discretion to search a car in all circumstances. Despite the fact that the state’s reading of *Belton*, allowing expansive vehicle searches for offenses as minor as a traffic infraction, has been relied on by police for 28 years, we do not believe that such a reliance interest, even if it exists, trumps the constitutional rights that all individuals possess. Nor does *stare decisis*require us to read *Belton* as broadly as the state would suggest.

#### Concurrence (Scalia, J.)

History obviously cannot tell us what the Framers thought of reasonableness in the vehicle-stop context, so we must apply traditional notions of reasonableness. *Belton* and *Thornton* do not adequately protect police officers, since searching a vehicle is not the best way to prevent an occupant from injuring an officer. Despite today’s holding, *Chimel* provides little guidance and can be manipulated by officers. It would be better to overrule *Belton* and *Thornton* and adopt the rule that it is reasonable to search a vehicle only when the object of the search is evidence of the crime for which the arrest was made, or another crime for which there is probable cause.

#### Dissent (Breyer, J.)

I agree with Justice Alito that we should read *Belton* as recommending a bright-line rule that would allow a warrantless search of the passenger compartment of a vehicle regardless of the threat that the individual poses. But I also agree with Justice Stevens that such a rule potentially runs afoul of the Fourth Amendment. *Stare decisis* requires that we follow the traditional interpretation of *Belton*, which has been relied on by other courts.

#### Dissent (Alito, J.)

Although the majority might deny it, the Court today is overruling its decision in *Belton*, which has proved a workable and clear-cut solution to vehicle searches at the same time that it has protected law enforcement officers. *Belton* provides a test that is easier to apply than that provided by today’s decision. The police can search the passenger compartment of a vehicle after a lawful custodial arrest, whether or not the arrestee is within reaching distance of the compartment. *Belton* represents a small extension of *Chimel*, and if we overrule the former, as it seems we are doing today, we should also reexamine the latter. The problem is that *Chimel* does not say whether the rule applies at the time of the arrest or the time of the search. The Court today reads *Chimel* as applying at the time of the search, but it makes more sense to think that the *Chimel* ruling was intended to use the time of arrest. The majority prefers its confused reading of *Chimel* and an unworkable two-part test. Also, in the second part of the test the Court inexplicably uses “reason to believe” instead of probable cause as the standard for this type of evidence-gathering search.

***Arizona V. Gant*** narrowed the longstanding interpretation of *Belton* which altered police practices following the arrest of a car’s driver.

**Key Terms:**

**Fourth Amendment -** An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Stare Decisis** - A legal principle under which legal precedents are adhered to and predictability is garnered.

**Search Incident to Arrest** - An exception to the Fourth Amendment prohibition of unreasonable searches and seizures that allows a police officer making a lawful arrest to perform a search of a suspect or the area under the suspect’s control, without a warrant or probable cause.

***Arizona v. Gant***

Rule: Police can search only the “grab area” while a person is unsecure without probable cause. Search incident to arrest DOES NOT apply if the person is secure.

Gant arrested for driving on suspended license. Police arrested him and put him in patrol car. Afterwards they searched Gant’s car and found cocaine. They did not have probable cause for the search…police argued they can search the car because of the search incident to arrest exception. US SC ruled they could search the grab area when the defendant is unsecure. Since Gant was secured in the back of the patrol car, they did not have reason to search car. *Belton* made it sound like you could search the entire area because they might destroy evidence or harm police. Grab area only applies when arrestee is unsecured and evidence is at risk of being destroyed.

***Arizona v. Gant* 556 US 332 (2009)**

**Facts: Defendant Gant was stopped and arrested for driving on a suspended license. Police handcuffed him and detained him in the back of a police car. While safely detained, police searched the car and found cocaine in his jacket. Arizona Supreme Court found that the search-incident-to-arrest-exception did not apply here.**

**Does the grab area (search incident to arrest) apply to an automobile after the suspect is safely detained in the back seat of a police car?**

**No. The justification for the grab area is (a) officer safety, and (b) destruction of evidence. Both of those justifications vanish where the suspect is handcuffed in the back of a police car.**

***New York v. Belton* applied the grab area rationale of the search incident to arrest exception to the automobile context. We hereby limit that exception to unsecured prisoners. Once the suspect is secured, the reason for the grab area search have mostly disappeared.**

**THUS: “[We] hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant’s arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search” or “when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.”**

# Chimel v. California

#### United States Supreme Court 395 U.S. 752 (1969)

#### Rule of Law

**Incident to a lawful arrest, a warrantless search of the area in possession and control of the person under arrest is permissible under the Fourth Amendment.**

#### Facts

Pursuant to a valid arrest warrant, the police went to Chimel’s (defendant) home to arrest him for the burglary of a coin shop. Chimel’s wife let the police inside and when Chimel returned home they arrested him. Without a search warrant and without permission, the police then conducted a complete search of Chimel’s home. The police instructed Chimel’s wife to remove items from drawers and eventually the police found and seized a number of coins, medals and tokens. Over Chimel’s objection, these items were introduced at trial. The appellate courts affirmed the decision holding that the search of Chimel’s home was valid as a search incident to a lawful arrest.

#### Issue

Is a warrantless search of an entire home permissible when the search is incident to a lawful arrest that takes place in the home?

#### Holding and Reasoning (Stewart, J.)

No. A warrantless search incident to a lawful arrest can only cover the area in possession or control of the person being arrested. When an arrest occurs, it is reasonable for the police to search the person being arrested to insure he is not armed and to ensure no evidence is destroyed. This rule is easily extended to include a search of the area that the person under arrest may access. However, a search of the area outside of the suspect’s immediate control cannot be similarly justified and is therefore not reasonable. The warrantless search of private homes was what the Fourth Amendment requirements of warrants and probable cause were intended to prevent. Furthermore, allowing warrantless searches of an entire home would encourage the police to make all arrests in suspects’ homes since they could then legally undertake a search even where probable cause is lacking. Because the coins introduced at trial were not found in an area under Chimel’s immediate control, the search and seizure was unconstitutional and the conviction is overturned.

#### Dissent (White, J.)

There is no need to overrule earlier precedent and hold that searches of entire homes incident to arrest are per-se unreasonable. Rather, an arrest creates exigent circumstances allowing for a warrantless search when there is probable cause to believe that delay would result in the destruction of evidence. In this case, if the police had not immediately searched the home for the coins, Chimel’s wife would have likely removed the coins from the home in the time it took the police to secure a search warrant. Therefore, the search was reasonable.

**Key Terms:**

**Fourth Amendment -** An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

In ***Chimel***, the Supreme Court clarified the permissible scope of a search incident to arrest.

# New York v. Belton

#### United States Supreme Court 453 U.S. 454 (1981)

#### Rule of Law

**Incident to a lawful arrest, the police may search the area within the arrestee’s immediate control.**

# Thornton v. United States

#### United States Supreme Court 541 U.S. 615 (2004)

#### Rule of Law

**A police officer may conduct a search incident to arrest of a suspect’s car even if the suspect was already outside the car when the officer made contact.**

#### Facts

Marcus Thornton (defendant) was driving a Lincoln Town Car when he approached an unmarked police car driven by a Norfolk Virginia Police Officer. Thornton slowed down to keep from driving next to the police car, and the officer became suspicious. The officer ran Thornton’s tags, which had been issued to a different car. Thornton parked the car in a nearby lot and exited the vehicle. The officer stopped Thornton, and Thornton consented to a patdown search. The officer felt an object in Thornton’s pocket and asked if Thornton had drugs. Thornton said yes and pulled the drugs out of his pocket. Thornton was arrested, handcuffed, and put in the back of the police car. The officer then searched Thornton’s car and found a gun under the driver’s seat.

#### Issue

May a police officer perform a search incident to arrest of a suspect’s car if the suspect was already outside the car when the officer made contact?

#### Holding and Reasoning (Rehnquist, C.J.)

Yes. An arresting officer may search the passenger area of a suspect’s car even if the suspect was already outside the car when the officer made contact. Under *New York v. Belton*, 453 U.S. 454 (1981), a police officer may search the passenger area of a car after making a custodial arrest of the car’s occupant. Arrests are highly stressful and dangerous to police officers. *Belton* protects officer safety and preserves evidence. The rule in *Belton* extends to cases where the suspect has already exited the vehicle before being stopped by police, because the same concerns exist whether the suspect was inside the car or outside but still in control of the car. This protects officer safety and preserves evidence in cases where the officer elects to wait until the suspect has exited the vehicle to make contact. This rule is meant to be simple and easily applied, and therefore its application is not dependent upon whether the suspect could have easily reached the contraband. In this case, Thornton probably could not have reached the gun in the car. Nevertheless, there was probable cause to arrest Thornton, and the search of Thornton’s car was reasonable for the safety of the officer and preservation of evidence.

#### Concurrence (Scalia, J.)

The Court’s argument that extending the *Belton* rule allowing searches of the passenger area of a car to cases where the suspect was already outside the vehicle is weak. *Belton* searches do not protect officer safety or preserve evidence from destruction by a handcuffed suspect in the backseat of a squad car. The real purpose of a *Belton* search is to find evidence of the crime the suspect was arrested for in the suspect’s car, where the suspect’s expectation of privacy is reduced. Any arresting officer with reasonable suspicion that evidence of the crime may be found in the suspect’s vehicle should be permitted to perform a *Belton* search.

#### Dissent (Stevens, J.)

The ruling in *Belton* was limited to cases involving the arrest of an occupant of a vehicle. The rule set forth in *Chimel v. California*, 395 U.S. 752 (1969), governs situations involving arrests of pedestrians, and pedestrians should be treated similarly whether they have recently exited a car or recently exited a house. The Court has created a great deal of uncertainty by extending the reach of *Belton* to these types of arrests.

**Key Terms:**

**Belton Search** - A search of the passenger area of a vehicle incidental to the arrest of an occupant performed to protect the officer and preserve evidence.

# United States v. Rabinowitz

70 S.Ct. 430

Supreme Court of the **United** **States**

**UNITED STATES**

**v.**

**RABINOWITZ.**

No. 293.

Argued Jan. 11, **1950**.Decided Feb. 20, **1950**.

**Synopsis**

Albert J. **Rabinowitz** was convicted in the District Court for the Southern District of New York of the possession and sale of postage stamps bearing forged overprints.

Judgment of conviction was reversed by the Court of Appeals, Second Circuit, L. Hand, Chief Judge, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I84ad2c248e3611d9bc61beebb95be672&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=7745921432b94e388e2a8ef631829dc4&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[176 F.2d 732,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1949119227&pubNum=350&originatingDoc=I2228b6129bf011d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and the **United** **States** brought certiorari.

The Supreme Court, Mr. Justice Minton, held that a search without warrant, as an incident of defendant's arrest, of the small one-room office constituting the defendant's place of business was reasonable and was valid even if the officers had had time to procure a search warrant prior to the arrest and search.

Judgment of the Court of Appeals reversed.

Mr. Justice Frankfurter, Mr. Justice Black, and Mr. Justice Jackson, dissented.

# Entick v. Carrington

# United 19 How. St. Tr. 1029, 1031, 1063-1074 (C.P. 1765)

***Entick v Carrington*** [1765] [EWHC KB J98](http://www.bailii.org/ew/cases/EWHC/KB/1765/J98.html) is a leading case in [English law](https://en.wikipedia.org/wiki/English_law) and [UK constitutional law](https://en.wikipedia.org/wiki/UK_constitutional_law)establishing the [civil liberties](https://en.wikipedia.org/wiki/Civil_liberties) of individuals and limiting the scope of [executive](https://en.wikipedia.org/wiki/Executive_(government)) power.[[1]](https://en.wikipedia.org/wiki/Entick_v_Carrington#cite_note-Entick_v_Carrington-1) The case has also been influential in other [common law](https://en.wikipedia.org/wiki/Common_law) jurisdictions and was an important motivation for the [Fourth Amendment to the United States Constitution](https://en.wikipedia.org/wiki/Fourth_Amendment_to_the_United_States_Constitution). It is famous for the [dictum](https://en.wikipedia.org/wiki/Obiter_dictum) of [Lord Camden](https://en.wikipedia.org/wiki/Charles_Pratt,_1st_Earl_Camden): "If it is law, it will be found in our books. If it not to be found there, it is not law."[[2]](https://en.wikipedia.org/wiki/Entick_v_Carrington#cite_note-2)

**Facts**

On 11 November 1762, the King's Chief Messenger, Nathan Carrington, and three other King's messengers, James Watson, Thomas Ardran, and Robert Blackmore, broke into the home of the [Grub Street](https://en.wikipedia.org/wiki/Grub_Street) writer, [John Entick](https://en.wikipedia.org/wiki/John_Entick) (1703?–1773) in the [parish](https://en.wikipedia.org/wiki/Parish) of [St Dunstan, Stepney](https://en.wikipedia.org/wiki/St_Dunstan%27s,_Stepney) "with force and arms". Over the course of four hours, they broke open locks and doors and searched all of the rooms before taking away 100 charts and 100 pamphlets, causing £2,000 of damage (£413,906 in 2020). The King's messengers were acting on the orders of [Lord Halifax](https://en.wikipedia.org/wiki/George_Montague-Dunk,_2nd_Earl_of_Halifax), newly appointed [Secretary of State for the Northern Department](https://en.wikipedia.org/wiki/Secretary_of_State_for_the_Northern_Department), "to make strict and diligent search for ... the author, or one concerned in the writing of several weekly very seditious papers intitled, [*The Monitor, or British Freeholder*](https://en.wikipedia.org/wiki/The_Monitor:_Or,_British_Freeholder)".

Entick sued the messengers for [trespassing](https://en.wikipedia.org/wiki/Trespass) on his land.

**Judgement**

The trial took place in [Westminster Hall](https://en.wikipedia.org/wiki/Westminster_Hall) presided over by Lord Camden, the [Chief Justice of the Common Pleas](https://en.wikipedia.org/wiki/Chief_Justice_of_the_Common_Pleas). Carrington and his colleagues claimed that they acted on Halifax's [warrant](https://en.wikipedia.org/wiki/Warrant_(legal)), which gave them legal authority to search Entick's home; they therefore could not be liable for the [tort](https://en.wikipedia.org/wiki/Tort). However, Camden held that Halifax had no right under [statute](https://en.wikipedia.org/wiki/Statute) or under [precedent](https://en.wikipedia.org/wiki/Precedent) to issue such a warrant and therefore found in Entick's favour. In the most famous passage Camden stated:

The great end, for which men entered into society, was to secure their property.[[3]](https://en.wikipedia.org/wiki/Entick_v_Carrington#cite_note-3) That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by private law, are various. Distresses, executions, forfeitures, taxes etc are all of this description; wherein every man by common consent gives up that right, for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and if such a justification can be maintained by the text of the statute law, or by the principles of common law. If no excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment.[[4]](https://en.wikipedia.org/wiki/Entick_v_Carrington#cite_note-4)

Hence Lord Camden ruled, as later became viewed as a general principle, that the state may do nothing but that which is expressly authorised by law, while the individual may do anything but that which is forbidden by law.

**Significance**

The judgment established the limits of executive power in English law: the state may act lawfully only in a manner prescribed by statute or [common law](https://en.wikipedia.org/wiki/Common_law).[[5]](https://en.wikipedia.org/wiki/Entick_v_Carrington#cite_note-5)

It was also part of the background to the [Fourth Amendment to the United States Constitution](https://en.wikipedia.org/wiki/Fourth_Amendment_to_the_United_States_Constitution) and was described by the [Supreme Court of the United States](https://en.wikipedia.org/wiki/Supreme_Court_of_the_United_States) as "a 'great judgment', 'one of the landmarks of English liberty', 'one of the permanent monuments of the British Constitution', and a guide to an understanding of what the Framers meant in writing the Fourth Amendment".[[6]](https://en.wikipedia.org/wiki/Entick_v_Carrington#cite_note-EngAm-6)[[7]](https://en.wikipedia.org/wiki/Entick_v_Carrington#cite_note-7)

# Michigan v. Long

#### United States Supreme Court 463 U.S. 1032 (1983)

#### Rule of Law

**(1) The U.S. Supreme Court has jurisdiction to review a state court's decision to provide a defendant with broader procedural protections than those guaranteed in the U.S. Constitution unless the state court explicitly states that its decision is based on separate, adequate, and independent state grounds.**

**(2) The search of an automobile's passenger compartment, limited to those areas in which a weapon may be placed or hidden, is permissible if a law-enforcement officer reasonably believes, based on specific and articulable facts combined with the rational inferences from those facts, that the suspect is dangerous and may gain immediate control of weapons.**

#### Facts

David Long (defendant) was stopped by police when officers observed Long's car swerve into a ditch after he had been traveling erratically at a high speed. Long met the officers at the rear of the car and did not respond to officers' repeated requests to produce his vehicle registration. The officers believed that Long may have been under the influence of some substance. Long began walking toward the car's open driver-side door. The officers followed him and saw a large hunting knife on the driver-side floorboard. At that point, officers conducted a protective patdown to check Long for weapons, but they did not find anything. One of the officers then shined his flashlight into the car to check for other weapons. The officer saw something sticking out from under the front armrest, and when the officer lifted the armrest, he found a pouch of marijuana. The officers then arrested Long and searched the rest of the car. They found no other contraband or weapons in the car's interior. Officers then decided to impound the car, and when one officer opened the car's unlocked trunk, he found 75 pounds of marijuana inside. Long was charged with possession of marijuana. He moved to suppress the marijuana found in the car's interior and trunk, but the trial court denied the motion. Long was convicted. Long’s appeal reached the Michigan Supreme Court, which reversed on the ground that the search of the car's interior went beyond that permitted by *Terry v. Ohio*, 392 U.S. 1 (1968). The Michigan Supreme Court concluded that the marijuana found in the trunk was therefore fruit of the poisonous tree and suppressed the evidence. The United States Supreme Court granted certiorari.

#### Issue

(1) Does the U.S. Supreme Court have jurisdiction to review a state court's decision to provide a defendant with broader procedural protections than those guaranteed in the U.S. Constitution if the state court does not explicitly state that its decision is based on separate, adequate, and independent state grounds?

(2) Is the search of an automobile's passenger compartment permissible if a law-enforcement officer reasonably believes that the suspect is dangerous and may gain immediate control of weapons?

#### Holding and Reasoning (O’Connor, J.)

(1) Yes. A state court may provide a defendant with broader procedural protection than is guaranteed in the Constitution as a matter of state law. A ruling that is based on independent and adequate state grounds is not reviewable by the U.S. Supreme Court. However, the state court must explicitly indicate that its ruling is based on separate, adequate, and independent state grounds. This must be apparent on the face of the opinion. If a court’s state-law basis is not explicitly stated, the state court’s decision will be reviewed under the assumption that the state court’s ruling was based on federal-law grounds. This rule will ensure consistency, which was sorely lacking in the *ad hoc* method of determining whether a state court’s decision rested on independent and adequate state grounds. Further, this will alleviate the need to delve into state law to make the determination or burden state courts by asking for clarification. State courts may of course look to federal precedent for guidance even if rulings are rooted in state law, but they should say so in the opinion. In this case, the Michigan Supreme Court’s decision was based solely on *Terry* and other federal cases. Therefore, there was no independent and adequate state ground for the decision, and the case may be reviewed.

(2) Yes. Although *Terry* involved the protective patdown of a suspect in search of weapons, this Court's subsequent precedent has recognized the significant dangers for law-enforcement officers during investigative detentions of suspects in vehicles. Accordingly, this Court has held that officers may order all of a vehicle's occupants out of the vehicle during a stop and may frisk them all if there is a reasonable belief that they are armed and dangerous. Similarly, after an officer arrests a suspect, the officer may search for weapons both on the arrested person and the area in the person's immediate control, including both the passenger compartment of a car and any open or closed containers found in the passenger compartment. Furthermore, if officers reasonably believe the suspect is dangerous, the suspect is dangerous whether or not he has been placed under arrest. Thus, even prior to a suspect's arrest, it is consistent with *Terry* to permit a search of a vehicle's passenger compartment if a law-enforcement officer reasonably believes, based on specific and articulable facts combined with the rational inferences from those facts, that a suspect is dangerous and may gain immediate control of weapons. The search must be limited to those areas in which a weapon may be placed or hidden. If officers find contraband besides weapons during the search of the vehicle, the Fourth Amendment does not require suppression of the contraband. In this case, the officers had a justifiable reasonable belief that Long posed a danger to them if they let him reenter the car. Long had been driving erratically and appeared to be under the influence, and officers observed a large knife on the driver's floorboard of the car. The further search was reasonable to ensure that there were no other weapons in Long's immediate grasp; it was limited to the car's passenger area and a pouch under the armrest that could have contained a weapon. Accordingly, the search is permissible under *Terry*. The Michigan Supreme Court's decision is reversed, and the case is remanded for further proceedings including a determination of whether the search of Long's trunk was permissible under the Fourth Amendment.

#### Dissent (Brennan, J.)

The Court goes too far in extending to the *Terry* protective-search context the principles applicable to a search incident to a lawful arrest. A *Terry*search must be carefully limited in scope, but the Court's holding suggests no limit on what constitutes a permissible "area search."

#### Dissent (Stevens, J.)

This case involves important issues of federalism. The State of Michigan is not denying a citizen rights guaranteed by the Constitution, but rather is giving additional protections to that citizen. The Supreme Court should not bother with those cases. Just as the federal government would not intervene if a foreign government gave an American too many rights (as it would had the American been denied fundamental rights), the Court should not step in when a state does so. States seeking review of their own courts’ decisions is a relatively recent phenomenon, and the Court’s decision to grant review is erroneous. The Court’s purpose in ensuring “'uniformity in federal law’ is truly an ungovernable engine.”

**Key Terms:**

**Federalism** - The constitutional concept that certain governmental functions should be the responsibility of the individual states and certain functions should be the responsibility of the federal government.

# United States v. Ross

#### United States Supreme Court 456 U.S. 798 (1982)

#### Rule of Law

**A police search of closed containers discovered inside a vehicle during a warrantless vehicle search does not violate the Fourth Amendment when probable cause justifies a search of the containers.**

#### Facts

Ross (defendant) was arrested pursuant to an informant’s tip that he was selling illegal drugs kept in the trunk of his car. District of Columbia police officers stopped Ross’ car and conducted a search. During the search, the officers found a bullet on the driver’s seat. The officers then searched the glove compartment and discovered a gun. Ross was placed under arrest. After arresting Ross, the officers took his keys and opened the trunk of his car. In the trunk, they found a brown paper bag. The officers opened the paper bag and discovered clear plastic bags containing what appeared to be drugs. The car was transported to the police station, where another search of the trunk uncovered a zippered leather pouch. A search of the pouch revealed that it contained a large sum of cash. Ross moved to suppress the introduction at trial of the contents of the paper bag and zippered pouch. The trial court denied Ross’ motion and he was convicted at trial. A panel of the court of appeals concluded that Ross had a greater expectation of privacy with respect to the contents of the zippered pouch than with respect to the contents of the paper bag. The panel upheld the judgment of conviction based on the admissibility of the paper bag evidence. The court of appeals *en banc* reversed the panel decision and vacated the judgment of conviction. The United States (plaintiff) petitioned the United States Supreme Court for review.

#### Issue

Does a police search of closed containers discovered inside a vehicle during a warrantless vehicle search violate the Fourth Amendment when probable cause justifies a search of the containers?

#### Holding and Reasoning (Stevens, J.)

No. A police search of closed containers discovered inside a vehicle during a warrantless vehicle search does not violate the Fourth Amendment when probable cause justifies a search of the containers. Police may permissibly search a vehicle without a warrant when the search is supported by probable cause. By contrast, we have held that police may not conduct a warrantless search of closed packages and containers discovered in a public location. In *United States v. Chadwick*, 433 U.S. 1 (1977), we held that the expectations of privacy with respect to a person’s luggage are greater than the expectations of privacy with respect to a vehicle. We noted that the seizure of an automobile for the period of time necessary to obtain a warrant presents practical difficulties that do not apply to the issuance of a warrant to search luggage. We held that the automobile exception to Fourth Amendment search and seizure requirements does not apply to movable containers. We applied the same rationale in *Arkansas v. Sanders*, 442 U.S. 753 (1979), to invalidate the warrantless search of a suitcase discovered in the trunk of a taxicab transporting a suspect. *Chadwick*and *Sanders* are distinguishable from the present case, however, in that the officers lacked probable cause in both cases to justify searching either the vehicle or the containers within. In this case, the officers had probable cause to search the entirety of Ross’ vehicle. The question is whether the scope of the permissible search extends to closed containers within the vehicle. The automobile exception to the Fourth Amendment warrant requirement arose in *Carroll v. United States*, 267 U.S. 132 (1925). In that case, prohibition agents were found to have probable cause to search the defendant’s car for contraband liquor. The agents discovered hidden contraband by ripping out the upholstery of the car’s seats. The court concluded that probable cause would have supported the issuance of a warrant authorizing a search of the upholstery and, therefore, that the upholstery fell within the scope of a constitutionally permissible warrantless search. In a number of cases, this Court has upheld the warrantless search of closed containers discovered in the course of a vehicle search. The question of the constitutionality of container searches was never raised in those cases, which demonstrates the prevailing view that closed containers fall within the scope of a permissible vehicle search. In *Carroll*, the contraband liquor was contained within a burlap bag concealed in the car’s upholstery. It would be irrational to conclude that discovery of the bag was constitutionally permissible but the subsequent search of the bag and discovery of its contents was not. In general, a warrant authorizing a premises search also authorizes the search of closed spaces, such as closets and drawers, within the premises. Imposing strict requirements demanding identification of every closed space to be searched within a premise would frustrate the efficient execution of searches. Although the Fourth Amendment protects the privacy of the contents of closed containers, the scope of that protection varies as defined by the judicial determination of probable cause. The permissible scope of an exempt automobile search is measured by the boundaries of probable cause, just as would be the case with a judicially authorized warrant. When probable cause supports the reasonable belief that a closed container conceals the object of a search, the Fourth Amendment does not guarantee the privacy of the container. We hold that closed containers may be subject to warrantless search in the context of the automobile exception when probable cause justifies a search of the containers. The decision of the state supreme court is reversed.

#### Dissent (Marshall, J.)

The majority opinion guts the warrant requirements of the Fourth Amendment and authorizes warrantless vehicle searches without limitation. The majority bases its opinion on the exigencies associated with the mobility of a vehicle, but makes no effort to explain why the same concerns should attach to containers that can be readily seized and detained while waiting for a warrant to issue. Realistically, officers will have probable cause to arrest the occupants of a vehicle in most cases, whereupon the vehicle itself ends up seized and under the control of law enforcement. With mobility concerns no longer at issue, the majority premises the continuing validity of a warrantless search on the idea that an individual enjoys only a limited expectation of privacy in a vehicle. Even if we accept the rationale underlying that premise, the reduced expectation of privacy should not extend to closed containers being transported inside the vehicle. An officer’s determination that probable cause exists to believe that a vehicle contains contraband is seldom overruled by the courts. This decision now authorizes police to search any private container without the benefit of a neutral determination as to whether probable cause extends to the contents of containers. Today’s ruling will severely undermine the privacy rights of any citizen traveling in a vehicle.

**Key Terms:**

**Probable Cause** - A reasonable basis, amounting to more than mere suspicion, to believe that a person has committed a crime or is about to commit a crime, or that evidence relevant to a crime exists in a particular location.

**Fourth Amendment -** An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

# Maryland v. Buie

#### United States Supreme Court 494 U.S. 325 (1990)

#### Rule of Law

**Incident to an arrest, the police may conduct a protective sweep of a premises based on reasonable suspicion that other people who pose a threat are in the building, provided the search is limited to those areas where a person may be hiding.**

# Robbins v. California

101 S.Ct. 2841

Supreme Court of the United States

**Jeffrey Richard ROBBINS, Petitioner,**

**v.**

**State of CALIFORNIA.**

No. 80-148.

Argued April 27, 1981.Decided July 1, 1981.Rehearing Denied Sept. 23, 1981.See [453 U.S. 950, 102 S.Ct. 26](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&pubNum=708&cite=102SCT26&originatingDoc=Ic1d3deb79c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

**Synopsis**

Defendant was convicted before the Superior Court, Solano County, Ellis R. Randall, J., of possession of marihuana and possession of marihuana for sale and transportation, and he appealed. The Court of Appeal affirmed. The United States Supreme Court, [443 U.S. 903, 99 S.Ct. 3093, 61 L.Ed.2d 870,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979233971&pubNum=708&originatingDoc=Ic1d3deb79c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) remanded case for further consideration. On remand, the Court of Appeal, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I541ac95dfab011d99439b076ef9ec4de&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[103 Cal.App.3d 34, 162 Cal.Rptr. 780,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980101885&pubNum=227&originatingDoc=Ic1d3deb79c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) again found that warrantless opening of packages was constitutionally permissible, and certiorari was granted. The Supreme Court, in an opinion announcing the judgment by Justice Stewart, held that: (1) a closed piece of luggage found in a lawfully searched car is constitutionally protected to same extent as are closed pieces of luggage found anywhere else; (2) the Fourth Amendment protects people's effects whether they are “personal” or “impersonal”; (3) as a general rule, a closed, opaque container may not be opened without a warrant, even if found during course of lawful search of an automobile; and (4) opening of closed containers which contained bricks of marihuana without a search warrant during lawful search of automobile violated the Fourth and Fourteenth Amendments.

Judgment of California Court of Appeal reversed.

Chief Justice Burger concurred in the judgment.

Justice Powell filed an opinion concurring in the judgment.

Justice Blackmun, Justice Rehnquist and Justice Stevens filed dissenting opinions.

# Harris v. U.S.

67 S.Ct. 1098

Supreme Court of the **United** **States**

**HARRIS**

**v.**

**UNITED STATES.**

No. 34.

Argued Dec. 12, 13, 1946.Decided May 5, **1947**.Rehearing Denied June 9, **1947**.See [**331** **U.S**. 867, 67 S.Ct. 1527.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1947201215&pubNum=708&originatingDoc=Iab9168789bf011d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))

**Synopsis**

George **Harris** was convicted under an indictment charging unlawful possession, concealment and alteration of certain notice of classification cards and registration certificates. The conviction was affirmed, [151 F.2d 837,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1946113831&pubNum=350&originatingDoc=Iab9168789bf011d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and defendant brings certiorari.

Affirmed.

Mr. Justice JACKSON, Mr. Justice MURPHY, Mr. Justice FRANKFURTER and Mr. Justice RUTLEDGE dissenting.

On Writ of Certiorari to the **United** **States** Circuit Court of Appeals for the Tenth Circuit.

# \*\*CALIFORNIA v. ACEVEDO\*\*

#### United States Supreme Court 500 U.S. 565 (1991)

#### Rule of Law

**The Fourth Amendment permits warrantless searches of containers found in automobiles provided the police have probable cause that the container contains contraband.**

#### Facts

The police watched as a man entered his home carrying a package they had probable cause to believe contained marijuana. Before a search warrant could be obtained, Acevedo (defendant) arrived at the house and left after about ten minutes carrying a bag that was the same size as the package. Acevedo put the bag in the trunk of his car and drove away. Fearful of losing the evidence, the police followed him, pulled him over, opened the trunk and looked inside the bag, finding marijuana. The California Court of Appeals held that the marijuana found in the bag should have been suppressed at trial because the police needed a warrant to search the bag. The court of appeals also found that the bag did not fall under the automobile exception since the police had probable cause that the bag, not the car, contained drugs. The United States Supreme Court granted certiorari.

**Facts Rephrased**

Daza picked up a package the police knew contained marijuana from a FedEx office and took it to his apartment. The police watched as a man (Acevedo) entered his home carrying a package they had probable cause to believe contained marijuana. Before a search warrant could be obtained, Acevedo (defendant) arrived at the house and left after about ten minutes carrying a bag that was the same size as the package. Acevedo put the bag in the trunk of his car and drove away. The police followed him, pulled him over, opened the trunk and looked inside the bag, finding marijuana. The California Court of Appeals held that the marijuana found in the bag should have been suppressed at trial because the police needed a warrant to search the bag. The court of appeals also found that the bag did not fall under the automobile exception since the police had probable cause that the bag, not the car, contained drugs. The United States Supreme Court granted certiorari.

#### Issue

Under the Fourth Amendment, must the police obtain a warrant to open a container in a moving vehicle where they have probable cause that the container, but not the car, contains contraband?

#### Holding and Reasoning (Blackmun, J.)

No. Just as the Fourth Amendment allows a warrantless search of a car when the police have probable cause that the car contains contraband, the Fourth Amendment allows the warrantless search of a container in the car when the police have probable cause that the container contains contraband. First, a container found after a general search and one found after a specific search, as is the case here, can both be easily hidden and destroyed. Furthermore, the privacy expectations and the exigent circumstances upon finding a container in either situation are the same and warrant the same treatment. Second, having two separate rules, one for when probable cause exists as to a car and one for when it exists as to a container in the car, will lead to confusion and possibly more extensive searches of the entire car than police would otherwise undertake. Therefore, when the police have probable cause that a container in a moveable car contains contraband, they may search the container without a warrant. However, their search must be limited to that specific container, unless they have probable cause that the car itself contains contraband too. Accordingly, the search of the bag found in the trunk of the car was constitutional because the police had probable cause that the bag contained contraband.

#### Concurrence (Scalia, J.)

The search was constitutional because a warrantless search of a closed container, when it is not inside a private building and when probable cause exists that the container contains contraband, is reasonable under the Fourth Amendment.

#### Dissent (White, J.)

Concurring with Justice Steven’s dissent.

#### Dissent (Stevens, J.)

Under the Fourth Amendment warrantless searches are per se unreasonable. The Court’s opinion fails to identify exigent circumstances that merit creating a new rule. The Court wrongly relies on unsupported presumptions to rationalize its decision when it assumes that prior jurisprudence is confusing, that the current rules do not protect significant privacy interest, and that the current rules impede law enforcement.

***California v. Acevedo*** permits warrantless searches of closed containers inside cars, as long as officers have probable cause.

**Key Terms:**

**Fourth Amendment -** An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Per Se Rule** - A rule that is applied uniformly without consideration of the specific situation or circumstance.

***California v. Acevedo***

Rule: Police can search an automobile and all containers without a warrant if they have probable cause to believe evidence is contained (even if container is locked, they can open it). Probable cause is specific…must have probable cause that containers actually can hold what they’re looking for. Ex: You can’t search an ashtray looking an illegal hunting riffle. The evidence recovered is admissible. No violation of 4th amendment.

Police knew a bag that contained marijuana was placed in Acevedo’s trunk. They stopped the car, opened the trunk and bag, and found marijuana. Probable cause followed the car…not the person.

***California v. Acevedo* 500 US 565 (1991)**

**An individual picked up a package known to police to contain marijuana from a FedEx store and took it to an apartment. Two hours later, Defendant Acevedo went into that apartment and left shortly thereafter carrying a package about the size of a marijuana package. Acevedo put the package in his trunk and drove away. Police stopped the car, searched it and found marijuana. Intermediate appellate court held search unreasonable, and state Supreme Court denied review.**

**Does the automobile exception extend to locked containers in cars?**

**YES. Where the police have probable cause to believe evidence or contraband is contained, they may search an automobile and all containers in it.**

**Dissent: Chadwick and Sanders had It right. Warrants should be the rule, not an exception. You can easily get a warrant for luggage after you seize it. NO reason to extend the automobile exception to the trunk. Now the law is just as anomalous, because you have to get a warrant for a briefcase in a person’s hand but not in the trunk.**

#### THE PROBLEM:

#### US v. Ross said the automobile exception(US v. Carroll) (where police have probable cause) included all containers including, in that case, brown paper bags in the trunk.

#### US v. Chadwick said that police needed a warrant to search a footlocker in a train station.

#### Arkansas v. Sanders said that, pursuant to Chadwick, police need a warrant to search a footlocker in a car.

#### Thus, “[u]ntil 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.”

# Arkansas v. Sanders

99 S.Ct. 2586

Supreme Court of the United States

**State of ARKANSAS, Petitioner,**

**v.**

**Lonnie James SANDERS.**

No. 77-1497.

Argued Feb. 27, 1979.Decided June 20, 1979.

**Synopsis**

Defendant was convicted in the Circuit Court, Fourth Division, Pulaski County, Arkansas, Richard B. Adkisson, J., of possession of marihuana with intent to deliver and he appealed. The [Arkansas Supreme Court, 262 Ark. 595, 559 S.W.2d 704,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977138002&pubNum=713&originatingDoc=Ic1df776c9c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) reversed and remanded, and certiorari was granted. The Supreme Court, Mr. Justice Powell, held that: (1) in the absence of exigent circumstances, police are required to obtain a warrant before searching luggage taken from an automobile properly stopped and searched for contraband, and (2) in the absence of exigent circumstances, even though police had probable cause to search defendant's suitcase for marihuana after seizing it from trunk of taxicab in which defendant was a passenger, they could not do so without first obtaining a warrant.

Judgment of Arkansas Supreme Court affirmed.

Mr. Chief Justice Burger concurred in the judgment in an opinion in which Mr. Justice Stevens joined.

Mr. Justice Blackmun dissented with an opinion in which Mr. Justice Rehnquist joined.

***Arkansas v. Sanders***, 442 U.S. 753 (1979), was a decision by the [United States Supreme Court](https://en.wikipedia.org/wiki/United_States_Supreme_Court), which held that absent [exigency](https://en.wikipedia.org/wiki/Exigent_circumstances), the warrantless search of personal luggage merely because it was located in an automobile lawfully stopped by the police, is a violation of the Fourth Amendment and not justified under the automobile exception. Similar to [*United States v. Chadwick*](https://en.wikipedia.org/wiki/United_States_v._Chadwick) (1977), the luggage was the subject of police suspicion before being placed in the vehicle.

*Sanders* resolved two distinct lines of cases: on the one hand, [*Carroll v. United States*](https://en.wikipedia.org/wiki/Carroll_v._United_States) (1925) laid down the automobile exception which allowed for warrantless searches of automobiles; on the other hand, *Chadwick*did not allow for a warrantless search of luggage. Sanders declined to extend the automobile exception here, again stressing, as in *Chadwick*, the heightened expectation of privacy in one's luggage.

**Arkansas v. Sanders**

**Rule of Law**

**Not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view," thereby obviating the need for a warrant. There are difficulties in determining which parcels taken from an automobile require a warrant for their search and which do not. A warrant generally is required before personal luggage can be searched and the extent to which the U.S. Const. amend. XIV applies to containers and other parcels depends not at all upon whether they are seized from an automobile.**

**Facts**

After an informant told them that a suspect would arrive on a flight to the local airport carrying a green suitcase containing marijuana, Little Rock, Arkansas, police officers placed the airport under surveillance and watched as the suspect, arriving as the informant had predicted, retrieved from the airline luggage service a green suitcase matching the informant's description. The suitcase was placed in a taxi, and the suspect was driven away. Thereafter, the officers stopped the taxi, and at their request the taxi driver opened the trunk of his vehicle, where the officers found the green suitcase. Without asking the permission of the suspect or his companion, the police opened the unlocked suitcase and discovered marijuana. Before his trial in an Arkansas state court on a charge of possession of marijuana with intent to deliver, the suspect moved to suppress the evidence obtained from the suitcase, contending that the search violated his rights under the Fourth and Fourteenth Amendments. The trial court denied the motion, and the suspect was convicted. On appeal, the Supreme Court of Arkansas reversed the conviction, ruling that the trial court should have suppressed the marijuana because it was obtained through an unlawful search of the suitcase.

**Issue**

Should the marijuana be suppressed as evidence because its seizure was allegedly obtained through an unlawful search of the suspect’s suitcase?

**Answer**

Yes.

**Conclusion**

The U.S. Supreme Court held that the Fourth Amendment required a search warrant unless the prosecution could prove that the warrantless search fell within one of the exceptions provided for warrantless searches. The court further held that the automobile exception, which was based on the mobility of automobiles, the burden of transporting and caring for automobiles if seized, and the exigent circumstances of a roadside stop, did not apply to a suitcase, even though contained in the trunk of the car which was in the control of police. The court further held that the Fourth Amendment required the police to obtain a warrant for a search of the suitcase because defendant had an expectation of privacy in the contents of the suitcase.

***Arkansas v. Sanders, 1979***

Opinion by: Powell

**Facts:** Acting on an informant's information that respondent, upon arriving at an airport, would be carrying a green suitcase containing marihuana, Little Rock, Ark., police officers placed the airport under surveillance. They watched as Lonnie Sanders retrieved a green suitcase from the airline baggage service, placed it into the trunk of a taxi, and entered the vehicle with a companion. When the taxi drove away, two of the officers gave pursuit and stopped the vehicle several blocks from the airport, requesting the taxi driver to open the vehicle's trunk. Without asking the permission of respondent or his companion, the police opened the unlocked suitcase and discovered marijuana. Before trial in state court on a charge of possession of marihuana with intent to deliver, respondent moved to suppress the evidence obtained from the suitcase, contending that the search violated his rights under the Fourth and Fourteenth Amendments. The trial court denied the motion and respondent was convicted. The Arkansas Supreme Court reversed, ruling that the marijuana should have been suppressed because it was obtained through an unlawful search of the suitcase.

**Rule**: In the absence of exigent circumstances, police are required to obtain a warrant before searching luggage taken from an automobile properly stopped and searched for contraband. United States v. Chadwick.

(a) In the ordinary case, a search of private property must be both reasonable and pursuant to a properly issued search warrant. The mere reasonableness of a search, assessed in the light of the surrounding circumstances, is not a substitute for the judicial warrant required under the Fourth Amendment.

(b) The “automobile exception” from the warrant requirement, as set forth in Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543, and its progeny, will not be extended to the warrantless search of one's personal luggage merely because it was located in an automobile lawfully stopped by the police. Luggage is a common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy. Once police have seized a suitcase from an automobile, the extent of its mobility is in no way affected by the place from which it was \*\*2588 taken; accordingly, as a general rule there is no greater need for warrantless searches of luggage taken from automobiles than of luggage taken from \*754 other places. Similarly, a suitcase taken from an automobile stopped on the highway is not necessarily attended by any lesser expectation of privacy than is associated with luggage taken from other locations. Where-as in the present case-the police, without endangering themselves or risking loss of the evidence, lawfully have detained one suspected of criminal activity and secured his suitcase, they should delay the search thereof until after judicial approval has been obtained. Pp. 2592-2594.

# United States v. Johns

105 S.Ct. 881

Supreme Court of the **United** **States**

**UNITED STATES, Petitioner**

**v.**

**Lyle Gerald JOHNS et al.**

No. 83–1625.

Argued Nov. 28, 1984.Decided Jan. 21, **1985**.

**Synopsis**

Defendants, charged with drug smuggling, moved to suppress evidence.

 The **United** **States** District Court for the District of Arizona, Alfredo C. Marquez, J., granted motion, and the Government appealed. The Court of Appeals for the Ninth Circuit, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Iba168429940711d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=d759b60cfbd34b17b39763df54b2e5e1&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[707 F.2d 1093,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1983127098&pubNum=350&originatingDoc=I2359f43f9c1e11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed. Certiorari was granted. The Supreme Court, Justice O'Connor, held that: (1) customs officers had probable cause to believe that pickup truck used by defendant and certain packages therein contained contraband; (2) customs officers conducted a vehicle search at least to extent of entering trucks and removing the packages; and (3) although officers could have conducted warrantless search of packages at the scene they were not required to do so and it was not unreasonable to remove the trucks from remote airstrip, place the packages in storage and conduct search thereof three days later.

Reversed and remanded.

Justice Brennan, who was from Justice Marshall joined, dissented with opinion.

**Procedural Posture(s):** On Appeal.

**United States v. Johns**

**Overview**

Pursuant to an investigation of a suspected drug smuggling operation, federal law enforcement agents conducted surveillance of respondents' two pickup trucks travelling to a remote airstrip where a small aircraft landed. Upon approaching the trucks, the agents smelled marijuana and observed packages wrapped in plastic in each of the trucks. Respondents were arrested, and the packages were taken to a warehouse. Three days later, the agents conducted a warrantless search of the packages and discovered them to be marijuana. At trial, the district court granted respondents' motion to suppress the marijuana. The intermediate appellate court affirmed, holding the three-day delay rendered the search unreasonable. On certiorari review, the United States Supreme Court reversed, holding that because the agents had probable cause to believe that respondents' vehicles and packages contained contraband, a mere delay between seizing and searching the packages did not render the search unreasonable under U.S. Const. amend. IV.

**Outcome**

The Court reversed the order suppressing the marijuana and remanded for further proceedings because probable cause existed to believe that respondents' vehicles and containers contained contraband and a mere delay between seizing and searching the containers did not render the search unreasonable under the Fourth Amendment.

# Weeks v. United States

#### United States Supreme Court 232 U.S. 383 (1914)

#### Rule of Law

**The United States and federal officials are prohibited from executing unreasonable searches and seizures upon people.**

# California v. Carney

#### United States Supreme Court 471 U.S. 386 (1985)

#### Rule of Law

**Under the Fourth Amendment, a vehicle that can be readily moved and that has a reduced expectation of privacy due to its use as a licensed motor vehicle may be searched without a warrant provided probable cause exists.**

# O’Connor v. Ortega

107 S.Ct. 1492

Supreme Court of the United States

**Dennis M. O'CONNOR, et al., Petitioners**

**v.**

**Magno J. ORTEGA.**

No. 85–530.

Argued Oct. 15, 1986.Decided March 31, 1987.

**Synopsis**

Former chief of professional education at state hospital brought action against various state hospital officials, alleging claims under § 1983 and state law. On cross motions for summary judgment, the United States District Court for the Northern District of California, John P. Vucasin, Jr., J., granted summary judgment against plaintiff, and he appealed. The Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I9146592e94ad11d9a707f4371c9c34f0&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[764 F.2d 703,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985132680&pubNum=350&originatingDoc=I617e80e99c1f11d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))affirmed in part and reversed and remanded with instructions in part, and officials petitioned for certiorari. The Supreme Court, Justice O'Connor, held that: (1) public employers' intrusions on constitutionally protected privacy interest of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by standard of reasonableness under all the circumstances, and (2) whether public employer's search of hospital supervisor's office was reasonable, both in its inception and in its scope, presented factual question precluding summary judgment.

Reversed and remanded.

Justice Scalia, concurred in judgment and filed opinion.

Justice Blackmun, dissented and filed opinion in which Justices Brennan, Marshall, and Stevens, joined.

**Procedural Posture(s):** On Appeal; Motion for Summary Judgment.

**Rule**

**A psychiatrist employed by a state hospital has a reasonable expectation of privacy in his office, and he is thus entitled to Fourth Amendment protections with respect to a search of his office conducted by hospital officials during an investigation into alleged work-related improprieties on his part.**

**Facts**

A doctor employed by a state hospital managed the hospital's psychiatric residency program. Hospital officials became concerned about possible improprieties on the doctor's part, including his acquisition of a computer by means of possibly coerced contributions of residents, and alleged incidents of sexual harassment of female employees and inappropriate disciplinary action against a resident. The hospital placed the doctor on paid administrative leave and conducted an investigation of the charges. As part of the investigation, hospital officials searched the doctor's office several times and seized personal items as well as articles belonging to the state. No formal inventory was made of the property in the office, but all the papers that were not seized were put in storage for the doctor to retrieve. After the investigation, his employment was terminated. The doctor brought suit against the officials in the United States District Court for the Northern District of California under 42 U.S.C.S. § 1983, alleging that the search of his office violated the Fourth Amendment. The District Court, granting the officials' motion for summary judgment, held that the search did not violate the Fourth Amendment because there was a need to secure state property in the office. The United States Court of Appeals for the Ninth Circuit reversed with respect to the § 1983 claim, holding that the search was unreasonable because the doctor had a reasonable expectation of privacy in his office. The Court of Appeals said that the record justified a grant of partial summary judgment for the doctor on the issue of liability for an unlawful search, and it remanded the case for a determination of damages.

**Issue**

Was the summary judgment for state hospital doctor, based on warrantless search of his office during investigation of his alleged misfeasance proper?

**Answer**

No

**Conclusion**

On further review, the Supreme Court affirmed in part and reversed in part, ruling that neither party was entitled to summary judgment. A majority of the Court agreed that doctor had a reasonable expectation of privacy in his office, subject to Fourth Amendment protection, but a plurality was of the opinion that there was a genuine issue as to the reasonableness of the inception and scope of the search, precluding summary judgment. Another justice concurring in the judgment wrote that the incomplete evidence in the record could not support a summary judgment.

# United States v. Watson

#### United States Supreme Court 423 U.S. 411 (1976)

#### Rule of Law

**A warrantless arrest is permitted if there is probable cause to believe the person has committed a felony.**

#### Facts

On August 17, 1972, a reliable informant alerted a postal inspector that Watson (defendant) had a stolen credit card. The informant gave the card to the inspector and agreed to set up a meeting with Watson. During the meeting, the informant signaled that Watson had more stolen cards. Police arrested Watson, read his rights as required by *Miranda v. Arizona*, 384 U.S. 436 (1966), and asked to search his car. Watson said, "go ahead," and repeated that officers could "go ahead" with the search even after an officer told him that anything found in the car would "go against" Watson. Watson gave officers the keys to the car, and officers found two stolen credit cards inside the car. Watson was charged with possessing stolen mail. Before trial, Watson moved to suppress the evidence found in the car. He claimed that the warrantless arrest was invalid and that his consent to search the car was involuntary and ineffective because he was not informed that he could withhold consent. The trial court denied the motion, and Watson was convicted. The appellate court reversed, holding that the warrantless arrest of Watson was unconstitutional and that Watson's consent to search the car was coerced and thus invalid. The United States Supreme Court granted certiorari.

#### Issue

Does a warrantless arrest violate the Fourth Amendment if there is probable cause to believe that the person has committed a felony?

#### Holding and Reasoning (White, J.)

No. Police may arrest a suspect without a warrant if there is probable cause to believe the suspect committed a felony. The United States Code expressly authorizes postal inspectors to make warrantless arrests if there are “reasonable grounds” for believing the suspect committed a felony. This same authority has been granted to various groups of officers of the federal government, such as the U.S. Marshals and FBI agents. This demonstrates that Congress has deemed these types of warrantless arrests reasonable under the Fourth Amendment. The judgment of Congress on matters of constitutionality is given great deference. Moreover, case law reflects the longstanding common-law rule regarding the validity of warrantless arrests for suspected felons. In this case, there was probable cause for the postal inspector and his subordinate officers to believe that Watson had committed a felony. Accordingly, Watson’s arrest was constitutional. Moreover, because Watson's arrest was constitutional, his consent to search the car did not result from an illegal arrest. Nor do the circumstances here indicate that Watson's consent was the product of coercion. Although Watson was under arrest when he consented, he gave consent on a public street and not while confined at the police station. Additionally, he was given *Miranda* warnings, and he was told that anything found in the car could be used against him. Watson still told officers to "go ahead" with the search. Although Watson may not have known that he could withhold consent, this is not controlling, because he was not mentally incompetent, incapable of making a free choice, or otherwise a "newcomer to the law." Accordingly, Watson's consent to the search was not illegally coerced. The appellate court's judgment is reversed.

#### Concurrence (Stewart, J.)

The Court's holding is limited to a warrantless arrest made in a public place upon probable cause. The Court did not decide whether or when officers must obtain a warrant before entering a private place to arrest someone.

#### Concurrence (Powell, J.)

In this case, the Court specifically holds for the first time that the Fourth Amendment allows officers to make a warrantless arrest in a public place, even if the officers had a sufficient opportunity to first obtain a warrant after developing probable cause. In the warrantless-search context, the Court has previously held that an officer's probable cause to search a private place does not excuse the officer's unexplained failure to obtain a warrant before conducting the search. Although it may seem that arrests and searches should be subject to the same warrant requirements, warrantless felony arrests have historically been allowed, and law-enforcement agencies have developed their procedural requirements for arrests and investigations around the understanding that warrantless arrests based on probable cause are proper. Requiring a warrant or exigent circumstances for a felony arrest would pose a serious burden on law enforcement. The Court's holding is therefore proper, even though it treats warrantless arrests and warrantless searches differently. In any event, even if Watson's arrest was unconstitutional, his consent to search the vehicle was so clearly voluntary and the product of free will that it disposes of this case.

#### Dissent (Marshall, J.)

The officers present during Watson’s meeting with the informant had probable cause to believe a felony was being committed in their presence; therefore, the arrest was valid under the exigent-circumstances doctrine. In other words, the probable cause developed during the meeting with the informant was an independent, sufficient basis for arrest. The appellate court's decision should be reversed on this basis alone and remanded for further proceedings, including a more detailed examination of whether Watson could voluntarily give consent to search the car while in custody. However, the Court goes far beyond the question presented by this case to issue a rule that is contrary to the current interpretation of the Fourth Amendment. Requiring a warrant for an arrest absent exigent circumstances protects sacred individual rights without impeding legitimate governmental interests in law enforcement.

**Key Terms:**

**Exigent Circumstances Doctrine** - An exception to the warrant requirement of the Fourth Amendment allowing police to make a warrantless entry, search, or seizure in circumstances that demand immediate action, such as a threat to human safety, the likely escape of a suspect, or the likely destruction of evidence.

**Ipse Dixit** - Latin for "he said it himself," used to refer to a statement that has been asserted but not proven.

# Chimel v. California

#### United States Supreme Court 395 U.S. 752 (1969)

#### Rule of Law

**Incident to a lawful arrest, a warrantless search of the area in possession and control of the person under arrest is permissible under the Fourth Amendment.**

In ***Chimel***, the Supreme Court clarified the permissible scope of a search incident to arrest.

# Illinois v. Lafayette

#### United States Supreme Court 462 U.S. 640 (1983)

#### Rule of Law

**Police may constitutionally perform an inventory search of the personal effects of an arrested person during booking.**

# Johnson v. United States

#### United States Supreme Court 333 U.S. 10 (1948)

#### Rule of Law

**The Fourth Amendment requires that law enforcement officers present a warrant, received from a neutral magistrate, before they can search an individual’s premises.**

#### Facts

At 7:30 p.m. Seattle narcotics officer Belland received information from a confidential informer, a narcotics user, that certain persons were smoking opium in a hotel. The informer, after returning to the hotel, said that he could smell burning opium in the hallway. Belland and four narcotics agents, all of whom were experienced in narcotics work, went to the hotel between 8:30 and 9 p.m. All agents recognized the unmistakably strong odor of opium, which led them to Room 1, whose occupant(s) was then unknown to the officers. The officers knocked on the door, and, when asked who was there, responded “Lieutenant Belland.” After a short delay, Johnson (defendant) opened the door. When told that the officer wanted to talk to her, Johnson “stepped back acquiescently and admitted us.” Asked about the opium smell, Johnson denied that there was such a smell. She was then told, “I want you to consider yourself under arrest because we are going to search the room.” She did not consent to the search. In the subsequent search, opium and a still-warm smoking apparatus were found, indicating recent use. The district court refused to suppress this information, and Johnson was convicted of having violated federal narcotics laws. The court of appeals affirmed.

#### Issue

Does the Fourth Amendment require that law enforcement officers present a warrant, received from a neutral magistrate, before they can search an individual’s premises?

#### Holding and Reasoning (Jackson, J.)

Yes. The Fourth Amendment requires that law enforcement officers present a valid warrant, received from a neutral and detached magistrate, before they can conduct a search of an individual’s premises. Requiring a warrant protects the privacy interests of the individual against intrusions by the state. If we were to allow law enforcement officers to act solely upon their own inferences and discretion in when to conduct a search, and not on those of an impartial magistrate, we would severely reduce the importance of the Fourth Amendment. In our analysis, we must balance important competing interests: the interest of the citizen to be free of intrusive government surveillance and the interest of law enforcement officers in fighting crime. The decision of when a citizen’s right to privacy must yield to the officer’s duty is an important one and will be made by a judicial officer, and not by a police officer or government agent. In some circumstances, we agree that a search can take place before securing a magistrate’s warrant. Those circumstances include when a suspect is fleeing, when the evidence is located in a vehicle that can be moved, or when the officer suspects that the evidence will be destroyed. None of these conditions was present here. The only reason offered here was the inconvenience to the officers and the possible delay caused by securing the magistrate’s consent. These are not convincing reasons, however, and therefore we have no good reason why the constitutional requirement of a warrant should be frustrated. Nor was this a search incident to a lawful arrest, since the search took place before the officers had probable cause to arrest the defendant. We therefore hold that the search was constitutionally invalid and reverse the judgment of the court below.

**Key Terms:**

**Probable Cause** - A reasonable basis, amounting to more than mere suspicion, to believe that a person has committed a crime or is about to commit a crime, or that evidence relevant to a crime exists in a particular location.

**Warrant** - An order issued by a court directing an officer to undertake a certain act (e.g., arrest or search).

# New York v. Belton

#### United States Supreme Court 453 U.S. 454 (1981)

#### Rule of Law

**Incident to a lawful arrest, the police may search the area within the arrestee’s immediate control.**

# Arizona v. Gant

#### United States Supreme Court 129 S.Ct. 1710 (2009)

#### Rule of Law

**Police may search a vehicle after a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe that crime-related evidence is located in the vehicle.**

# Mincey v. Arizona

#### United States Supreme Court 437 U.S. 385 (1978)

#### Rule of Law

**The fact that a homicide has occurred does not justify making an exception to the rule that police must obtain a warrant prior to searching a suspect’s home.**

#### Facts

Police officer Barry Headricks, working undercover, arranged to purchase heroin from Mincey (plaintiff). Officer Headricks and other officers later went to Mincey’s home where Officer Headricks was shot and killed. Shortly after Officer Headricks was shot, other officers arrived and began investigating and searching for evidence. Over four days, Mincey’s home was thoroughly searched, although a warrant was never obtained. Mincey made a pretrial motion to suppress the fruits of the four-day warrantless search of his home, but the court denied that motion. The trial court convicted Mincey of murder, assault, and drug charges despite his claim that evidence used against him at trial was unlawfully seized. Mincey appealed and the Arizona Supreme Court upheld its previous rulings that there is an exception to the warrant requirement when searching the scene of a homicide. Mincey’s appeal was denied. The Supreme Court granted certiorari.

#### Issue

Where a homicide occurs, may police search the scene of the crime without first obtaining a warrant?

#### Holding and Reasoning (Stewart, J.)

No. The Fourth Amendment protects individuals against unreasonable searches and seizures. In *Katz v. United States*, 389 U.S. 347, 357 (1967), the Court held that a search conducted without first obtaining a warrant is per se unreasonable unless it falls into one of the exceptions to the warrant requirements. In Mincey’s case, the Arizona Supreme Court has made an exception to the warrant requirement that allows police officers to search the scene of a homicide without first obtaining a warrant. This exception should not stand. First, Arizona argues that Mincey gave up any reasonable expectation of privacy in his apartment when he shot Officer Headricks and that the search of Mincey’s apartment did not violate his right to privacy. This argument unfairly assumes Mincey is guilty before his trial. Second, Arizona argues that the possibility of a homicide is an emergency that requires officers to react immediately. While it is true that officers may search the area without a warrant for people who need aid or other victims, the four-day search of Mincey’s apartment went far beyond what could be justified as an emergency search. Third, Arizona argues that the public’s interest in the quick investigation of a homicide justifies this exception. If we followed this line of reasoning, we would have to make an exception to every serious crime. Furthermore, the protections of the Fourth Amendment must not be set aside simply because it would make investigating a crime more convenient. We therefore hold that a warrant is required to search a person or his home unless there are exigent circumstances. There were no exigent circumstances in Mincey’s case and a warrant could have easily been obtained. The fact a homicide was committed at Mincey’s apartment does not create an exigent circumstance that would negate the warrant requirement. The search of Mincey’s apartment without a warrant was unconstitutional. Arizona’s creation of an exception to the warrant requirement where police are searching the scene of a homicide is also unconstitutional. The judgment of the Arizona Supreme Court is reversed.

# \*\*WYOMING v. HOUGHTON\*\*

#### United States Supreme Court 526 U.S. 295 (1999)

#### Rule of Law

**Where an officer has probable cause to search a car, he may search containers that belong to a passenger in the car if the containers could possibly contain the object of the search.**

#### Facts

An officer stopped a car for speeding and saw a syringe in the driver’s shirt pocket. When asked why he had it, the driver stated that he used it to take drugs. Sandra Houghton (defendant), a passenger in the car, was asked to step out. The officer searched the passenger compartment and then found a purse on the backseat. Houghton stated that the purse was hers. The purse contained a brown pouch with 60 ccs of methamphetamine which Houghton claimed was not hers. Houghton was arrested and charged with felony possession of methamphetamine. She moved to suppress all evidence found in the purse as fruit of an illegal search. The trial court held that the search was legal because the officer had probable cause to search the car and any container in the car that may contain contraband. Houghton’s motion to suppress was denied and she was convicted. She appealed and the Wyoming Supreme Court held that the search of Houghton’s purse was illegal and that officers may not search a container that belongs to a passenger who is not suspected of criminal activity unless someone else had an opportunity to hide contraband in the container. The court reversed her conviction. The Supreme Court granted certiorari.

#### Issue

May an officer search containers that belong to a passenger in a car if there is probable cause to search the car?

#### Holding and Reasoning (Scalia, J.)

Yes. To determine whether a search violates the Fourth Amendment’s prohibition on unreasonable searches and seizures, the Court must first look at the Framers’ intent. In *Carroll v. United States*, 267 U.S. 132 (1925), we reasoned that the Framers would have held it permissible to search an entire car without a warrant if there is probable cause that the car contains contraband. In *United States v. Ross*, 456 U.S. 798 (1982), we held that the Framers would have held it permissible to search containers within a car without first obtaining a warrant if there is probable cause to search the car. The holding in *Ross* is not limited to allowing warrantless searches of only containers that belong to the driver. If the holding was meant to be limited in that way, the limitation would have been expressed. *Ross* permits warrantless searches of all containers in a car if there is probable cause to search the car. There is no distinction made between containers owned by the driver or by anyone else. As long as there is probable cause to search the car, any containers in the car may be searched, regardless of ownership. In this case, the existence of probable cause is not challenged. Thus, the officer’s search of the purse did not violate the Fourth Amendment. Even if the historical evidence did not decide the issue, balancing the interests at stake would lead to the same result. There is a reduced expectation of privacy in things a person carries in a car. On the other hand, where police have probable cause to search a car, prohibiting the search of containers in the car would greatly diminish law enforcement interests. This is amplified by the mobility of the car and risk that the evidence would disappear while a warrant was obtained. While personal privacy interests are lowered, government interests are heightened. The interests at stake weigh in favor of allowing the search of containers in a car that may contain the object of the search where there is probable cause to search the car. Accordingly, the Wyoming Supreme Court’s judgment is reversed.

#### Dissent (Stevens, J.)

The majority’s holding is not consistent with our precedent. The only prior case addressing the automobile exception as it applies to the search of a passenger is *United States v. Di Re*, 332 U.S. 581 (1948). In that case, a passenger’s person was searched and the Court held that the exception to the warrant requirement did not apply. In Houghton’s case, as in *Di Re*, the facts triggering the search implicated the driver. Further, the Court is incorrect to assume that a passenger in a car is participating in any illegal activity in which the driver might be involved. Lastly, I disagree with the Court’s assessment that law enforcement concerns outweigh privacy concerns in this case.

***Wyoming v. Houghton*** shows that if a police officer conducts a warrantless search inside a car based on probable cause, the officer may search property belonging to a passenger.

**Key Terms:**

**Probable Cause** - A reasonable basis, amounting to more than mere suspicion, to believe that a person has committed a crime or is about to commit a crime, or that evidence relevant to a crime exists in a particular location.

***Wyoming v. Houghton***

Rule: Police can search passengers and their belongings without a warrant if they have probable cause. The automobile exception applies to passenger belongings.

Car pulled over speeding and brake light out. Officer noticed syringe in driver’s shirt pocket. Passengers were asked to exit. Police searched a purse in the back seat and found drugs. Purse belonged to one passenger and police also noticed needle marks on her arm. The police had probable cause to search the car for drug/paraphernalia. They are allowed to search the passenger’s belongings…they are attached to the car. Passengers have the same less diminished expectation of privacy in a car as the driver, and people in the car are usually involved in the same enterprises.

***Wyoming v. Houghton*, 526 US 295 (1999)**

**Facts:** Police stopped a car for speeding (and a bad taillight). Upon questioning the driver, police noticed a syringe in the driver’s shirt pocket, which the driver admitted was for drugs. Police then ordered the passengers, including the Defendant, out of the car. Defendant Houghton gave a false name, which the officer discovered by searching **her purse**. Upon a further search, police found drugs and paraphernalia. Defendant Houghton was convicted at trial, and the Wyoming Supreme Court reversed, holding that the search of the purse was unconstitutional.

**Does the automobile exception, (wherein police may search a car without a warrant (provided they have probable cause)) extend to a passenger’s belongings?**

**YES, where the belongings are capable of concealing the object of the search. Here, there was probable cause to believe drugs in car. So automobile exception, based on mobility and regulation leading to diminished expectation of privacy, is the rule. Same rationale applies to passenger, because the pc follows the item, not the person. It would nto make sense to allow an exception for the driver and not the passenger.**

**Concurrence: This is only for containers, not the person.**

**Dissent: Passengers are people too, and should have constitutional protections. Here is the passenger’s purse was searched, which is like her person. Balancing is off.**

# Carroll v. United States

***Carroll v. United States***, 267 U.S. 132 (1925), was a decision by the [United States Supreme Court](https://en.wikipedia.org/wiki/United_States_Supreme_Court) that upheld the [warrantless searches](https://en.wikipedia.org/wiki/Warrantless_searches_in_the_United_States) of an automobile, which is known as the [automobile exception](https://en.wikipedia.org/wiki/Motor_vehicle_exception). The case has also been cited as widening the scope of warrantless search.

**Rule**

**Where the facts and circumstances within police officers' knowledge and of which they had reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution in the belief that intoxicating liquor is being transported in the automobile which the officers stop and search, the officers are justified in conducting the search.**

**Facts**

Cronenwett and Scully, federal prohibition agents, where in an operation where they met three men to buy three cases of whiskey, including defendants George Carroll and John Kiro. The three men said they had to go to the east end of Grand Rapids, Michigan, to get the liquor and that they would be back in 30-45 minutes. They returned in an automobile known as an Oldsmobile Roadster but without the whiskey. Two months later, Cronenwett and other agents were patrolling the road leading from Detroit to Grand Rapids, looking for violations of the Prohibition Act. The officers were not anticipating that defendants would be coming through on the highway at that particular time, but when they met them there they believed they were carrying liquor. They stopped the car and searched it. They found behind 68 bottles of liquor hidden in the car seats. Defendants were arrested and later convicted in federal district court for transporting intoxicating spirituous liquor in a vehicle, in violation of § 26 of the National Prohibition Act. Defendants sought a writ of error, asserting that the warrantless search of the vehicle violated U.S. Const. amend. IV and that the liquor discovered as a result of the search should not have been admitted into evidence.

**Issue**

Was the warrantless search and seizure valid?

**Answer**

Yes

**Conclusion**

The Supreme Court of the United States affirmed the district court's judgment. The Court found that the main purpose of § 26 of the National Prohibition Act was seizure and forfeiture, and that the right to search and the validity of the seizure were not dependent on the right to arrest, but were dependent on the reasonable cause the seizing liquor agents had for their belief that the contents of defendant's automobile were illegal. The evidence showed that the agents had ample reason to believe defendants' vehicle contained illegal liquor because defendants were known to transport liquor in that vehicle, were recognized by the agents, and were on a route known for illegal liquor traffic. Those circumstances provided sufficient probable cause to search the vehicle.

# United States v. Ross

#### United States Supreme Court 456 U.S. 798 (1982)

#### Rule of Law

**A police search of closed containers discovered inside a vehicle during a warrantless vehicle search does not violate the Fourth Amendment when probable cause justifies a search of the containers.**

# Zurcher v. Stanford Daily

#### United States Supreme Court 463 U.S. 547 (1978)

#### Rule of Law

**It does not violate constitutional protections to issue a search warrant for the offices of a newspaper even though the object of the search could be demanded through the issuance of a subpoena duces tecum.**

#### Facts

A reporter for the Stanford Daily (plaintiff) captured photographs of a violent confrontation between police and protesters at Stanford University Hospital. The county District Attorney (defendant) obtained a warrant to search the offices of the Stanford Daily for photographic materials providing evidence relevant to the circumstances of the confrontation. Officers searched various areas of the offices, including desks and trash cans, but did not open any locked doors or containers. Some members of the newspaper staff were present during the search. The staff members did not inform police that they were viewing confidential materials during some aspects of the search. The only evidence obtained from the search was the photographs taken by the reporter on the scene. The Stanford Daily filed suit in the federal district court seeking a declaratory judgment. The district court issued a rule that would have the effect of prohibiting the issuance of a search warrant when the subject of the search is not suspected of criminal activity, except in cases in which there is probable cause to believe that a subpoena duces tecum would not be obeyed and that evidence might be destroyed. The district court also held that First Amendment considerations supported a prohibition against the issuance of a warrant to search a newspaper office in most cases. The district court decision was affirmed on appeal and the county District Attorney petitioned the United States Supreme Court for review. The Supreme Court reversed the district court’s rule restricting the issuance of a search warrant and proceeded to consider the First Amendment implications of the search.

#### Issue

Does it violate constitutional protections to issue a search warrant for the offices of a newspaper when the object of the search could be demanded through the issuance of a subpoena duces tecum?

#### Holding and Reasoning (White, J.)

No. It does not violate constitutional protections to issue a search warrant for the offices of a newspaper when the object of the search could be demanded through the issuance of a subpoena duces tecum. The district court concluded that searches of newspaper offices should be generally prohibited over concerns that the threat of a search would deter the provision of confidential information and the documentation of events by reporters due to concerns of compulsory disclosure. The district court also perceived that the threat of search would hinder prompt publication of important events and jeopardize the confidentiality of editorial decisions, which would result in self-censorship by news organizations. Fourth Amendment search and seizure requirements must be applied rigorously when the object of a search implicates First Amendment protections. The Fourth Amendment prohibits the issuance of a general warrant by imposing particularity requirements demanding a description of places to be searched and evidence expected to be discovered by a search. Issuance of a warrant that leaves it to the discretion of law enforcement to determine the permissible scope of a search amounts, for all practical purposes, to the issuance of a general warrant. The particularity requirements must be stringently observed when the object of a search may be subject to constitutional protections. Although the Constitution recognizes the significance of the tension between government and a free press, it does not prohibit the issuance of a warrant or require the imposition of any special procedures when the press is the subject of a search. Neither does the constitution require that the subject of a search be suspected of criminal activity. A properly conducted probable cause determination, when coupled with the protections of Fourth Amendment particularity requirements and the general test of reasonableness, affords adequate protection against the detrimental impacts of subjecting the press to search warrants. The evidence does not indicate any history of governmental abuse of press freedom through the issuance of search warrants. The warrant in this case meets all the requirements of constitutionality. If a probable cause determination sufficiently correlates the object of a search to a crime, there is no reason to limit the use of search warrants in preference to subpoenas. The decisions of the state courts are reversed.

#### Concurrence (Powell, J.)

Justice Stewart proposes an outright ban on searches of the press when a subpoena could be used as an alternative. The adequacy of a subpoena in any given case would be a challenging determination that would need to be addressed on a case-by-case basis. The Constitution does not require any such differentiation between the press and the general public.

#### Dissent (Stewart, J.)

The possibility of an unannounced search threatens the integrity of confidential sources. Confidentiality is critical to the function of a free and informative press. A warrant authorizes a search of broad scope, whereas a subpoena can identify with particularity the evidence demanded and enable the press organization to produce the required documentation without risk to source confidentiality. It seems inevitable that the effect of this rule will be to deter the provision of sensitive information and stifle its release to the public.

**Key Terms:**

**Fourth Amendment -** An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**First Amendment** - Guarantees that the government will not abridge freedoms of the press, religion, and speech; the right to peacefully assemble; and the right to petition the government to remedy grievances.

# United States v. Di Re

68 S.Ct. 222

Supreme Court of the **United** **States**

**UNITED STATES**

**v.**

**DI RE.**

No. 61.

ArguedOct. 17, 1947.Decided Jan. 5, **1948**.

**Synopsis**

Michael **Di** **Re** was convicted on a charge of knowingly possessing counterfeit gasoline ration coupons in violation of the Second War Powers Act of 1942, s 301, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=NAA2879F0B5BF11D8983DF34406B5929B&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=a897b170a87e4940bd8a3255b9cc7f6b&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[50 U.S.C.A.Appendix, s 633](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000866&cite=50APPUSCAS633&originatingDoc=Ic1d2310c9c1e11d991d0cc6b54f12d4d&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). Judgment was reversed by the Circuit Court of Appeals, [159 F.2d 818,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1947117213&pubNum=350&originatingDoc=Ic1d2310c9c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and the **United** **States** brings certiorari.

Affirmed.

Mr. Chief Justice VINSON and Mr. Justice BLACK dissenting.

On Writ of Certiorari to the **United** **States** Circuit Court of Appeals for the Second Circuit.

**Procedural Posture**

Petitioner sought review of a decision of the United States Court of Appeals for the Second Circuit and sought certiorari to consider whether respondent government's search by officials was illegal.

**Overview**

Certiorari was granted where the government appealed from a judgment that held respondent's warrantless arrest and search was illegal, thus requiring reversal of respondent's conviction. The court addressed whether the government's arrest and search were legal. First, the government contended the warrantless search was permissible because the officers had the right to search any vehicle they reasonably suspected carried contraband. The U.S. Supreme Court held that a person, by mere presence in a suspected car, did not lose immunities from search of his person to which he would otherwise be entitled. Second, the government contended that a search of respondent incident to justifiable arrest was proper. The Court held that inferences that everyone on the scene of a crime was a party disappeared if the government informer singled out the guilty person. In this case, respondent was not singled out. The Court further held an inference of probable cause from a failure to discuss charges with arresting officers was unwarranted. The presumption of innocence was not lost or impaired by neglect of respondent to argue with a policeman. The judgment of the appeals court was affirmed.

**Outcome**

The judgment of the appeals court was affirmed. Probable cause could not be found from submissiveness, and the presumption of innocence was not lost or impaired by respondent's neglect to argue with a policeman.

# Ybarra v. Illinois

#### United States Supreme Court 444 U.S. 85 (1979)

#### Rule of Law

**A person’s mere proximity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person.**

#### Facts

Law enforcement obtained a search warrant for a bar and its bartender. In executing the search warrant, law enforcement searched every patron that happened to be in the bar at that time, including Ybarra (defendant). Upon searching Ybarra, an officer found heroin in his pocket. No bar patrons, including Ybarra, were mentioned in the search warrant. The trial court found the heroin admissible. The United States Supreme Court granted certiorari.

#### Issue

Does a person’s mere proximity to others independently suspected of criminal activity give rise to probable cause to search that person?

#### Holding and Reasoning (Stewart, J.)

No. A person’s mere proximity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person. Here, there was no probable cause to search Ybarra. The search warrant was for the bar and the bartender. It did not include any generic bar patrons, let alone Ybarra specifically. The police conducting the search did not recognize Ybarra and did not have any reason to believe that he was involved in the bartender’s drug activities. In addition, although the prosecution claims that the search of Ybarra was conducted pursuant to *Terry v. Ohio*, 392 U.S. 1 (1969), the officer provided no evidence that he believed that Ybarra was armed and dangerous. As a result of the foregoing, the search of Ybarra violated his Fourth Amendment rights. The lower courts are reversed.

#### Dissent (Rehnquist, J.)

This case presents a different set of circumstances than gave rise to the *Terry* suspicion standard. First, in this case, a magistrate determined that a search of the bar was necessary. Moreover, an officer executing a search warrant is inherently in more danger than an officer encountering someone on the street.

**Key Terms:**

**Probable Cause** - A reasonable basis, amounting to more than mere suspicion, to believe that a person has committed a crime or is about to commit a crime, or that evidence relevant to a crime exists in a particular location.

# Terry v. Ohio

#### United States Supreme Court 392 U.S. 1 (1968)

#### Rule of Law

**When an officer observes unusual conduct that reasonably leads him to assume that criminal activity is afoot and that the people he is interacting with are armed, the police officer may conduct a limited search for weapons.**

# *Terry* was the first time the Court permitted a warrantless search for less than probable cause.

# \*\*COLORADO v. BERTINE\*\*

#### United States Supreme Court 479 U.S. 367 (1987)

#### Rule of Law

**A police officer’s warrantless inventory search of closed containers inside an automobile, conducted pursuant to an established inventory policy, does not violate the Fourth Amendment to the U.S. Constitution.**

#### Facts

Steven Lee Bertine (defendant) was arrested for driving under the influence. In accordance with standard local police procedures, a police officer conducted an inventory search of Bertine's van after Bertine was arrested but before a tow truck arrived to take the van to the impound lot. As part of the search of the van, the officer opened a closed backpack that he found behind the van's front seat. The backpack contained a nylon bag with closed metal canisters. Upon opening the canisters, the officer found methaqualone tablets, cocaine, cocaine paraphernalia, and cash. Bertine was charged with driving under the influence; unlawful possession of cocaine with the intent to dispense, sell, and distribute; and unlawful possession of methaqualone. Bertine moved to suppress the evidence found during the inventory search, claiming that the search of the closed backpack and canisters went beyond the scope of a permissible search under the Fourth Amendment. The trial court held that the search did not violate Bertine's Fourth Amendment rights but granted Bertine's motion to suppress on the grounds that the inventory search violated the state constitution. The state supreme court affirmed the trial court's grant of the motion to suppress. However, the state supreme court based its decision on the Fourth Amendment to the U.S. Constitution. The United States Supreme Court granted certiorari.

#### Issue

Does a police officer’s warrantless inventory search of closed containers inside an automobile, conducted pursuant to an established inventory policy, violate the Fourth Amendment to the U.S. Constitution?

#### Holding and Reasoning (Rehnquist, C.J.)

No. A police officer’s warrantless inventory search of closed containers inside an automobile, conducted pursuant to an established inventory policy, does not violate the Fourth Amendment to the U.S. Constitution. Reasonable police regulations relating to inventory procedures administered in good faith satisfy the Fourth Amendment. This is true even if a court later comes up with its own, different rules requiring a different procedure. Inventory-search procedures serve the interests of protecting seized property while the property is in police custody and guarding against claims that the property has been lost, stolen, damaged, or vandalized. Inventory searches also help to keep police officers safe. These interests outweigh the property owner’s Fourth Amendment interests. In conducting an inventory search, officers do not need to make individual balancing decisions regarding every closed container they encounter to determine whether the likelihood that the container contains a dangerous or valuable item outweighs the owner's privacy interest in the container. Rather, if a legitimate inventory search is in progress, the officers' goal is rightly to complete the search quickly and efficiently, and they may appropriately survey the contents of the containers they find during the search. In this case, the inventory search of Bertine’s van was conducted pursuant to standard police procedures, and there is nothing in the record that would indicate that the search was not conducted in good faith or that it was conducted solely for investigative purposes. It was reasonable for the officer arresting Bertine to inventory the van before it was taken to the impound lot. Accordingly, the search did not violate Bertine’s Fourth Amendment rights. The state supreme court's decision is reversed.

#### Concurrence (Blackmun, J.)

It is permissible for police to open closed containers during an inventory search of an impounded vehicle only if this practice is authorized by standard police procedures. In this case, the police department's procedures allow the opening of closed containers and the listing of the containers' contents during an inventory search.

#### Dissent (Marshall, J.)

The search in this case cannot be called an inventory search, as it was not conducted pursuant to standard police procedures. The local police procedures contain no guidance limiting an officer's exercise of discretion regarding whether to impound a vehicle, what areas of the vehicle to search, and what items found in the vehicle to inventory. Allowing unlimited discretion to officers is dangerous and unreasonable, and it gives rise to the serious risk that officers will abuse their discretion. Accordingly, the search of Bertine's vehicle was unreasonable and violated the Fourth Amendment. Furthermore, even assuming the search in this case could be considered a legitimate inventory search, the search would still be unreasonable because Bertine's expectation of privacy in the closed containers outweighed the government's interests. The government's interest in protecting an owner's property is the only government interest that justifies an inventory search of an impounded vehicle. However, Bertine was present during the search and could have made other arrangements to keep his property safe. Moreover, Bertine had only been arrested for driving under the influence and was likely to be in police custody only for a short time, and he may have been willing to leave his property in his locked van for that short time period. Therefore, the government's interest is relatively weak. In contrast, Bertine's privacy interest is strong, as the search concerned a closed backpack that, by its nature as luggage, was likely to contain Bertine's personal items.

***Colorado v. Bertine*** held that incriminating evidence discovered in closed containers during a standardized inventory search is admissible under the Fourth Amendment.

**Key Terms:**

**Probable Cause** - A reasonable basis, amounting to more than mere suspicion, to believe that a person has committed a crime or is about to commit a crime, or that evidence relevant to a crime exists in a particular location.

**Inventory Search** - A routine search performed by police before taking a person or property into custody, performed for administrative rather than investigative purposes.

**Colorado v. Bertine**

479 U.S. 367 (1987)

Opinion by: CJ Rehnquist

**Facts:** A Boulder CO officer arrested Bertine for driving his van while under the influence. The procedures allowed for three options…(1) a third party takes car, (2) the officer or driver can park/lock car in a public lot, or (3) impound it. They chose to impound the van. Before a tow truck arrived to take the van to an impound lot, a second officer inventoried the van’s contents in accordance with local police procedures. Without a warrant, the second officer opened a closed backpack where he found various metal containers holding controlled substances, cocaine, cocaine paraphernalia, and a large amount of cash.

Prior to Bertine’s trial, the state trial court granted his motion to suppress the evidence found during the inventory search. He argued the inventory search violated his 4th amendment right and the search was unconstitutional because the departmental regulations gave officers the unfair discretion to choose between impounding his van or parking/locking it in a public lot.

The trial court said the search did not violate his 4th amendment rights (it recognized that inventory searches are a well-defined exception to the warrant requirement of the fourth amendment) but that the search violated the Colorado Constitution. The Supreme Court stated CO supreme court incorrectly relied on *Arkansas v. Sanders* and *United States v. Chadwick*. Both of these cases are concerned with searches for the purpose of criminal investigation, validity of the searches was dependent on probable cause…requiring a warrant under the 4th amendment.

*Sanders…*police searched a suit case based on a tip from an informant. The suit case was taken from a taxi cab trunk and unlocked. It contained marijuana as reported by the informant. The Supreme Court ruled the search was illegal even though the police has probable cause to search it. The locked suit case was inevitably associated with the expectation of privacy because it contains one’s personal belongings.

*Chadwick…* a locked trunk suit case suspected to be filled with marijuana was held by police for an 1.5 hours before it was searched without a warrant….since the trunk was in police custody, there was no reason to not wait on the warrant to search…evidence was not in jeopardy of being destroyed. By locking the trunk Chadwick not only had the expectation that the contents would remain private but this expectation was reasonable because the contents of personal luggage typically stay private. Supreme Court ruled the search was unconstitutional.

The Colorado supreme court affirmed but premised it’s ruling on the federal Constitution. They felt the search unreasonable because Bertine’s van was towed to a secure, lighted facility negating the need for inventory, and because Bertine himself could have been given the opportunity to make arrangements for safekeeping of the van/contents.

**Issue:** Did the state courts err in approving Bertine’s motion to suppress the evidence collected by the inventory search? Does a warrantless inventory search violate the 4th amendment?

**Rule:** The state courts ruled incorrectly, the evidence collected should not be suppressed. Bertine’s 4th amendment rights were not violated by the inventory search.

**Analysis:** The Supreme Court stated inventory searches are designed to protect the property impounded, insure against claims of lost/stolen/vandalized property, and guard police from danger. The strong “governmental interests” outweighed the diminished expectation of privacy in an automobile. The caretaking procedures were designed to secure and protect vehicles and their contents while in police custody. The police were following standardized procedures and there is no evidence they acted in bad faith or for the sole purpose of investigation. Since police are potentially responsible for property in their custody, they were securing and protecting it from unauthorized interference. There is no evidence the police chose to impound the vehicle in order to investigate suspected criminal activity. Their discretion to impound the vehicle was related to feasibility and appropriateness of parking/locking it versus impounding…they chose to impound it.

The Supreme Court addressed the CO supreme courts statements by saying the lighting/secureness of the facility still does not eliminate the police’s need to protect themselves and the owners of the lot against false claims of theft or dangerous contents. Next, they stated the 4th amendment does not require such steps of giving Bertine an opportunity to take care of the van himself…”the reasonableness does not necessarily or invariably turn on the existence of alternative ‘less intrusive’ means”.

**Conclusion:** The motion to suppress evidence collected by the inventory search is reversed. Reasonable inventory procedures conducted in good faith satisfy the 4th amendment. (Also stated still good law even if courts in hindsight devise equally reasonable rules requiring a different procedure.)

**Dissent (Marshall and Brennan):** There are no standardized criteria to limit the Boulder officer’s direction. No limits or specific polices for items to be search…the officer testified at the suppression hearing that officers can search “whatever arouses his suspicions”. Under the park/lock option, the police have no occasion to search the car. Only if they chose the third option are they entitled to search. In this case, the vehicle was not evidence itself of a crime. The closed containers carry a greater weight of expectancy of privacy than given in the court’s opinion.

***Colorado v. Bertine***

Rule: While following policy/jurisdiction procedures, police can do an inventory search of car being impounded without a warrant. Evidence found is admissible and warrantless search does not violate the 4th amendment.

Bertine was arrested for DUI. Police chose to impound his van. At the impound lot, police did a normal protocol inventory search of van and all containers. Police found drug paraphernalia in a backpack. Argument is police need to protect themselves from what could inside car they are impounding and be able to avoid claims of stolen property.

***Colorado v. Bertine*, 479 US 367 (1987)**

**Facts: Police arrested Defendant Bertine for driving under the influence. After his arrest but before the car was towed, police, acting in accordance with local procedure, searched the car to inventory the contents. They found drugs, paraphernalia, and cash. Defendant moved to suppress, trial court granted based solely on the Colorado Constitution. Colorado Supreme Court affirmed the dismissal based on US Constitution.**

**Issue: Does the 4th Amendment prohibit police inventories where, as here, the police acted pursuant to a policy that allows a complete search of an automobile without probable cause following the Defendant’s arrest?**

**No. The inventory exception to the warrant requirement is based on the police’s responsibility for the property, not on a criminal investigation. It is impermissible to act in bad faith or to investigate. Those things weren’t alleged here. We have previously recognized search of a bag as a legitimate inventory search in Lafayette.**

**Concurrence: Agreed, but only pursuant to a policy.**

**Dissent:** The police had other options, but chose to inventory, at which point the policy allowed. Exceptions to the warrant requirement should be narrowly drawn. Here, the government’s interest (inventory) is weak, and the privacy interest is strong.

# Arkansas v. Sanders

99 S.Ct. 2586

Supreme Court of the United States

**State of ARKANSAS, Petitioner,**

**v.**

**Lonnie James SANDERS.**

No. 77-1497.

Argued Feb. 27, 1979.Decided June 20, 1979.

**Synopsis**

Defendant was convicted in the Circuit Court, Fourth Division, Pulaski County, Arkansas, Richard B. Adkisson, J., of possession of marihuana with intent to deliver and he appealed. The [Arkansas Supreme Court, 262 Ark. 595, 559 S.W.2d 704,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977138002&pubNum=713&originatingDoc=Ic1df776c9c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) reversed and remanded, and certiorari was granted. The Supreme Court, Mr. Justice Powell, held that: (1) in the absence of exigent circumstances, police are required to obtain a warrant before searching luggage taken from an automobile properly stopped and searched for contraband, and (2) in the absence of exigent circumstances, even though police had probable cause to search defendant's suitcase for marihuana after seizing it from trunk of taxicab in which defendant was a passenger, they could not do so without first obtaining a warrant.

Judgment of Arkansas Supreme Court affirmed.

Mr. Chief Justice Burger concurred in the judgment in an opinion in which Mr. Justice Stevens joined.

Mr. Justice Blackmun dissented with an opinion in which Mr. Justice Rehnquist joined.

***Arkansas v. Sanders***, 442 U.S. 753 (1979), was a decision by the [United States Supreme Court](https://en.wikipedia.org/wiki/United_States_Supreme_Court), which held that absent [exigency](https://en.wikipedia.org/wiki/Exigent_circumstances), the warrantless search of personal luggage merely because it was located in an automobile lawfully stopped by the police, is a violation of the Fourth Amendment and not justified under the automobile exception. Similar to [*United States v. Chadwick*](https://en.wikipedia.org/wiki/United_States_v._Chadwick) (1977), the luggage was the subject of police suspicion before being placed in the vehicle.

*Sanders* resolved two distinct lines of cases: on the one hand, [*Carroll v. United States*](https://en.wikipedia.org/wiki/Carroll_v._United_States) (1925) laid down the automobile exception which allowed for warrantless searches of automobiles; on the other hand, *Chadwick*did not allow for a warrantless search of luggage. Sanders declined to extend the automobile exception here, again stressing, as in *Chadwick*, the heightened expectation of privacy in one's luggage.

**Arkansas v. Sanders**

**Rule of Law**

**Not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view," thereby obviating the need for a warrant. There are difficulties in determining which parcels taken from an automobile require a warrant for their search and which do not. A warrant generally is required before personal luggage can be searched and the extent to which the U.S. Const. amend. XIV applies to containers and other parcels depends not at all upon whether they are seized from an automobile.**

**Facts**

After an informant told them that a suspect would arrive on a flight to the local airport carrying a green suitcase containing marijuana, Little Rock, Arkansas, police officers placed the airport under surveillance and watched as the suspect, arriving as the informant had predicted, retrieved from the airline luggage service a green suitcase matching the informant's description. The suitcase was placed in a taxi, and the suspect was driven away. Thereafter, the officers stopped the taxi, and at their request the taxi driver opened the trunk of his vehicle, where the officers found the green suitcase. Without asking the permission of the suspect or his companion, the police opened the unlocked suitcase and discovered marijuana. Before his trial in an Arkansas state court on a charge of possession of marijuana with intent to deliver, the suspect moved to suppress the evidence obtained from the suitcase, contending that the search violated his rights under the Fourth and Fourteenth Amendments. The trial court denied the motion, and the suspect was convicted. On appeal, the Supreme Court of Arkansas reversed the conviction, ruling that the trial court should have suppressed the marijuana because it was obtained through an unlawful search of the suitcase.

**Issue**

Should the marijuana be suppressed as evidence because its seizure was allegedly obtained through an unlawful search of the suspect’s suitcase?

**Answer**

Yes.

**Conclusion**

The U.S. Supreme Court held that the Fourth Amendment required a search warrant unless the prosecution could prove that the warrantless search fell within one of the exceptions provided for warrantless searches. The court further held that the automobile exception, which was based on the mobility of automobiles, the burden of transporting and caring for automobiles if seized, and the exigent circumstances of a roadside stop, did not apply to a suitcase, even though contained in the trunk of the car which was in the control of police. The court further held that the Fourth Amendment required the police to obtain a warrant for a search of the suitcase because defendant had an expectation of privacy in the contents of the suitcase.

***Arkansas v. Sanders, 1979***

Opinion by: Powell

**Facts:** Acting on an informant's information that respondent, upon arriving at an airport, would be carrying a green suitcase containing marihuana, Little Rock, Ark., police officers placed the airport under surveillance. They watched as Lonnie Sanders retrieved a green suitcase from the airline baggage service, placed it into the trunk of a taxi, and entered the vehicle with a companion. When the taxi drove away, two of the officers gave pursuit and stopped the vehicle several blocks from the airport, requesting the taxi driver to open the vehicle's trunk. Without asking the permission of respondent or his companion, the police opened the unlocked suitcase and discovered marijuana. Before trial in state court on a charge of possession of marihuana with intent to deliver, respondent moved to suppress the evidence obtained from the suitcase, contending that the search violated his rights under the Fourth and Fourteenth Amendments. The trial court denied the motion and respondent was convicted. The Arkansas Supreme Court reversed, ruling that the marijuana should have been suppressed because it was obtained through an unlawful search of the suitcase.

**Rule**: In the absence of exigent circumstances, police are required to obtain a warrant before searching luggage taken from an automobile properly stopped and searched for contraband. United States v. Chadwick.

(a) In the ordinary case, a search of private property must be both reasonable and pursuant to a properly issued search warrant. The mere reasonableness of a search, assessed in the light of the surrounding circumstances, is not a substitute for the judicial warrant required under the Fourth Amendment.

(b) The “automobile exception” from the warrant requirement, as set forth in Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543, and its progeny, will not be extended to the warrantless search of one's personal luggage merely because it was located in an automobile lawfully stopped by the police. Luggage is a common repository for one's personal effects, and therefore is inevitably associated with the expectation of privacy. Once police have seized a suitcase from an automobile, the extent of its mobility is in no way affected by the place from which it was \*\*2588 taken; accordingly, as a general rule there is no greater need for warrantless searches of luggage taken from automobiles than of luggage taken from \*754 other places. Similarly, a suitcase taken from an automobile stopped on the highway is not necessarily attended by any lesser expectation of privacy than is associated with luggage taken from other locations. Where-as in the present case-the police, without endangering themselves or risking loss of the evidence, lawfully have detained one suspected of criminal activity and secured his suitcase, they should delay the search thereof until after judicial approval has been obtained. Pp. 2592-2594.

# United States v. Chadwick

#### United States Supreme Court 433 U.S. 1 (1977)

#### Rule of Law

**The Fourth Amendment protects a person’s reasonable expectations of privacy and requires that the police obtain a warrant before executing a search unless a relevant exception applies.**

# South Dakota v. Opperman

#### United States Supreme Court 428 U.S. 364 (1976)

#### Rule of Law

**Police may constitutionally perform an inventory search of a vehicle lawfully in police possession.**

#### Facts

On December 10, 1973, police in Vermillion, South Dakota ticketed and then towed an illegally parked car. At the impound lot, the officer saw a watch and other property inside the car. The officer had the car door unlocked and performed a routine inventory search, using a standard inventory form. The officer found drugs in the unlocked glove compartment. The drugs and other items were removed from the car. Opperman (defendant) was arrested for marihuana possession when he arrived at the police department to claim his property. Opperman’s motion to suppress evidence found in the inventory search was denied. Opperman was tried by a jury, convicted, and sentenced to a $100 fine and two weeks in county jail. The Supreme Court of South Dakota reversed Opperman’s conviction and held that the police violated the Fourth Amendment. The United States Supreme Court granted certiorari.

#### Issue

Under the Fourth Amendment, may police perform an inventory search of the contents of a vehicle lawfully in police possession?

#### Holding and Reasoning (Burger, C.J.)

Yes. Police may conduct an inventory search of the contents of a vehicle lawfully held in police possession. Vehicles are “effects” for purposes of the Fourth Amendment. Nevertheless, automobiles do not carry the same expectation of privacy as a home or office, because automobiles are subject to heavy governmental regulation and travel by car is inherently public. Police as caretakers may legitimately take possession of an illegally parked vehicle and may inventory the contents of the vehicle once impounded. This (1) protects the vehicle owner’s property, (2) protects police against false claims of damage or loss of property, and (3) protects police from harm. The probable cause and warrant requirements of the Fourth Amendment are inapplicable to noncriminal inventory searches of vehicles lawfully in police custody. *Cady v. Dombrowski*, 413 U.S. 433 (1973), and other cases have repeatedly affirmed the right of police to perform inventory searches on impounded vehicles without a warrant in order to secure the vehicles’ contents. In this case, police clearly had the authority to seize Opperman’s illegally parked vehicle. Further, the inventory search of the vehicle did not violate the Fourth Amendment. The ruling of the South Dakota Supreme Court is reversed.

#### Dissent (Marshall, J.)

The Court’s ruling permits a full search of essentially any vehicle impounded by police, including the vehicle’s closed compartments. Determining whether such a search is reasonable requires balancing the owner’s reasonable expectation of privacy against governmental goals of securing the vehicle’s contents, and the Court has failed to demonstrate this balance. The police department in this case inventories every vehicle impounded for the purpose of securing any valuables inside, not for protecting the department from claims or protecting public safety. This type of search without owner consent or exigent circumstances violates the Fourth Amendment.

**Key Terms:**

**Impound** - Possession and custody of an automobile or other property by police or a court.

**Inventory Search** - A routine search performed by police before taking a person or property into custody, performed for administrative rather than investigative purposes.

***South Dakota v. Opperman*** (1976)

Opinion by: CJ Burger

**Facts:** On December 10, 1973, police in Vermillion, South Dakota ticketed and then towed an illegally parked car. At the impound lot, the officer saw a watch and other property inside the car. The officer had the car door unlocked and performed a routine inventory search, using a standard inventory form. The officer found drugs in the unlocked glove compartment. The drugs and other items were removed from the car. Opperman was arrested for marijuana possession when he arrived at the police department to claim his property. Opperman’s motion to suppress evidence found in the inventory search was denied. Opperman was tried by a jury, convicted, and sentenced to a $100 fine and two weeks in county jail. The Supreme Court of South Dakota reversed Opperman’s conviction and held that the police violated the Fourth Amendment. The United States Supreme Court granted certiorari.

**Issue:** Can police perform an inventory search of contents in a vehicle that is in police possession?

**Rule:** Yes, Police may conduct an inventory search of the contents of a vehicle lawfully held in police possession. Automobiles do not carry the same expectation of privacy as a home or office, because automobiles are subject to heavy governmental regulation and travel by car is inherently public. Police as caretakers may legitimately take possession of an illegally parked vehicle and may inventory the contents of the vehicle once impounded. This (1) protects the vehicle owner’s property, (2) protects police against false claims of damage or loss of property, and (3) protects police from harm. The probable cause and warrant requirements of the Fourth Amendment are inapplicable to noncriminal inventory searches of vehicles lawfully in police custody. *Cady v. Dombrowski*, 413 U.S. 433 (1973), and other cases have repeatedly affirmed the right of police to perform inventory searches on impounded vehicles without a warrant in order to secure the vehicles’ contents. In this case, police clearly had the authority to seize Opperman’s illegally parked vehicle. Further, the inventory search of the vehicle did not violate the Fourth Amendment. The ruling of the South Dakota Supreme Court is reversed.

#### Dissent (Marshall):

The Court’s ruling permits a full search of essentially any vehicle impounded by police, including the vehicle’s closed compartments. Determining whether such a search is reasonable requires balancing the owner’s reasonable expectation of privacy against governmental goals of securing the vehicle’s contents, and the Court has failed to demonstrate this balance. The police department in this case inventories every vehicle impounded for the purpose of securing any valuables inside, not for protecting the department from claims or protecting public safety. This type of search without owner consent or exigent circumstances violates the Fourth Amendment.

# Illinois v. Lafayette

#### United States Supreme Court 462 U.S. 640 (1983)

#### Rule of Law

**Police may constitutionally perform an inventory search of the personal effects of an arrested person during booking.**

# Florida v. Wells

110 S.Ct. 1632

Supreme Court of the United States

**FLORIDA, Petitioner**

**v.**

**Martin Leslie WELLS.**

No. 88–1835.

Argued Dec. 4, 1989.Decided April 18, 1990.

**Synopsis**

Defendant was convicted, upon conditional plea of nolo contendere, before the Circuit Court, Putnam County, E.L. Eastmoore and Robert R. Perry, JJ., of possession of a controlled substance. Pursuant to his plea, he appealed from denial of his motion to suppress evidence. The District Court of Appeal, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I890bb8530da211d9821e9512eb7d7b26&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[492 So.2d 1375,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986142742&pubNum=735&originatingDoc=I5dfce9e99c9011d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) reversed, and State petitioned for review. The [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ice06fcb60c7d11d98220e6fa99ecd085&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[Florida Supreme Court, 539 So.2d 464,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989034393&pubNum=735&originatingDoc=I5dfce9e99c9011d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed. After granting the State's petition for certiorari, the Supreme Court, Chief Justice [Rehnquist](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0238463201&originatingDoc=I5dfce9e99c9011d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I5dfce9e99c9011d9bc61beebb95be672), held that absent a policy with respect to the opening of closed containers encountered during an inventory search, inventory search which involved the opening of a locked suitcase was not sufficiently regulated to satisfy the Fourth Amendment, and marijuana which was found in suitcase was subject to suppression.

Affirmed.

Justice Brennan filed an opinion concurring in the judgment, in which Justice [Marshall](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0336250901&originatingDoc=I5dfce9e99c9011d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I5dfce9e99c9011d9bc61beebb95be672) joined.

Justice [Blackmun](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0264439801&originatingDoc=I5dfce9e99c9011d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I5dfce9e99c9011d9bc61beebb95be672) and Justice [Stevens](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0156277701&originatingDoc=I5dfce9e99c9011d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I5dfce9e99c9011d9bc61beebb95be672) filed opinions concurring in the judgment.

Facts of the case

On February 11, 1985, a Florida Highway Patrol officer stopped Martin Wells for speeding and smelled alcohol on his breath. Wells was arrested for driving under the influence and taken to the police station for a breathalyzer test. While in custody, police told Wells that his car would be impounded, and he granted permission to the officer to open the trunk. An inventory search of the car at the impoundment revealed two marijuana cigarette butts and a locked suitcase in the trunk. Under the direction of a trooper, impoundment employees opened the suitcase and found a garbage bag of marijuana.

Wells was charged with possession of a controlled substance. He moved to suppress the marijuana evidence by arguing that it was seized in violation of the Fourth Amendment. The trial court denied the motion. Wells pleaded nolo contendere but reserved the right to appeal on the motion to suppress. The Florida District Court of Appeal for the Fifth District reversed the ruling on the motion to suppress, and the Florida Supreme Court affirmed.

Question

Does the Fourth Amendment allow the police to open closed containers during an inventory search where the suspect gave permission to open the truck where the container was found?

Conclusion

No. Justice William H. Rehnquist delivered the opinion for five members of the court. The Supreme Court held that there must be a policy in place that determines whether inventory searches include opening closed containers or not. Such a policy allows the situation to be regulated. Absent such a policy, as in this case, the search is not regulated sufficiently to be permissible under the Fourth Amendment. The Fourth Amendment does allow police officers to use discretion in determining whether a container can be opened based on the nature of the search.

Justice William J. Brennan, Jr. wrote an opinion concurring in the judgment where he argued that there must be a standard inventory search policy in place that limits police discretion to prevent the abuse of a suspect’s Fourth Amendment rights. Justice Thurgood Marshall joined in the opinion. In his separate opinion concurring in the judgment, Justice Harry A. Blackmun argued that the majority opinion went beyond the bounds of the case by allowing individual police discretion to determine whether to open a sealed container in an inventory search. Justice John Paul Stevens also wrote an opinion concurring in the judgment where he argued that the majority opinion represented blatant judicial activism by granting certiorari to a case that the Florida Supreme Court adequately handled. He also wrote that the majority’s opinion on the issue of police discretion extended beyond the question at hand.

# Colorado v. Bertine

#### United States Supreme Court 479 U.S. 367 (1987)

#### Rule of Law

**A police officer’s warrantless inventory search of closed containers inside an automobile, conducted pursuant to an established inventory policy, does not violate the Fourth Amendment to the U.S. Constitution.**

# \*\*RILEY v. CALIFORNIA\*\*

#### United States Supreme Court 573 U.S. 373 (2014)

#### Rule of Law

**Under the Fourth Amendment, the government may not conduct a warrantless search of the contents of a cell phone seized incident to an arrest absent exigent circumstances.**

#### Facts

Police searched David Riley (defendant) incident to an arrest and seized his smartphone from his pocket. The police searched the smartphone and used items found on it as evidence at Riley’s trial on shooting charges brought by the State of California (plaintiff). Riley was convicted. On appeal, the state court of appeal determined that the warrantless search was a valid search incident to arrest. In a consolidated case, Brima Wurie (defendant) had his flip-phone seized from his person incident to an arrest for drug sales. Police used items seized from the flip-phone to secure a search warrant for Wurie’s residence. The district court admitted evidence found in the residence at trial, but on appeal, the federal court of appeals held that the evidence was the fruit of an illegal search of the flip-phone. The United States Supreme Court granted certiorari on both cases.

#### Issue

Under the Fourth Amendment, may the government conduct a warrantless search of the contents of a cell phone seized incident to an arrest absent exigent circumstances?

#### Holding and Reasoning (Roberts, C.J.)

No. Police officers generally must secure a warrant before conducting a search of the contents of a cell phone seized incident to an arrest. The search of a person incident to an arrest is a valid exception to the warrant requirement of the Fourth Amendment to the United States Constitution. This exception is permitted for the safety of the arresting officer and to prevent destruction of evidence. *Chimel v. California*, 395 U.S. 752 (1969). There is no safety risk posed to an officer by a cell phone beyond a preliminary search to make sure the phone does not house a blade or other small weapon. Searching the contents of a cell phone is distinguishable from the approved warrantless search of a cigarette pack. *See* *United States v. Robinson*, 414 U.S. 218 (1973). To the extent that a search of the contents of a cell phone might indirectly affect officer safety by alerting of potential danger, the separate exigent-circumstances warrant exception may apply. Once officers have secured a cell phone, there is little risk of destruction of evidence stored on the phone. The government concerns of destruction of evidence via remote wiping or data encryption goes beyond the concern in *Chimel* that a defendant can destroy that which is within reach. An additional justification for searches incident to arrest is the diminished privacy rights of a defendant once an arrest occurs. Although the search of a cigarette pack incident to arrest is acceptable, a complete search of a defendant’s house or cell phone is not. The search of the data on a cell phone is a major invasion of privacy due to the quality and quantity of personal information stored on cell phones. Here, the government argues that, pursuant to *Arizona v. Gant*, 556 U.S. 332 (2009), a warrantless search of a cell phone is justified when the cell phone is reasonably believed to contain evidence of the crime of arrest. *Gant* applied to searches of vehicles, however, and the search of a cell phone cannot possibly be limited in any reasonable fashion. The government may not conduct a warrantless search of cell phone incident to arrest; rather, the government must secure a warrant or demonstrate exigent circumstances. Accordingly, the judgment of the state court of appeal is reversed, and the judgment of the federal court of appeals is affirmed.

#### Concurrence (Alito, J.)

The history of the search-incident-to-arrest warrant exception is based more on probative evidence than on officer safety and destruction of evidence. The majority is correct, however, in holding that the rules of a physical search do not apply to cell-phone data. The state legislatures are better suited to address this issue through new laws than federal courts are through Fourth Amendment decisions.

***Riley v. California*** was lauded by digital privacy advocates as preserving the privacy of personal data on a cell phone.

**Key Terms:**

**Fourth Amendment -** An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Search Incident to Arrest** - An exception to the Fourth Amendment prohibition of unreasonable searches and seizures that allows a police officer making a lawful arrest to perform a search of a suspect or the area under the suspect’s control, without a warrant or probable cause.

**Riley v. California**

573 U.S. 373 (2014)

Opinion by: Roberts

**Facts: (**2 cases discussed)Riley was arrested on a weapons charge and a smart phone was seized from his pocket. The officer found evidence of gang activity and a detective later examined the phone more thoroughly and found photos and videos that were later introduced into evidence at Riley’s trial for a recent shooting. On appeal, the evidence was ruled to have been lawfully obtained in a valid search incident to arrest.

Wurie was arrested for a drug sale and police found a flip phone on him. It was receiving multiple calls from a number titled “my house “. The officer accessed the call log to determine the identity of the number. This led to an issuance of a search warrant for Wurie’s apartment. The evidence found in his home was admitted at trial, but on appeal, the evidence was held to be “fruits of an illegal search of the phone”.

**Issue:** Whether police without a warrant, may search digital information on a cell phone seized from an arrested individual.

**Rule:** No, a warrant is required prior to searching someone’s phone.

**Analysis:** Cell phones contain vast amounts of personal information. United States and California argued on three cases: Robinson, Chimel, and Gant.

The Court ruled *Robinson* does not apply because it referred to a brief physical search of an arrestee. It regarded any privacy interests retained by an individual after arrest are significantly diminished by the fact of the rest itself. The search of the cigarette pack on Robinson was a reasonable protective measure. In this case, once the officer secured the phone and eliminated any potential threats, the data on the phone endangered no one. Cell phones are different in that they place vast quantities of personal information… different from a brief physical search. Just because an arrestee has diminished privacy interests does not mean the fourth amendment falls out of the picture entirely.

*Chimel* identified two risks....harm to officers and destruction of evidence during arrest. It’s different to seach someone’s pockets versus ransacking someone’s entire house for anything and everything that might incriminate them. A government’s search of a modern day phone would turn up far more than even an exhaustive house search.

In both Riley and Wurie, the officers could have seized and secured the cell phones to prevent destruction of evidence while seeking a warrant. Once the officer has the phone, there is no longer any risk that the arrestee will be able to delete incriminating information. US and California then argued evidence could be remotely wiped or data encrypted. The Court felt there was little reason given to believe either problem is prevalent. Nonetheless, remote wiping can be prevented by powering off the phone or removing the battery. It can also be placed in a location that isolates the phone from radio waves. The Court went on to say “ if police are truly confronted with a now or never situation, for example circumstances suggesting that a defendant’s phone will be the target of an imminent remote wipe attempt, they may be able to rely on exigent circumstances to search the phone immediately”.

*Gant*- United States asked that *Gant* be the standard for search of an arrestee’s cell phone whenever it is reasonable to believe the phone contains evidence of the crime of arrest. *Gant* relied on “circumstances unique to vehicle context”. The Court ruled *Gant* provided no practical limit to all cell phone searches. *Gant* protected against searches for evidence of past crimes. On cell phones, it’s reasonable that incriminating information will be found regardless when the crime occurred. United States also offered limits could be placed on what areas of the phone and scope officers could search. The Court states this would impose few meaningful constraints on the officers…this approach would still result in a large sweep of information. How can officers say for certain what information will be found where?

The Court’s cell phone discussion: Digital data stored on a cell phone cannot itself be used as a weapon. Officers are free to examine the physical aspects of the phone to ensure it’s not used as a weapon… check for a hidden razor blade under the cover, etc. Once an officer gains control of the phone, there is no longer danger to themselves or destruction of evidence. California and the United States suggest that a search of cell phone data might help ensure officer safety... alerting officers that accomplices of the arrestee are headed to the scene... This argument fell flat because they did not provide any evidence to suggest their concerns are based on actual experience.

The Court discussed the recording/detailed storing of information ability of current day phones.... thousands of text messages, phone calls, pictures, internet browsing history, calendars, 1,000 number phone books, prescriptions, insurance information, health concerns, movements, locations, bank statements, apps (33 is the average), videos, cloud information...endless amount of personal information. Cell phones today have the capacity to convey far more information than previously possible. The same cannot be said for a photograph or two, or reminder note tucked into a wallet that would turn up in pat down. Previously people did not typically carry around a horde of sensitive personal information with them every day, now they do. Referring to the cloud, United States conceded a search may not extend to the cloud. Such a search would be like finding a key in someone’s pocket and arguing that is allowed law enforcement to unlock and search a house. The Court asked how would officers know the information on the cell phone they were searching was locally stored at the time of the arrest or has it been pulled from the cloud?

*Smith v. Maryland-* The United States argued officers should always be able to search a call log based on *Smith,* as they did in Wurie’s case. The Court rejected this argument because the officer’s searched Wurie’s phone to identify the number…not a third party log as in *Smith*.

**Conclusion:** Information on a cell phone is not immune to search, but a warrant is required before a search can occur. There is an exigent circumstance exception: where the facts are so compelling that a warrantless search would be objectively reasonable under the 4th andment. Examples given are a suspect texting an accomplice who is preparing to detonate a bomb, or a child abductor who might have information about child’s location on his phone.

***Riley v. California***

Rule: Absent exigent circumstances, police cannot search a cell phone incident to arrest. Evidence recovered is inadmissible and warrantless search violates the 4th amendment.

During the search of a person after arrest, police went through arrestee’s cell phones and found incriminating information used a trial. US SC ruled police may search a person incident to arrest but they cannot go through a cell phone if found. They can search the cover of a phone to make sure nothing dangerous (razor blade) is hidden, but they cannot search phone’s contents unless exigent circumstances exist….ex: cell phone is suspected to be connected to an immediate bomb threat.

***Riley v. California*, 573 US 373 (2014)**

**Two cases that involve police searching (in various ways) cell phones following arrest.**

**May the police search data on cell phones without a warrant pursuant to the search-incident-to-arrest exception to the warrant requirement?**

**NO, Police generally need a warrant to search a cell phone.**

# United States v. Robinson

#### United States Supreme Court 414 U.S. 218 (1973)

#### Rule of Law

**During a lawful arrest, it is reasonable under the Fourth Amendment to search the person being arrested.**

***United States v. Robinson*** extended the search incident to arrest exception to minor offenses. It also clarified that arresting officers may open containers found during search, even without probable cause.

**Facts:** Robinson (defendant) was arrested for driving with an expired license. The arresting officer proceeded to search Robinson and during the pat-down, he felt something in Robinson’s breast pocket. After removing the object, the officer discovered it was a cigarette packet and upon opening the packet, the officer discovered capsules of heroin. The heroin was introduced as evidence at trial and Robinson was convicted. The court of appeals disagreed with the admission of the heroin holding that a search incident to arrest is only permissible if the officer seeks evidence related to the crime or if the officer undertakes a protective search to ensure the arrestee is not armed. Since no evidence of Robinson driving with an expired license would be found on his person, the court of appeals held that only a search for weapons was justified and the officer testified that he knew the object was not a weapon.

# Chimel v. California

#### United States Supreme Court 395 U.S. 752 (1969)

#### Rule of Law

**Incident to a lawful arrest, a warrantless search of the area in possession and control of the person under arrest is permissible under the Fourth Amendment.**

In ***Chimel***, the Supreme Court clarified the permissible scope of a search incident to arrest.

**Facts:** Pursuant to a valid arrest warrant, the police went to Chimel’s (defendant) home to arrest him for the burglary of a coin shop. Chimel’s wife let the police inside and when Chimel returned home they arrested him. Without a search warrant and without permission, the police then conducted a complete search of Chimel’s home. The police instructed Chimel’s wife to remove items from drawers and eventually the police found and seized a number of coins, medals and tokens. Over Chimel’s objection, these items were introduced at trial. The appellate courts affirmed the decision holding that the search of Chimel’s home was valid as a search incident to a lawful arrest.

# Arizona v. Gant

#### United States Supreme Court 129 S.Ct. 1710 (2009)

#### Rule of Law

**Police may search a vehicle after a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe that crime-related evidence is located in the vehicle.**

**Facts:** Gant (defendant) was arrested for driving with a suspended license shortly after getting out of his car. He was handcuffed and then put in the back of a police car. With Gant secured in the police car, officers proceeded to search the passenger compartment of his vehicle and found a gun and cocaine. Gant was charged with possession of a narcotic drug and drug paraphernalia. At a preliminary hearing, Gant moved to suppress the drug evidence because he felt that the decision in New York v. Belton, 453 U.S. 454 (1981), did not allow police to search his vehicle after he was secured in the police car, since he posed no threat to the officers and he was arrested for an offense for which no evidence could be found in his car. At trial, his motion to suppress was denied and he was convicted. The Supreme Court of Arizona, however, upheld the motion, claiming the search violated the Fourth Amendment. The United States Supreme Court granted certiorari.

# Smith v. Maryland

#### United States Supreme Court 442 U.S. 735 (1979)

#### Rule of Law

**A person has no legitimate expectation of privacy in information that the person voluntarily turns over to third parties.**

#### Facts

Patricia McDonough was the victim of a robbery. She gave the police a description of the robber and of a 1975 Monte Carlo automobile that she had witnessed during the robbery. McDonough later received threatening phone calls from a man who claimed to be the robber. On one occasion, the man asked McDonough to step out on her front porch. McDonough did so and witnessed the 1975 Monte Carlo that she had earlier described to police moving slowly past her home. Police saw a man who met McDonough's description driving the same car in McDonough’s neighborhood. The police traced the license plate number and learned that the car was registered to Michael Lee Smith (defendant). Without obtaining a warrant, the police requested the telephone company to install a pen register at its central offices to record the numbers dialed from Smith’s home. The pen register showed that Smith later placed another call to McDonough. The State of Maryland (plaintiff) charged Smith with robbery. Prior to trial, Smith attempted to suppress the pen register because the police did not obtain a warrant. A jury convicted Smith, and the court of appeals affirmed. Smith appealed, arguing that the police's use of the pen register constituted an unlawful search under the Fourth Amendment and that he had a reasonable expectation of privacy in his home. The United States Supreme Court granted certiorari.

#### Issue

Does a person have a legitimate expectation of privacy in information that the person voluntarily turns over to third parties?

#### Holding and Reasoning (Blackmun, J.)

No. A person has no legitimate expectation of privacy in information that the person voluntarily turns over to third parties. It is public knowledge that the phone company keeps records of people’s outgoing calls so when people make calls they are voluntarily making public who they call. In this case, while Smith made the phone call in the privacy of his home, he only had a reasonable expectation that his conversation would remain private, not that the number he called would remain out of the public record. Therefore, even if Smith believed he had an expectation of privacy in the number he dialed, this expectation was not reasonable and the use of a pen register does not constitute a search under the Fourth Amendment. The ruling of the court of appeals is affirmed.

#### Dissent (Marshall, J.)

Even assuming that people know the phone companies keep records of outgoing calls, such voluntary disclosure to a third party does not mean people have assumed the risk that the information will be passed on to the police. Furthermore, people should not be expected to assume such risks that a free and open society would condemn.

#### Dissent (Stewart, J.)

The Fourth Amendment should apply to phone numbers that a person dials in the privacy of his or her home or office. First, this information comes from places where a person has a reasonable expectation of privacy. And second, revealing who a person speaks with on the phone actually reveals intimate details about his or her life.

**Key Terms:**

**Fourth Amendment -** An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

# Weeks v. United States

#### United States Supreme Court 232 U.S. 383 (1914)

#### Rule of Law

**The United States and federal officials are prohibited from executing unreasonable searches and seizures upon people.**

# January 14, 2021

# Chapter 3, Section 8 – Stop and Frisk

# State v. Daniel, 12 S.W.3d 420 (Tenn. 2000)

# Chapter 3, Section 9 – Consent Searches

# State v. Berrios, 235 S.W.3d 99 (Tenn. 2007)

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# Chapter 3, Section 8 – Stop and Frisk

**Camara v. Municipal Court**

United States Supreme Court  
387 U.S. 523 (1967)

**Rule of Law**

**Under the Fourth Amendment, routine administrative searches require consent or a warrant.**

**Facts**

On November 6, 1963, a San Francisco Housing Inspector entered the apartment building where Roland Camara (defendant) resided to make a routine inspection. After being told that Camara was living on the ground floor in violation of the building’s occupancy permit, the inspector demanded to inspect the area. Camara refused to allow the inspector in without a search warrant that day and again when the inspector returned. Camara was issued a citation requiring appearance at the office of the district attorney. When Camara did not appear, inspectors returned to the building demanding entry pursuant to § 503 of the Housing Code. Camara refused. A complaint was filed, and Camara was charged and later arrested for refusing the inspection. While he was awaiting trial, Camara brought an action in state trial court for a writ of prohibition. The court denied the writ, and the appellate court affirmed. The state supreme court declined to hear the case, and the action came before the United States Supreme Court.

**Issue**

Does a routine administrative search require a prior judicial warrant?

**Holding and Reasoning (White, J.)**

Yes. Under the Fourth Amendment, routine administrative searches require consent or a warrant. In general, entry and search of private property without consent or a warrant is considered unreasonable under the Fourth Amendment. Although a routine inspection does not present the same threat to privacy that an investigative search by police does, the protections of the Fourth Amendment are not limited to individuals suspected of crime. Further, violations of health and safety codes carry criminal penalties. Requiring a warrant protects an occupant from unauthorized searches without limiting the ability of government agencies to canvass a particular area. Public interest does not require an exception to the warrant requirement; health and safety inspections can still be performed effectively without the exception. Thus, the balancing test under the Fourth Amendment favors the individual’s privacy interest and requires consent or a warrant for administrative searches. However, obtaining a warrant does not require probable cause that the particular place to be inspected is in violation of the code. The governmental goals of detecting public hazards and ensuring compliance with minimum safety standards requires that officials be able to consider the relevant circumstances for inspecting an entire area, not a specific building. Area inspections are the accepted, effective technique for discovering often concealed hazards and do not intrude upon personal privacy as much as an investigative search for evidence of criminal activity. Therefore, routine administrative searches require consent or a warrant, and that warrant can be obtained by showing probable cause to inspect an entire area. Probable cause for an area code-enforcement-inspection exists if reasonable legislative and administrative standards for conducting the area inspection are satisfied with respect to a particular dwelling. Such standards will depend on the nature of the municipal program being enforced. They may be based on the passage of time, the nature of the building, or the condition of the entire area. They do not require specific knowledge of the condition of the particular dwelling. Here, the housing inspectors tried to enter Camara's home without a warrant. However, Camara had a constitutional right to insist that the inspectors obtain a warrant to search his home, and accordingly, he may not be convicted for refusing to consent to the inspection. The judgment is vacated, and the case is remanded so that a writ of prohibition may be issued to the criminal court.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Administrative Search -** A search of property for public health and safety, rather than investigative, purposes.

**\*\*TERRY v. OHIO\*\***

United States Supreme Court  
392 U.S. 1 (1968)

**Rule of Law**

**When an officer observes unusual conduct that reasonably leads him to assume that criminal activity is afoot and that the people he is interacting with are armed, the police officer may conduct a limited search for weapons.**

**Facts**

An experienced police officer observed two men outside a store. Several times, the men walked up to the store window, peered inside, and then walked away. The officer found this behavior suspicious and suspected the men of planning a robbery of the store. At trial, the officer also testified that he thought the men may be armed. The officer approached the men and identified himself as the police. When the men merely mumbled answers in response to his inquiries, the officer grabbed Terry (defendant), spun him around, and patted down his outer clothing to determine whether Terry was armed. The officer discovered a gun in Terry’s coat pocket. The officer then conducted the same type of pat down of the other man and discovered a gun on him as well. Both men were charged with carrying a concealed weapon and Terry was convicted.

**Issue**

Absent probable cause, may a police officer detain a person on the street and conduct a limited search for weapons?

**Holding and Reasoning (Warren, C.J.)**

Yes. When an officer observes suspicious conduct that reasonably leads him to believe that a crime is occurring or about to occur, the officer may identify himself as a police officer and make an initial inquiry. If after this the officer still believes a threat to himself or others exists, the officer may conduct a limited search for weapons. When a police officer stops someone on the street, that person is “seized” because he is not free to simply walk away, and Fourth Amendment protections apply. Similarly, a pat-down of someone’s outer clothes constitutes a Fourth Amendment search. The Fourth Amendment prohibits unreasonable searches and seizures. Therefore, the issue to be decided here is whether the police action was reasonable. This involves asking whether the stop itself was reasonable and also whether the scope of the search is reasonable in light of the circumstances that warranted the temporary seizure in the first place. The officer must be able to articulate those facts that led him to intrude on a person’s Fourth Amendment rights. To determine reasonableness, the government’s interests of effective law enforcement and officer safety must be weighed against Terry’s Fourth Amendment right to privacy. If the stop and search is deemed to be unreasonable, the evidence obtained cannot be used at trial pursuant to the exclusionary rule. However, the exclusionary rule is aimed at preventing police misconduct and the rule is therefore limited in situations where other concerns, such as police safety, trump such an evidentiary concern. Therefore, a police officer’s interest in his own safety and the safety of others outweighs an individual’s Fourth Amendment rights when an officer lawfully stops a citizen on the street, and the officer may conduct a search for weapons if he reasonably believes, based on specific facts, that the person is armed. In this case, the officer acted reasonably. Based on their behavior, it was reasonable for the officer to assume the two men were planning a robbery. The government’s interest in law enforcement trumps any minimal invasion of privacy the two men may have experienced when the officer approached them to talk. Furthermore, the officer’s pat-down was reasonable because his concerns were not abated by what the two men had to say; it was reasonable to assume that two men planning a robbery would be armed; the pat-down was limited to a search for weapons; and, most importantly, the officer’s interest in his own safety outweighed the privacy interest of the two men. The judgment is affirmed.

**Concurrence (Harlan, J.)**

If an officer reasonably stops a citizen on the street, to ensure his own safety, the officer may immediately search the citizen and need not first question him.

**Concurrence (White, J.)**

A citizen who is stopped on the street by an officer need not answer the officer’s questions. The refusal to answer, while maybe heightening the officer’s suspicions, is alone no basis for arrest.

**Dissent (Douglas, J.)**

A magistrate needs probable cause before he may issue a warrant. Therefore, today’s holding, that police may conduct a search and seizure based only on reasonable suspicion, gives police greater authority than a judge.

# *Terry* was the first time the Court permitted a warrantless search for less than probable cause.

# Key Terms:

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Terry v. Ohio**

**This case was the first time the Court permitted a warrantless search for less than probable cause.**

(My thoughts on this case: if the detective had not been plain-clothes would it have made a difference? Also, were the men Black? Chief Justice Warren talks about race in his opinion).

**1968, Chief Justice Warren delivered the opinion**

**Facts**

Cleveland plainclothes detective becomes suspicious of 2 men standing on a downtown street corner about 2:30pm. One of the men walks up the street, looks into a store, walks on, starts back and looks into the same store. He then goes to the other man and confers with him. This happens about a dozen times. They also talk to a 3rd man and then follow him up the street about 10 minutes after he leaves. The detective thinks they may be casing the store to rob it and might be armed. The detective follows the 3 and confronts them. He identifies himself and asks for their names**.** The men mumble something and Terry (one of the men) and the detective spins Terry around and pats his breast pocket. He felt a pistol and took it. He frisked the other man also found a pistol. The 3rd man did not have a weapon and wasn’t searched further.

Terry was charged with carrying a concealed weapon

He moved to suppress the weapon as evidence.

The motion was denied by the trial judge, who upheld the officer’s actions on a stop and frisk theory.

The Ohio court of appeals affirmed and the state supreme court dismissed Terry’s appeal.

(Info from Quimbee says the officer had been patrolling this area for over 30 years and had never seen these people before in the area.)

**Issue**: Does a stop and frisk violate the 4th amendment if it lacks probable cause?

Was Terry’s right to personal security violated by an unreasonable search and seizure?

**Rule of Law**: When an officer observes unusual conduct that reasonably leads him to assume that criminal activity is afoot and that the people he is interacting with are armed, the police officer may conduct a limited search for weapons.

**Chief Justice Warren**:

“We would be less than candid if we did not acknowledge that this question thrusts to the fore difficult and troublesome issues regarding a sensitive area of police activity – issues which have never before been squarely presented to this court.”

**ON ONE HAND**, it is frequently argued that in dealing with rapidly unfolding and often dangerous situations on city streets the police are in need of an escalating set of flexible responses, graduated in relation to the amount of information they possess.

Distinctions should be made between a “stop” and an “arrest” (or a “seizure” of a person) and between a “frisk” and a “search.”

It is argued that the police should be allowed to “stop” a person and detain him briefly for questioning upon suspicion that he may be connected with criminal activity. Upon suspicion he may be armed, the police should have the power to “frisk” him for weapons. If the “stop” and the “frisk” give rise to probable cause to believe that the suspect has committed a crime, then the police should be empowered to make a formal “arrest” and a full incident “search” of the person.

The notion is that a “stop” and a “frisk” amount to a mere “inconvenience and petty indignity” which one can properly be imposed upon the citizen in the interest of effective law enforcement on the basis of a police officer’s suspicion.

**ONE THE OTHER SIDE**:

The argument is made that the authority of the police must be strictly circumscribed by the law of arrest and search as it has developed to date in the traditional jurisprudence. ….There is not…and cannot be – a variety of police activity which does not depend solely upon the voluntary cooperation of the citizen and yet which stops short of an arrest upon probable cause to make such an arrest. The heart of the 4th Amendment, the argument runs, is a severe requirement of specific justification upon protected personal security, coupled with a highly developed system of judicial controls to enforce upon the agents of the State for commands of the Constitution.

**Analysis**

The issue is not the abstract propriety of the police, but the admissibility against petitioner of the evidence uncovered by the search and seizure. A ruling admitting evidence in a criminal trial has the necessary effect of legitimizing the conduct which produced the evidence, while an application of he exclusionary rule withholds the constitutional ***imprimatur*** (def: a person’s acceptance or guarantee that something is of good standard).

The exclusionary rule has its limitations as a tool of judicial control.

(Exclusionary rule: a law the prevents evidence collected or analyzed in violation of the D’s constitutional rights from being used in a court of law. The exclusionary rule is grounded in the 4th Amendment in the Bill of Rights and is intended to protect citizens from illegal searches and seizures.)

Street encounters between citizens and police officers are rich in diversity. They range from friendly exchanges of pleasantries to hostile confrontations. Some start friendly and take a different turn. Some encounters are wholly unrelated to a desire to prosecute for crime.

Doubtless, some “field interrogations” conduct violates the 4th Amendment. Regardless of how effective the rule may be where obtaining convictions is an important objective of the police, it is powerless to deter invasions of constitutionally guaranteed rights where the police either have no interest in prosecuting or are willing to forego 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 rule**. ,,,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.

**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 probably cause for an arrest?

It is quite plain that the 4th Amendment governs “seizures” of the person which do not eventuate a trip to the station house and prosecution for crime – “arrests.” It must be recognized that when a police officer accosts an individual and restrains his freedom to walk away, he has “seized” that person…..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.”

It is fantastic to urge that such a procedure performed in public by a policeman while the citizen stands helpless, perhaps facing a wall with his hands raised is a “petty indignity.” **It is a serious** **intrusion upon the sanctity of the person**…**and not to be undertaken lightly**.

Officer McFadden “seized” the petitioner and subjected him to a search when he took hold of him and patted down the outer surfaces of his clothing.

We must decide if it was reasonable for Officer MdFadden to have interfered with petitioner’s  
personal security as he did. …Unreasonable – our inquiry is a dual one

1. whether the officer’s action was justified at its inception
2. whether it was reasonably related in scope to the circumstances which justified the interference in the first place

**We do not retreat from our holdings that the police, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant process… or that in most instances failure to comply with the warrant requirement can only be excused by exigent circumstances. …Swift action predicated upon on-the-spot observations of the officer on the beat – which historically has not been, and as a practical matter could not be, subjected to the warrant procedure.**

The conduct in this case must be tested by the 4th Amendment’s general proscription against unreasonable searches and seizures.

In order to assess the reasonableness Officer MeFadden’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 balancing the need to search (or seize) against the invasion which the search (or seize) entails.** The police must be able to point to specific and articulable facts, which taken together, reasonable warrant that intrusion. (Top of pg 281)

The 4th Amendment becomes meaningful 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 of seizure in light of the particular circumstances. In making this assessment it is imperative that the facts be judged upon an OBJECTIVE standard. Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more than substantial than inarticulate hunches, a result this court has consistently refused to sanction.

**APPLYING THESE PRINCIPLES**: we must consider the nature and extent of the governmental interests involved

1. effective crime prevention and detection – this underlies that an officer may approach a person for investigating possibly criminal behavior even though there is no probable cause to make an arrest. Officer McFadden had observed Terry through a series of acts that together warranted further investigation. (See more of this on pg 282)
2. There is an 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. …every year in this country many law enforcement officers are killed in the line of duty

**Weaknesses in Petitioner’s line of reasoning: page 283**

The petitioner does not that an officer is always unjustified in searching a suspect to discover weapons. Rather, it is unreasonable for the policeman to take that step until such time as the situation evolves to the point where there is probable cause.

**FIRST**: this recognizes no distinction in purpose, character, and extent between a search incident to an arrest and a limited search for weapons. The former can involve a relatively extensive exploration of the person. The search for weapons must be strictly circumscribed by the exigencies which justify its initiation.

**SECOND**: it assumes the law of arrest has already worked out the balance between the particular interests involved here – the neutralization of danger to the policeman and the sanctity of the individual. But this is not so. An arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons. An arrest is the initial stage of a criminal prosecution. …the search for weapons constitutes a brief intrusion upon the sanctity of the person. A perfectly reasonable apprehension of danger may arise long before the officer is possessed of adequate information to justify taking a person into custody for the purpose of prosecuting him for a crime. (top of page 284)

**We conclude** that there must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has a reason to believe he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime. **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…not unparticularized suspicion or “hunch” but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.**

The actions of Terry and Chilton were consistent with McFAdden’s hypothesis that these men were contemplating a daylight robbery…which would likely involve the use of weapons. There was nothing to indicate abandonment of an intent to commit a robbery at some point. The record evidences the (the officer) had to make a quick decision as how to protect himself and others and took limited steps to do so (by patting down Terry).

**A protective search for weapons, unlike a search without a warrant incident to a lawful arrest, is not justified by any need to prevent the disappearance or destruction of evidence of a crime. The sole justification is the protection of the police officer (page 285**).

Officer McFAdden didn’t place his hands in their pockets or under their garments, he merely reached for and removed the guns. He never did invade Katz’s person.

**We conclude that the revolver seized from Terry was properly admitted in evidence against him. (pg 285-286)**

**“A policeman 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 4th Amendment and any weapons seized may properly be introduced in evidence against the person from whom they were taken.”**

**AFFIRMED**

**Justice Harlan concurring: “The holding has 2 logical corollaries that I do not think the Court has fully expressed.” (Page 286)**

1. if the frisk is justified in order to protect the officer during an encounter with a citizen, the officer must first have constitutional grounds to insist on an encounter, the make a FORCIBLE stop. Any person, including an officer, is at liberty to avoid a person he considers dangerous. I would make it perfectly clear that the right to frisk in this case depends upon the reasonableness of a forcible stop to investigate a suspected crime.
2. Where such a stop is reasonable, the right to frisk must be immediate and automatic if the reason for the stop is, as here, an articulable suspicion of a crime of violence…frisk must be rapid and routine. There is no reason why an officer…should have to ask one question and take the risk that the answer might be a bullet.

**Justice White concurring**: I think an additional word is in order concerning the matter of interrogation during an investigative stop. There is nothing in the Constitution which prevents a policeman from addressing questions to anyone on the streets. Absent special circumstances, the person approached may not be detained or frisked but may refuse to cooperate and go on his way. ….it seems to me the person may be briefly detained against his will while pertinent questions are directed to him. The person stopped is not obliged to answer…and refusal to answer furnishes no basis for an arrest, although it may alert the officer to the need for continued observation.

**JUSTICE DOUGLAS DISSENTING**: page 288

Had a warrant been sought, a magistrate would, therefore, have been unauthorized to issue one, for he can act only if there is a showing of “probable cause.” We hold today that the police have greater authority that make a “seizure” and conduct a “search” than a judge has to authorize such action. We have said precisely the opposite over and over again. The infringement on personal liberty of any “seizure” of a person can only be “reasonable” under the 4th 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 about to commit a particular crime.

***Footnotes re:*** *search: the officer must feel with sensitive fingers every portion of the prisoner’s body. A thorough search must be made of the prisoner’s arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.*

*We cannot tell with any certainty upon this record whether any such “seizure” took place prior to Officer McFadden’s initiation of physical contact for purposes of searching Terry for weapons, and we thus may assume that up to that point no intrusion upon constitutionally protected rights had occurred.*

***Heien v. North Carolina*** *“the Court has long “recognized that searches and seizures based on mistake of fact can be reasonable.” The Court held “But reasonable men make mistakes of law, too, and such mistakes are no less compatible with the concept of reasonable suspicion. Reasonable suspicion arises from the combination of an officer’s understanding of the facts and his understanding of the relevant law. The officer may be reasonably mistaken on either ground. The Heine majority did not elaborate upon its holding other than to say that its ruling extwnded only to mistakes of law that were “objectively reasonable” meaning “the subjective understanding of the particular officer involved” is not controlling ; and that the inquiry is not as forgiving as the one employed in the distinct context of deciding whether an officer is entitled to qualified immunity for a constitutional or statutory violation., meaning an officer can gain no 4th Amendment advantage through a sloppy study of the laws he is duty-bound to enforce.*

***Terry v. Ohio* 392 US 1 (1968)**

**A Cleveland detective observed two men (Terry and Chilton) on a street corner. They were walking back and forth pausing to stare in the same store window, which they did for a total of about 24 times. Each completion of the route was followed by a conference between the two on a corner, at one of which they were joined by a third man (Katz) who immediately departed. The detective suspected the men of casing the store. He followed them and saw them rejoin the third man a couple of blocks away in front of a store. The officer approached the three, identified himself as a policeman, and asked their names. The men "mumbled something," whereupon the detective spun Terry around, patted down his outside clothing, and found in his overcoat pocket, but was unable to remove, a pistol. The officer ordered the three into the store. He removed petitioner's overcoat, took out a revolver, and ordered the three to face the wall with their hands raised. He patted down the outer clothing of Chilton and Katz and seized a revolver from Chilton's outside overcoat pocket. He did not put his hands under the outer garments of Katz (since he discovered nothing in his pat-down which might have been a weapon), or under petitioner's or Chilton's outer garments until he felt the guns. The three were taken to the police station. Petitioner and Chilton were charged with carrying concealed weapons. The defense moved to suppress the weapons. Trial Court denied. D’s convicted. Affirmed. State Supreme Court did not hear. Appeal to SCOTUS.**

**Issue: Whether it is always unreasonable for police to seize a person and subject him to a limited search for weapons unless there is probable cause for arrest?**

**(1) Is it a search or seizure at all?**

**Yes, it is a seizure, albeit a limited one, so the 4th Amendment is implicated.**

**(2) Was it reasonable?**

**There was no warrant, so it should fall into an exception to be reasonable.**

**Court cannot find an exception, so engages in balancing individual privacy interest against government interest.**

**Court creates an exception allowing a brief investigatory seizure or “stop” based on “reasonable suspicion.”**

**(3) What is reasonable suspicion?**

**Whether officer had specific and articulable facts, which taken together with rational inferences from those facts, reasonably justify the intrusion. Would the facts available to the officer at the moment of the seizure or search allow a person of reasonable caution to believe the action taken was appropriate.**

**TERRY STOP is a time limited seizure based on reasonable suspicion of criminal activity. If it lasts too long then it becomes an arrest which must be justified by probable cause.**

**How long is too long?**

**(Government interest which justifies the seizure is the prevention, investigation, detection of crime, and apprehension of criminals)**

**TERRY FRISK is a search and is allowed if reasonable suspicion to believe the person is armed and dangerous.**

**Allows only a search to determine if the person is armed and to reach in and disarm him. Intrusion limited to what is reasonably necessary to discover gun, knives, clubs, or other hidden instruments for the assault of the officer.**

**Justified by the need to protect the officer and the nearby public.**

**PLAIN FEEL DOCTRINE – if during the pat-down for weapons the officer feels something that is obviously contraband, the officer may seize it. Does not allow for manipulation of the object to further “search” whether it is contraband.**

**Heien v. North Carolina**

United States Supreme Court  
574 U.S. 54 (2014)

**Rule of Law**

**A mistake of law can give rise to the reasonable suspicion necessary to uphold a warrantless seizure under the Fourth Amendment.**

**Facts**

The State of North Carolina (plaintiff) prosecuted Nicholas Brady Heien (defendant) on drug charges related to cocaine that a police officer found in Heien's car. The officer had stopped the car for operating with only one of its two brake lights working. The officer believed this to violate state traffic laws. The trial judge denied Heien's motion to exclude the seized cocaine from evidence. Heien was convicted and appealed to the North Carolina Court of Appeals, which reversed the trial judge's ruling. The appellate court noted that the applicable North Carolina traffic law required only one working brake light, and therefore the police officer's initial traffic stop was unjustified. Without proper justification, the officer's search of Heien's car and seizure of the cocaine violated Heien's Fourth Amendment rights. The state appealed to the North Carolina Supreme Court, which reversed the appellate court on the grounds that the officer reasonably misinterpreted an ambiguously worded traffic law, and therefore a traffic stop based on that misinterpretation was justifiable. On remand, the appellate court affirmed the trial judge's evidentiary ruling. On appeal, the North Carolina Supreme Court affirmed the appellate court judgment. Heien appealed to the United States Supreme Court, which granted certiorari.

**Issue**

Can a mistake of law give rise to the reasonable suspicion necessary to uphold a warrantless seizure under the Fourth Amendment?

**Holding and Reasoning (Roberts, C.J.)**

Yes. A mistake of law can give rise to the reasonable suspicion necessary to uphold a warrantless seizure under the Fourth Amendment. A traffic stop constitutes a seizure of the vehicle and its occupants. The police officer makes a traffic stop based on the officer's factual assumptions as to how the car is operating. To satisfy the Fourth Amendment, these assumptions need not be correct, so long as they are reasonable. The officer's stop is also based on his understanding of the applicable traffic laws. There is no reason to apply one standard to mistakes of fact and another to mistakes of law. Two centuries of cases, although not always decided under the Fourth Amendment, hold that a law enforcement officer's mistaken understanding of the law may still give the officer probable cause to make an arrest. It has also been held that an arrest made pursuant to a subsequently invalidated law nonetheless may be valid, so long as the law was not grossly or flagrantly unconstitutional when the arrest was made. These holdings are equally applicable in Fourth Amendment cases. This should not discourage officers from properly learning the law because a permissible mistake of law must be objectively reasonable and not based on a careless or sloppy study of the law.

**Concurrence (Kagan, J.)**

Where the law enforcement officer was unaware of or untrained in the applicable law, or trained improperly, the officer's mistake of law is not permissible. However, the mistake is permissible if the applicable law is ambiguous and requires hard interpretation to understand its correct meaning. In this case, the statute was ambiguous enough to justify the traffic stop.

**Dissent (Sotomayor, J.)**

A mistake of fact may be permitted because the law enforcement officer must make quick factual judgments in the field and is better positioned to make those judgments than a judge in the courtroom some time later. This consideration does not apply to the officer's judgment concerning the applicable law, which is objective and for courts to interpret. Against such a fixed yardstick, the officer should not be excused for mistaking the law's meaning.

# Key Terms:

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**United States v. Hensley**

United States Supreme Court  
469 U.S. 221 (1985)

**Rule of Law**

**If police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, a *Terry* stop may be made to investigate that suspicion.**

**Facts**

On December 4, 1981, two armed men robbed a tavern. Six days later, a police officer learned from an informant that Thomas Hensley (defendant) drove the getaway car during the robbery. The officer issued a "wanted" flyer to other police departments in the area. The flyer included information that Hensley was wanted in connection with the investigation of an armed robbery, a description of the robbery's date and location, and a request that the other police departments pick up Hensley and hold him for the investigating police department. Officers at one of the police departments that received the flyer were familiar with Hensley. On December 16, 1981, an officer from that police department saw a car stopped in the middle of the street and saw Hensley in the driver's seat. The officer asked Hensley to "move on." After Hensley drove away, the officer radioed the dispatcher to determine whether there was a warrant out for Hensley's arrest. Two other officers answered before the dispatcher and said that there may be a warrant outstanding on Hensley for the robbery. Before the dispatcher was able to confirm whether a warrant had indeed been issued for Hensley, one of the officers reported seeing Hensley's car approaching him on the street. The officer turned on his flashing lights, and Hensley pulled over to the curb. The officer approached the car with his weapon drawn and ordered Hensley and a passenger out of the car. Another officer arrived on the scene and recognized Hensley's passenger as a convicted felon. The officer went to the open passenger door and saw the butt of a revolver under the passenger's seat. Officers then arrested Hensley's passenger. A search of the car revealed two additional handguns. Hensley was arrested and charged with being a convicted felon in possession of a firearm. Hensley moved to suppress the weapons on the grounds that his stop violated the Fourth Amendment and the principles of *Terry v. Ohio*, 392 U.S. 1 (1968). The district court denied the motion to suppress and convicted Hensley after a bench trial. The appellate court reversed the conviction. The court concluded that an investigative stop under *Terry* could pertain only to the investigation of an ongoing crime. Because the stop of Hensley occurred nearly two weeks after the robbery, the appellate court held that the officers did not have a reasonable suspicion to justify the investigative stop, and thus, the evidence against Hensley was obtained during an illegal arrest. The United States Supreme Court granted certiorari.

**Issue**

If police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, may a *Terry* stop be made to investigate that suspicion?

**Holding and Reasoning (O’Connor, J.)**

Yes. The holding in *Terry*is not limited to ongoing criminal activity. If police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, a *Terry* stop may be made to investigate that suspicion. Although the circumstances surrounding the detention of a person wanted for a past crime are not as urgent or dangerous as those surrounding an ongoing crime, the interests of law enforcement in solving the completed crime nevertheless outweigh the suspect’s freedom from seizure. Forcing law enforcement to wait and obtain probable cause in these situations would undoubtedly harm their chances of solving the case, and would give the suspect the opportunity to get away. In this case, the information the initial investigating officer received from the informant gave rise to a reasonable suspicion that Hensley had been involved in criminal activity and justified an investigative stop. The justification for the stop continued to exist even after the robbery was completed, as Hensley was at large from the time of his involvement in the robbery to the time of his eventual stop by the officer from the other police department. Stopping Hensley at the first available opportunity after the reasonable suspicion arose is consistent with the Fourth Amendment. Moreover, the wanted flyer was issued on the basis of articulate facts that gave rise to a reasonable suspicion of Hensley's criminal activity, and an objective reading of the flyer would lead an experienced officer to conclude that Hensley was wanted for questioning in connection with the robbery. This justifies the stop and detention that occurred here. Furthermore, once they stopped Hensley, the officers could take reasonably necessary steps to protect their safety, including seizing evidence in plain view during the stop, *i.e.*, the revolver under the passenger's seat, and then searching the rest of the passenger compartment. Because police found the handguns in Hensley's car during this search, they had justification to arrest Hensley for possession of firearms. Accordingly, the appellate court's judgment is reversed.

# Key Terms:

**Probable Cause** - A reasonable basis, amounting to more than mere suspicion, to believe that a person has committed a crime or is about to commit a crime, or that evidence relevant to a crime exists in a particular location.

**Reasonable Suspicion** - Generally, a quantum of proof sufficient to justify an objectively reasonable person in suspecting, but not necessarily believing, that someone has committed, is committing, or is about to commit a crime. Reasonable suspicion is usually the lowest quantum of proof that the law will recognize for any purpose. It is sufficient to justify brief investigatory detentions, but not full-blown arrests, by the police.

# United States v. Place

#### United States Supreme Court 462 U.S. 696 (1983)

#### Rule of Law

**When police seize luggage from a suspect’s custody, the limitations applicable to investigative detentions of the person himself should define the permissible scope of an investigative detention of the person’s luggage on less than probable cause.**

# Michigan v. Long

#### United States Supreme Court 463 U.S. 1032 (1983)

#### Rule of Law

**(1) The U.S. Supreme Court has jurisdiction to review a state court's decision to provide a defendant with broader procedural protections than those guaranteed in the U.S. Constitution unless the state court explicitly states that its decision is based on separate, adequate, and independent state grounds.**

**(2) The search of an automobile's passenger compartment, limited to those areas in which a weapon may be placed or hidden, is permissible if a law-enforcement officer reasonably believes, based on specific and articulable facts combined with the rational inferences from those facts, that the suspect is dangerous and may gain immediate control of weapons.**

**United States v. Robinson**

United States Supreme Court  
414 U.S. 218 (1973)

#### Rule of Law

**During a lawful arrest, it is reasonable under the Fourth Amendment to search the person being arrested.**

***United States v. Robinson*** extended the search incident to arrest exception to minor offenses. It also clarified that arresting officers may open containers found during search, even without probable cause.

**Pennsylvania v. Mimms**

United States Supreme Court  
434 U.S. 106 (1977)

**Rule of Law**

**In assessing the reasonableness of a search and seizure, a court must weigh the incremental intrusiveness of the search against the public policy justifying the search.**

**Facts**

Philadelphia police officers stopped a car driven by Harry Mimms (defendant) because the car had an expired license plate. Although this was a routine traffic stop and the officers had no reason to suspect criminal activity, they ordered Mimms to exit the vehicle. After Mimms exited the car, the police noticed a bulge in Mimms's jacket. The police frisked Mimms and found a revolver under his jacket. The State of Pennsylvania (plaintiff) prosecuted Mimms for carrying a concealed gun without a permit. The trial judge denied Mimms's motion to exclude the gun from evidence. The gun was introduced into evidence, and Mimms was convicted. Mimms appealed to the Supreme Court of Pennsylvania. The state high court reversed the conviction on the grounds that, because the police ordered Mimms to exit the car without any reason to suspect his involvement in criminal activity, the seizure of Mimms's gun was unconstitutional under the Fourth Amendment to the United States Constitution. The United States Supreme Court granted certiorari.

**Issue**

In assessing the reasonableness of a search and seizure, must a court weigh the incremental intrusiveness of the search against the public policy justifying the search?

**Holding and Reasoning (Per Curiam)**

Yes. In assessing the reasonableness of a search and seizure, a court must weigh the incremental intrusiveness of the search against the public policy justifying the search. Whether a search and seizure is reasonable and therefore constitutionally permissible depends on the totality of the circumstances. The public interest must be balanced against an individual's right to personal security and freedom from arbitrary interference by law officers. In this case, the police officers' practice of ordering a driver to leave his vehicle was justified by the public interest in ensuring a policeman's safety. Many policemen have been shot and killed by vehicle occupants during routine traffic stops. Also, an officer's safety is at risk while he stands at the side of the road to question the vehicle's driver. It is safer both for the officer and the driver if the driver exits the vehicle so that both can converse on the road's shoulder and away from traffic. Balanced against these weighty considerations, the incremental intrusiveness of ordering a driver to leave his vehicle during a traffic stop is de minimis. Further, because the police officers noticed a bulge in Mimms's jacket, they were justified in suspecting that Mimms could be "armed and presently dangerous." *Terry v. Ohio*, 392 U.S. 1 (1968). In these circumstances, any reasonably cautious officer might have frisked Mimms. Both the frisking and the seizure of Mimms's gun were reasonable and constitutional. The decision of the Supreme Court of Pennsylvania is reversed, and the case is remanded for a new trial.

**Dissent (Stevens, J.)**

*Terry*was carefully drawn to apply only in narrow circumstances. Almost casually, the Court now broadens *Terry* to permit the police to order any driver out of his car, even during a routine traffic stop. This is an improper departure from traditional Fourth Amendment jurisprudence, which demands individual consideration of the circumstances in each case.

**Dissent (Marshall, J.)**

The Court significantly departs from *Terry*, in which the police officer had good reason to believe a suspect was about to commit an armed robbery and therefore presently dangerous. Here, the police officers made a routine stop and had no reason to suspect Mimms was involved in or intended any criminal conduct, or that they were in any present danger. There was no relation between the trivial reason for stopping Mimms —an expired license plate—and the intrusive step of ordering Mimms to exit his car.

# Key Terms:

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**De Minimis** - Something that is too minor to be considered.

**Terry Stop** - From *Terry v. Ohio*, 392 U.S. 1 (1968), a brief seizure by law enforcement that falls short of a traditional arrest. A *Terry* stop, or investigatory stop, is lawful if officers have a reasonable suspicion that a person is engaged in criminal activity. The stop must be limited to the amount of time reasonably necessary for officers to confirm or dispel the reasonable suspicion, and officers must use the least intrusive means to confirm or dispel the suspicion. The investigatory stop is often followed by an investigatory frisk, which is a brief patdown of the person's outer clothing in search of a deadly weapon, if the circumstances would justify a reasonable person to suspect that the person poses a danger to the officers or other people. The frisk must be strictly confined to what is necessary to discover a deadly weapon; officers may not search for contraband or other evidence of a crime.

# Marlyand v. Wilson

**Rule of Law**

**Arrest**

**Police officer may, as a matter of course, order passenger of lawfully stopped automobile to exit vehicle.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=Ibdd906309c2511d9bc61beebb95be672&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Automobiles**

**Police officer making traffic stop may order passengers to get out of car pending completion of stop.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=Ibdd906309c2511d9bc61beebb95be672&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

117 S.Ct. 882

Supreme Court of the United States

**MARYLAND, Petitioner,**

**v.**

**Jerry Lee WILSON.**

No. 95–1268.

Argued Dec. 11, 1996.Decided Feb. 19, 1997.

**Synopsis**

Passenger in automobile moved to suppress crack cocaine obtained after police officer ordered him to step out of car during traffic stop. The Circuit Court, Baltimore County, [Thomas J. Bollinger](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0106623601&originatingDoc=Ibdd906309c2511d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ibdd906309c2511d9bc61beebb95be672), J., granted motion. State appealed. The Maryland Court of Special Appeals, Moylan, J., [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Iacc482b2359111d986b0aa9c82c164c0&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[106 Md.App. 24, 664 A.2d 1,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995177342&pubNum=162&originatingDoc=Ibdd906309c2511d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed. State sought and the Maryland Court of Appeals denied certiorari. State sought certiorari. After granting certiorari, the Supreme Court, Chief Justice [Rehnquist](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0238463201&originatingDoc=Ibdd906309c2511d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ibdd906309c2511d9bc61beebb95be672), held that police officer making traffic stop may order passengers to get out of car pending completion of stop.

Reversed and remanded.

Justice [Stevens](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0156277701&originatingDoc=Ibdd906309c2511d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ibdd906309c2511d9bc61beebb95be672) filed dissenting opinion in which Justice [Kennedy](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0243105201&originatingDoc=Ibdd906309c2511d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ibdd906309c2511d9bc61beebb95be672) joined.

Justice [Kennedy](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0243105201&originatingDoc=Ibdd906309c2511d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ibdd906309c2511d9bc61beebb95be672) filed separate dissenting opinion.

**Hiibel v. Sixth Judicial Dist. Court of Nevada**

United States Supreme Court  
542 U.S. 177 (2004)

**Rule of Law**

**An arrest for failure to provide identification does not violate the Fourth Amendment so long as the request was reasonably related to the circumstances justifying the stop.**

**Facts**

Larry Dudley Hiibel (defendant) repeatedly refused to identify himself to a police officer investigating a reported assault. The officer arrested Hiibel and charged him with obstructing a police officer from performing his duty in violation of Nevada law. Hiibel was found guilty in the Justice Court of Union Township and fined $250.

**Issue**

Does an arrest for failure to provide identification violate the Fourth Amendment?

**Holding and Reasoning (Kennedy, J.)**

No. An arrest for failure to provide identification does not violate the Fourth Amendment if the request was reasonably related in scope to the circumstances which justified’ the stop. Under *Terry v. Ohio*, 392 U.S. 1 (1968), a police officer with reasonable suspicion that a suspect is or has been engaged in criminal behavior may briefly detain that person to investigate without violating the Fourth Amendment. Nevertheless, the stop must be valid at the outset, reasonably related to the facts giving rise to the stop, reasonable in length, and less than a full custodial arrest. Case law indicates that requests for identification during *Terry* stops are constitutional and serve important governmental interests in effectively investigating crimes and protecting police and others from dangerous suspects. Based on these principles, a state may legally require a suspect to identify himself during a *Terry*stop. Balancing the infringement of individual privacy interests against the achievement of legitimate governmental goals, it is clear that Nevada’s “stop and identify” statute is reasonable. The request for identification is properly related to the legitimate needs of a *Terry*stop. Further, Nevada’s law adds force to requests for identification, but does not otherwise have any affect on such stops. An officer may only arrest for failure to provide identification if the request was reasonably related to the facts giving rise to the stop, and thus this rule in no way permits police to avoid the traditional probable cause requirement for an arrest. In this case, the officer was investigating a domestic violence allegation, and the request for identification was reasonably related to the situation that justified the stop. There was no violation of the Fourth Amendment.

**Dissent (Stevens, J.)**

The arrest violates the Fifth Amendment privilege against self-incrimination.

**Dissent (Breyer, J.)**

*Terry*stops are strictly limited under the Fourth Amendment, and suspects cannot be forced to respond to questioning by police. The Court’s rule today departs from longstanding precedent and creates uncertainty for police conducting *Terry* stops.

# Key Terms:

**Probable Cause** - A reasonable basis, amounting to more than mere suspicion, to believe that a person has committed a crime or is about to commit a crime, or that evidence relevant to a crime exists in a particular location.

**Reasonable Suspicion** - Generally, a quantum of proof sufficient to justify an objectively reasonable person in suspecting, but not necessarily believing, that someone has committed, is committing, or is about to commit a crime. Reasonable suspicion is usually the lowest quantum of proof that the law will recognize for any purpose. It is sufficient to justify brief investigatory detentions, but not full-blown arrests, by the police.

**Berkemer v. McCarty**

United States Supreme Court  
468 U.S. 420 (1984)

**Rule of Law**

**Police must issue *Miranda*warnings prior to all custodial interrogations, regardless of the nature or severity of the offense.**

**Facts**

A police officer suspected that McCarty (defendant) was driving while intoxicated and pulled him over. The officer asked McCarty to step out of the car and, when McCarty could not stand up straight, the officer decided he would be charged with a traffic offense. While McCarty was not yet told he would be taken into custody, at that moment he was no longer free to leave. The officer then asked McCarty whether he had been using intoxicants. McCarty answered in the affirmative. McCarty was then arrested and brought to the police station. At the station, McCarty was again questioned. At no point was McCarty read his *Miranda* warnings. McCarty moved to exclude both his statements made during the traffic stop and his statements made at the station house.

**Issue**

Must police issue *Miranda*warnings before questioning a suspect taken into custody during a stop for a minor traffic offense?

**Holding and Reasoning (Marshall, J.)**

Yes. Police must issue *Miranda*warnings prior to all custodial interrogations, regardless of the nature or severity of the offense. However, a motorist is not subject to custodial interrogation for the purpose of *Miranda* when he is questioned on the side of the road during a routine traffic stop. It is undisputed that a traffic stop significantly infringes on a motorist’s freedom, but the concerns that the *Miranda* decision intended to alleviate are not present in a routine traffic stop. Primarily, a routine traffic stop does not create an environment where a person would feel compelled to speak and incriminate himself. First, a roadside stop is generally temporary and brief. In contrast, questioning at a stationhouse can go on for hours. Second, during a routine traffic stop, the police officers’ aura of authority and ability to intimidate is less than would be at the police station. Traffic stops generally take place where others can see, whereas questioning at a stationhouse takes place in private. Also, a motorist is likely to encounter only one or two officers, not a group of officers as is possible when questioned at the police station. In these respects, a traffic stop is akin to a *Terry* stop where no *Miranda* warnings are required either. In this case, McCarty was not in custody when he was questioned on the side of the road, and his statement is therefore admissible. Although the officer knew McCarty was not free to leave once he stepped out of the car, the officer never conveyed this information to McCarty. Therefore, because a reasonable person in McCarty’s situation would believe he was still free to leave at the end of the encounter, McCarty was not yet in custody for the purpose of *Miranda*. However, once the officer brought McCarty to the police station, McCarty knew he was no longer free to leave and the police should have read him his *Miranda* warnings. Therefore, McCarty’s statements while at the police station are inadmissible.

**Key Terms:**

**Miranda Warnings** - The notices of constitutional rights set forth in the opinion of the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436(1966) that law enforcement authorities must provide to a suspect in a criminal investigation prior to initiation of a custodial interrogation. The suspect must be advised that the suspect has the right to remain silent, anything the suspect says may be used against the suspect, and the suspect has the right to an attorney.

# Kansas v. Glover

**Rule of Law**

**Automobiles**

**An investigative traffic stop conducted after a police officer runs a vehicle's license plate and learns that the registered owner has a revoked driver's license is reasonable under the Fourth Amendment when the officer lacks information negating an inference that the owner is the driver of the vehicle.**[**U.S. Const. Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOAMENDIV&originatingDoc=I246e79c0780911ea8939c1d72268a30f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Arrest**

**The Fourth Amendment permits an officer to initiate a brief investigative traffic stop when he has a particularized and objective basis for suspecting the particular person stopped of criminal activity.**[**U.S. Const. Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOAMENDIV&originatingDoc=I246e79c0780911ea8939c1d72268a30f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Automobiles**

**Although a mere hunch does not create reasonable suspicion justifying an investigative traffic stop, the level of suspicion the standard requires is considerably less than proof of wrongdoing by a preponderance of the evidence, and obviously less than is necessary for probable cause.**[**U.S. Const. Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOAMENDIV&originatingDoc=I246e79c0780911ea8939c1d72268a30f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Automobiles**

**Because it is a less demanding standard, reasonable suspicion, as required to justify an investigative traffic stop, can be established with information that is different in quantity or content than that required to establish probable cause.**[**U.S. Const. Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOAMENDIV&originatingDoc=I246e79c0780911ea8939c1d72268a30f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Automobiles**

**The reasonable suspicion standard for initiating an investigative traffic stop depends on the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.**[**U.S. Const. Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOAMENDIV&originatingDoc=I246e79c0780911ea8939c1d72268a30f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Automobiles**

**Courts reviewing investigative traffic stop under the reasonable suspicion standard cannot reasonably demand scientific certainty where none exists.**[**U.S. Const. Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOAMENDIV&originatingDoc=I246e79c0780911ea8939c1d72268a30f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Automobiles**

**Courts reviewing investigative traffic stop under the reasonable suspicion standard must permit officers to make commonsense judgments and inferences about human behavior.**[**U.S. Const. Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOAMENDIV&originatingDoc=I246e79c0780911ea8939c1d72268a30f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Automobiles**

**Facts known to deputy at the time he stopped vehicle registered to defendant gave rise to reasonable suspicion that defendant was driving with a revoked license in violation of Kansas law, and thus justified the investigative traffic stop, based on commonsense inference that defendant was likely the driver of the vehicle; before initiating the stop, deputy observed an individual operating a pickup truck, he knew that the license plate was linked to a truck matching the observed vehicle, he knew that defendant, the registered owner of the truck, had a revoked license, and he possessed no exculpatory information, let alone sufficient information to rebut the reasonable inference that defendant was driving his own truck.**[**U.S. Const. Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOAMENDIV&originatingDoc=I246e79c0780911ea8939c1d72268a30f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**;**[**Kan. Stat. Ann. § 8-285(a)(3)**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1001553&cite=KSSTS8-285&originatingDoc=I246e79c0780911ea8939c1d72268a30f&refType=SP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_28cc0000ccca6)**.**

**Automobiles**

**The reasonable suspicion inquiry for justifying a traffic stop falls considerably short of 51% accuracy, for to be reasonable is not to be perfect.**[**U.S. Const. Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOAMENDIV&originatingDoc=I246e79c0780911ea8939c1d72268a30f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Automobiles**

**In determining whether reasonable suspicion exists to justify conducting a traffic stop, an officer is not limited to drawing inferences based on knowledge gained only through law enforcement training and experience.**[**U.S. Const. Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOAMENDIV&originatingDoc=I246e79c0780911ea8939c1d72268a30f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Automobiles**

**Although an officer's specialized training and experience routinely play a significant role in law enforcement investigations, such experience is not required in every instance to satisfy reasonable suspicion standard for conducting a traffic stop.**[**U.S. Const. Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOAMENDIV&originatingDoc=I246e79c0780911ea8939c1d72268a30f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Arrest**

**The Fourth Amendment requires an individualized suspicion that a particular citizen was engaged in a particular crime, in order for an officer to conduct a traffic stop.**[**U.S. Const. Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOAMENDIV&originatingDoc=I246e79c0780911ea8939c1d72268a30f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Automobiles**

**Traffic stops based on a combination of database information and an officer's commonsense judgments do not delegate to officers broad and unlimited discretion to stop drivers at random, nor do they allow officers to stop drivers whose conduct is no different from any other driver's.**[**U.S. Const. Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOAMENDIV&originatingDoc=I246e79c0780911ea8939c1d72268a30f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Automobiles**

**Officers may rely on probabilities in the reasonable suspicion context, in order to justify conducting a traffic stop.**[**U.S. Const. Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOAMENDIV&originatingDoc=I246e79c0780911ea8939c1d72268a30f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Searches and Seizures**

**The ultimate touchstone of the Fourth Amendment is reasonableness.**[**U.S. Const. Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOAMENDIV&originatingDoc=I246e79c0780911ea8939c1d72268a30f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Automobiles**

**Like all seizures, the officer's action in conducting a traffic stop must be justified at its inception.**[**U.S. Const. Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOAMENDIV&originatingDoc=I246e79c0780911ea8939c1d72268a30f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Kansas v. Glover (2020)**

**Facts:** Before initiating the stop, a deputy observed a person operating a Chevrolet truck. He knew that the registered owner of the truck had a revoked license. From these facts the deputy drew the common sense inference that the owner of the vehicle, Glover, was likely the driver, which provided more than reasonable suspicion to initiate to stop. Gloved was in fact driving the truck and was charged with driving on a revoked license as a habitual violator. He moved to suppress all evidence from the stop claiming the deputy did not have reasonable suspicion. The district court granted the motion but the appeals court reversed. The Kansas Supreme Court reversed holding that the deputy violated the fourth amendment by stopping him without reasonable suspicion of criminal activity.

**Issue:** Whether a police officer violates the fourth amendment by initiating an investigative traffic stop after running a vehicles license plate and learning the registered owner has a revoked drivers license...is this reasonable?

**Rule:** **When the officer lacks information negating an inference that the owner is the driver of the vehicle, the stop is reasonable. It’s a fair and reasonable assumption to make...the person driving the vehicle is likely the owner of the vehicle. This does not violate the 4th amendment.**

**Analysis:** The fact that the registered owner of a vehicle is not always the driver of the vehicle does not discount the deputies inference. The fourth amendment permits an officer to initiate a brief investigative traffic stop when he has particular and objective basis for suspecting the particular person stopped of criminal activity.

Because it is “less demanding”, reasonable suspicion can be established with information that is different in quantity in content than that required to establish probable cause. Courts permit officers to make commonsense judgments and inferences about human behavior. Glover argues common sense is not enough for reasonable suspicion.

1). Glover (and dissent) argue the deputy’s inference was unreasonable because it was not grounded in his law enforcement training or experience. The Supreme Court ruled the inference that the driver of a car is the registered owner does not require any specialized training. It is a reasonable inference made by ordinary people on a daily basis.

2). Glover (and dissent) argue this could allow police to rely on probabilities. They suggest this would eviscerate the need for officers to base reasonable suspicion on “specific and articulable facts”. Supreme Courts responds with officers like jurors may rely on probabilities in the reasonable suspicion context. The deputy did not rely exclusively on probabilities. He knew the license plate was linked to a truck matching the observed vehicle and that the registered owner of the vehicle had a revoked license. He used common sense to form reasonable suspicion that a specific individual was potentially engaged in a specific criminal activity… Driving with a revoked license.

The standard takes into account the totality of the circumstances. The court gives an example: if an officer knows that the registered owner of a vehicle is in his mid-60s, but observes the driver is in her mid-20s, then the totality of the circumstances would not “raise a suspicion that the particular individual being stopped is engaged in wrongdoing”.

**Concurring: Kagan & Ginsburg**

When you see a car coming down the street your common sense tells you that the registered owner may be behind the wheel, but not always....families share cars, friends borrow them. A person usually buys a vehicle to drive it himself, so your suspicion that the owner is driving it would be perfectly reasonable.

**Dissenting: Sotomayor**

The state left out unexplained key components of the reasonable suspicion inquiry. In an effort to uphold the conviction, the Supreme Court destroys the fourth amendment jurisprudence that requires individualized suspicion.

The stop at issue here rests on just one key fact: the vehicle was owned by someone with a revoked license. The seizing of a vehicle was constitutional on the record because drivers with revoked licenses (as opposed to suspended licenses) in Kansas “have already demonstrated a disregard for the law or categorically unfit to drive.”

The reasonable suspicion inquiry does not accommodate the average persons intuition. It relies on a particular type of common sense, the reasonable sense an officer developed through experiences in law enforcement. What may be common sense to a lay person may not be relevant in law enforcement context.

140 S.Ct. 1183

Supreme Court of the United States.

**KANSAS, Petitioner**

**v.**

[**Charles GLOVER**](https://1.next.westlaw.com/Search/Results.html?query=advanced%3a+OAID(5016761060)&saveJuris=False&contentType=BUSINESS-INVESTIGATOR&startIndex=1&contextData=(sc.Default)&categoryPageUrl=Home%2fCompanyInvestigator&originationContext=document&transitionType=DocumentItem)

No. 18-556

Argued November 4, 2019Decided April 6, 2020

**Synopsis**

**Background:** Defendant was charged with driving without a license as a habitual violator. The District Court, Douglas County, [Paula B. Martin](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0316833301&originatingDoc=I246e79c0780911ea8939c1d72268a30f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I246e79c0780911ea8939c1d72268a30f), J., granted defendant's motion to suppress evidence obtained after traffic stop. State filed interlocutory appeal challenging suppression. The Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ie96495205e0511e7a3f3a229dca6c9c6&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[54 Kan.App.2d 377, 400 P.3d 182](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2041982654&pubNum=0004645&originatingDoc=I246e79c0780911ea8939c1d72268a30f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), reversed and remanded. Defendant petitioned for review. The Supreme Court of Kansas, Luckert, J., [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Id4f3677091c011e89b71ea0c471daf33&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[308 Kan. 590, 422 P.3d 64](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2045142251&pubNum=0004645&originatingDoc=I246e79c0780911ea8939c1d72268a30f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), reversed. Certiorari was granted.

[**Holding:**](https://1.next.westlaw.com/Document/I246e79c0780911ea8939c1d72268a30f/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_anchor_F82050715372) The Supreme Court, Justice [Thomas](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I246e79c0780911ea8939c1d72268a30f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I246e79c0780911ea8939c1d72268a30f), held that deputy had reasonable suspicion to stop vehicle registered to defendant based on commonsense inference that defendant, whose license had been revoked, was likely the driver.

Reversed and remanded.

Justice [Kagan](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=I246e79c0780911ea8939c1d72268a30f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I246e79c0780911ea8939c1d72268a30f) filed a concurring opinion, in which Justice [Ginsburg](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I246e79c0780911ea8939c1d72268a30f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I246e79c0780911ea8939c1d72268a30f) joined.

Justice [Sotomayor](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I246e79c0780911ea8939c1d72268a30f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I246e79c0780911ea8939c1d72268a30f) filed a dissenting opinion.

**Procedural Posture(s):** Appellate Review; Pre-Trial Hearing Motion.

**Westlaw: Kansas v. Glover (2020)**

A Kansas deputy sheriff ran a license plate check on a pickup truck, discovering that the truck belonged to respondent Glover and that Glover's driver's license had been revoked. The deputy pulled the truck over because he assumed that Glover was driving. Glover was in fact driving and was charged with driving as a habitual violator. He moved to suppress all evidence from the stop, claiming that the deputy lacked reasonable suspicion. The District Court granted the motion, but the Court of Appeals reversed. The Kansas Supreme Court in turn reversed, holding that the deputy violated the Fourth Amendment by stopping Glover without reasonable suspicion of criminal activity.

Held: When the officer lacks information negating an inference that the owner is driving the vehicle, an investigative traffic stop made after running a vehicle's license plate and learning that the registered owner's driver's license has been revoked is reasonable under the Fourth Amendment. Pp. 1187 – 1191.

(a) An officer may initiate a brief investigative traffic stop when he has “a particularized and objective basis” to suspect legal wrongdoing. United States v. Cortez, 449 U.S. 411, 417, 101 S.Ct. 690, 66 L.Ed.2d 621. The level of suspicion required is less than that necessary for probable cause and “depends on ‘ “the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.” ’ ” Prado Navarette v. California, 572 U.S. 393, 402, 134 S.Ct. 1683, 188 L.Ed.2d 680. Courts must therefore permit officers to make “commonsense judgments and inferences about human behavior.” Illinois v. Wardlow, 528 U.S. 119, 125, 120 S.Ct. 673, 145 L.Ed.2d 570. P. 1188.

(b) Here, the deputy's commonsense inference that the owner of a vehicle was likely the vehicle's driver provided more than reasonable suspicion to initiate the stop. That inference is not made unreasonable merely because a vehicle's driver is not always its registered owner or because Glover had a revoked license. Though common sense suffices to justify the officer's inference, empirical studies demonstrate that drivers with suspended or revoked licenses frequently continue to drive. And Kansas’ license-revocation scheme, which covers drivers who have already demonstrated a disregard for the law or are categorically unfit to drive, reinforces the reasonableness of the inference that an individual with a revoked license will continue to drive. Pp. 1188 – 1189.

(c) Glover's counterarguments are unpersuasive. He argues that the deputy's inference was unreasonable because it was not grounded in his law enforcement training or experience. Such a requirement, however, is inconsistent with this Court's Fourth Amendment jurisprudence. See, e.g., Navarette, 572 U.S. at 402, 134 S.Ct. 1683. It would also place the burden on police officers to justify their inferences by referring to training materials or experience, and it would foreclose their ability to rely on common sense obtained outside of their work duties. Glover's argument that Kansas’ view would permit officers to base reasonable suspicion exclusively on probabilities also carries little force. Officers, like jurors, may rely on probabilities in the reasonable suspicion context. See, e.g., United States v. Sokolow, 490 U.S. 1, 8–9, 109 S.Ct. 1581, 104 L.Ed.2d 1. Moreover, the deputy here did more than that: He combined facts obtained from a database and commonsense judgments to form a reasonable suspicion that a specific individual was potentially engaged in specific criminal activity. Pp. 1189 – 1190.

(d) The scope of this holding is narrow. The reasonable suspicion standard “ ‘takes into account the totality of the circumstances.’ ” Navarette, 572 U.S. at 397, 134 S.Ct. 1683. The presence of additional facts might dispel reasonable suspicion, but here, the deputy possessed no information sufficient to rebut the reasonable inference that Glover was driving his own truck. P. 1191.

308 Kan. 590, 422 P.3d 64, reversed and remanded.

THOMAS, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, ALITO, KAGAN, GORSUCH, and KAVANAUGH, JJ., joined. KAGAN, J., filed a concurring opinion, in which GINSBURG, J., joined. SOTOMAYOR, J., filed a dissenting opinion.

# Kansas v. Glover, 589 US \_\_\_\_\_ (2021)

# Police observed an individual driving a pickup truck with a certain license plate number, and knew that Glover had a revoked license and that the pickup was consistent with a pickup registered to Glover. Based on those three facts, police assumed Glover was the driver of the pickup truck and pulled him over. The police cited Glover for being a habitual traffic offender. Glover moved to suppress, which was granted. The state appellate court reversed the trial court, and the Kansas Supreme Court reversed the appellate court. State appeals here.

# Issue: Did the police have reasonable suspicion to stop Glover where they saw someone driving Glover’s truck, they knew that Glover owned the truck and they knew that Glover’s license was suspended?

# Yes, Reversed. The question is whether the known informatioi, Glover’s license is suspended, Glover owns a truck, and someone is driving the truck, leads to a permissible inference that Glover is the driver currently. SCOTUS holds that It is a reasonable inference in the absence of knowledge to the contrary. Reasonable inferences need not arise from police experience, but may arise from common experience. We find that the known facts here amount to “specific and articulable facts” which add up to reasonable suspicion. Reasonable suspicion is something less than 51%.

# Concurrence: (Kagan, Ginsberg): Agree with the court because of everything they said, and because the police knew that Glover was a habitual offender, meaning he is a person who often breaks traffic laws.

# Dissent: (Sotomayor): The state only knew one fact: the owner of the truck had a suspended license. That does not mean that the driver that day was the owner. This is a seizure, and pretty serious. So it shouldn’t be guesswork. There is no evidence in the record that it was likely to the owner driving, like a study.

**\*\*FLORIDA v. J.L.\*\***

United States Supreme Court  
529 U.S. 266 (2000)

**Rule of Law**

**An anonymous tip that a person may be carrying a gun does not justify a stop and frisk under the Fourth Amendment unless there is additional corroboration to ensure that the tip has "sufficient indicia of reliability" to create reasonable suspicion justifying a stop.**

**Facts**

Miami-Dade Police received an anonymous tip that a man matching J.L.’s (defendant’s) description had a gun at the bus stop. Officers stopped and frisked J.L. and found a gun. J.L. was charged with possessing a concealed firearm without a license and while under age 18. J.L. moved to suppress the gun on the grounds that it was found during an unlawful search. The trial court granted the motion. The appellate court reversed. The Supreme Court of Florida quashed the appellate court’s ruling and held that the search violated the Fourth Amendment. The United States Supreme Court granted certiorari.

**Issue**

Does an anonymous tip that a person is carrying a gun, without additional corroboration to ensure that the tip has "sufficient indicia of reliability," justify a stop and frisk under the Fourth Amendment?

**Holding and Reasoning (Ginsburg, J.)**

No. Without corroboration, an anonymous tip that a person is carrying a gun does not justify a stop and frisk under the Fourth Amendment. Because of the unique danger presented by armed suspects, the Court in *Terry v. Ohio*, 392 U.S. 1 (1968), carved out an exception to the probable-cause requirement of the Fourth Amendment. That exception allows police to stop and frisk a suspect for weapons with only reasonable suspicion. Nevertheless, a blanket exception allowing police to stop and frisk suspects based solely on anonymous tips carries too great a potential for abuse and risks further erosion of the protections of the Fourth Amendment. When police receive a tip from a known informant, officers can evaluate the informant’s credibility and hold the informant accountable for false allegations. Police have no means of similarly assessing the credibility of an anonymous tip. Therefore, additional corroboration is needed to ensure that the tip has “sufficient indicia of reliability” to create reasonable suspicion justifying a stop. For instance, if a tip includes a prediction about the suspect's future activity, officers may be able to develop reasonable suspicion by confirming that the prediction came true. In this case, the anonymous tip did not possess sufficient indicia of reliability to create reasonable suspicion. Although the tip provided a description of J.L. and his location, the tip provided no predictive information about J.L.'s future conduct. The police thus had no way of assessing the informant's knowledge or credibility. Even though the tip accurately described J.L. and his location, this does not demonstrate the informant's knowledge of criminal behavior. A tip must be reliable not only in its identification of a particular person, but also in its assertion of the likelihood of criminal activity. In some circumstances, an anonymous tip may allege something so dangerous that a search is justified even without sufficient indicia of reliability, *e.g.*, an anonymous tip about a bomb. However, the anonymous tip in this case does not rise to that level. The fact that J.L did have a gun does not retroactively validate the stop and frisk. The ruling of the Supreme Court of Florida is affirmed.

**Concurrence (Kennedy, J)**

The Court's decision is correct in all respects based on the record in this case. As the Court recognizes, a prediction about a suspect's future conduct is one indicator that an anonymous tip is reliable. However, there may be other indicia of reliability, such as if an informant with the same voice calls on successive nights to inform police about criminal activity that actually occurs each night and then calls again with additional information. In that circumstance, the police may be informed by their prior experience with the informant, and this may alleviate some of the uncertainty of the anonymity. Other circumstances may also affect a tip's reliability, including if the informant risks his anonymity to make the tip or if the police are able to use recording or tracing technology to identify the informant. The Court may take up these additional possible indicia of reliability in future cases if these issues present themselves.

***Florida v. J.L.*** – A mere anonymous tip that a person possesses a concealed firearm is insufficient for a ***Terry* stop** and frisk.

**Key Terms:**

**Reasonable Suspicion** - Generally, a quantum of proof sufficient to justify an objectively reasonable person in suspecting, but not necessarily believing, that someone has committed, is committing, or is about to commit a crime. Reasonable suspicion is usually the lowest quantum of proof that the law will recognize for any purpose. It is sufficient to justify brief investigatory detentions, but not full-blown arrests, by the police.

**Florida v. J.L.**

**Synopsis**

Juvenile being tried on weapons charge moved to suppress evidence. The Circuit Court of Dade County, Steve Levine, J., granted motion, and state appealed. The District Court of Appeal, 689 So.2d 1116, reversed. Juvenile petitioned for review, and the Florida Supreme Court, 727 So.2d 204,reversed the court of appeal. After granting state's petition for certiorari, the Supreme Court, Justice Ginsburg, held that anonymous tip lacked sufficient indicia of reliability to establish reasonable suspicion for Terry investigatory stop.

Decision of Florida Supreme Court affirmed.

Justice Kennedy filed concurring opinion in which Chief Justice Rehnquist joined.

After 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, officers went to the bus stop and saw three black males, one of whom, 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 or observe any unusual movements. One of the officers frisked J.L. and seized a gun from his pocket. J.L., who was then almost 16, was charged under state law with carrying a concealed firearm without a license and possessing a firearm while under the age of 18. The trial court granted his motion to suppress the gun as the fruit of an unlawful search. The intermediate appellate court reversed, but the Supreme Court of Florida quashed that decision and held the search invalid under the Fourth Amendment.

Held: An anonymous tip that a person is carrying a gun is not, without more, sufficient to justify a police officer's stop and frisk of that person. An officer, for the protection of himself and others, may conduct a carefully limited search for weapons in the outer clothing of persons engaged in unusual conduct where, inter alia, the officer reasonably concludes in light of his experience that criminal activity may be afoot and that the persons in question may be armed and presently dangerous. Terry v. Ohio, 392 U.S. 1, 30, 88 S.Ct. 1868, 20 L.Ed.2d 889. Here, the officers' suspicion that J.L. was carrying a \*\*1377 weapon arose not from their own observations but solely from a call made from an unknown location by an unknown caller. The tip lacked sufficient indicia of reliability to provide reasonable suspicion to make a Terry stop: It provided no predictive information and therefore left the police without means to test the informant's knowledge or credibility. See Alabama v. White, 496 U.S. 325, 327, 110 S.Ct. 2412, 110 L.Ed.2d 301. The contentions of Florida and the United States as amicus that the tip was reliable because it accurately described J.L.'s visible attributes misapprehend the reliability needed for a tip to justify a Terry stop. 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. This Court also declines to adopt the argument that the standard Terry analysis should be modified to license a “firearm exception,” under which a tip alleging an illegal gun would justify a stop and frisk even if \*267 the accusation would fail standard pre-search reliability testing. The facts of this case do not require the Court to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great—e.g., a report of a person carrying a bomb—as to justify a search even without a showing of reliability. Pp. 1378–1380.

727 So.2d 204, affirmed.

GINSBURG, J., delivered the opinion for a unanimous Court. KENNEDY, J., filed a concurring opinion, in which REHNQUIST, C.J., joined, post, p. 1380.

**Opinion**

\*268 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. App. to Pet. for Cert. A–40 to A–41. So far as the record reveals, there is no audio recording of the tip, and nothing is known about the informant. Sometime after the police received the tip—the record does not say how long—two officers were instructed to respond. They arrived at the bus stop about six minutes later and saw three black males “just hanging out [there].” Id., at A–42. One of the three, respondent J.L., was wearing a plaid shirt. Id., at A–41. 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. Id., at A–42 to A–44. 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.

\*269 J.L., who was at the time of the frisk “10 days shy of his 16th birth [day],” Tr. of Oral Arg. 6, 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 \*\*1378 quashed that decision and held the search invalid under the Fourth Amendment. 727 So.2d 204 (1998).

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. Id., at 207 (quoting Alabama v. White, 496 U.S. 325, 332, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990)). 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. 727 So.2d, at 207–208. 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. Id., at 214–215.

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. See, e.g., United States v. DeBerry, 76 F.3d 884, 886–887 (C.A.7 1996); United States v. Clipper, 973 F.2d 944, 951 (C.A.D.C.1992). We granted certiorari, 528 U.S. 963, 120 S.Ct. 395, 145 L.Ed.2d 308 (1999), and now affirm the judgment of the Florida Supreme Court.

Our “stop and frisk” decisions begin with Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968). This Court held in Terry:

“[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his \*270 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.” Id., at 30, 88 S.Ct. 1868.

1 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, see Adams v. Williams, 407 U.S. 143, 146–147, 92 S.Ct. 1921, 32 L.Ed.2d 612 (1972), “an anonymous tip alone seldom demonstrates the informant's basis of knowledge or veracity,” Alabama v. White, 496 U.S., at 329, 110 S.Ct. 2412. 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.” Id., at 327, 110 S.Ct. 2412. 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. Ibid. Standing alone, the tip would not have justified a Terry stop. 496 U.S., at 329, 110 S.Ct. 2412. 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. \*271 Id., at 332, 110 S.Ct. 2412. \*\*1379 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.” Ibid.

2 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. Brief for Petitioner 20–21. 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....” Brief \*272 for United States 16. These contentions misapprehend the reliability needed for a tip to justify a Terry stop.

3 An accurate description of a subject's readily observable location and appearance is of course reliable in this limited sense: It will help the police correctly identify the person whom the tipster means to accuse. Such a tip, however, does not show that the tipster has knowledge of concealed criminal activity. The reasonable suspicion here at issue requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person. Cf. 4 W. LaFave, Search and Seizure § 9.4(h), p. 213 (3d ed.1996) (distinguishing reliability as to identification, which is often important in other criminal law contexts, from reliability as to the likelihood of criminal activity, which is central in anonymous-tip cases).

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.

4 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. See 392 U.S., at 30, 88 S.Ct. 1868. But an automatic firearm exception to our established reliability analysis would rove too far. Such an exception would enable any person seeking to harass another to set in motion an intrusive, embarrassing \*\*1380 police search of the targeted person simply by placing an anonymous call falsely reporting the target's unlawful carriage of a gun. Nor could one securely confine such an exception to allegations involving firearms. \*273 Several Courts of Appeals have held it per se foreseeable for people carrying significant amounts of illegal drugs to be carrying guns as well. See, e.g., United States v. Sakyi, 160 F.3d 164, 169 (C.A.4 1998); United States v. Dean, 59 F.3d 1479, 1490, n. 20 (C.A.5 1995); United States v. Odom, 13 F.3d 949, 959 (C.A.6 1994); United States v. Martinez, 958 F.2d 217, 219 (C.A.8 1992). If police officers may properly conduct Terry frisks on the basis of bare-boned tips about guns, it would be reasonable to maintain under the above-cited decisions that the police should similarly have discretion to frisk based on bare-boned tips about narcotics. As we clarified when we made indicia of reliability critical in Adams and White, the Fourth Amendment is not so easily satisfied. Cf. Richards v. Wisconsin, 520 U.S. 385, 393–394, 117 S.Ct. 1416, 137 L.Ed.2d 615 (1997) (rejecting a per se exception to the “knock and announce” rule for narcotics cases partly because “the reasons for creating an exception in one category [of Fourth Amendment cases] can, relatively easily, be applied to others,” thus allowing the exception to swallow the rule).\*

The facts of this case do not require us to speculate about the circumstances under which the danger alleged in an anonymous tip might be so great as to justify a search even without a showing of reliability. We do not say, for example, that a report of a person carrying a bomb need bear the \*274 indicia of reliability we demand for a report of a person carrying a firearm before the police can constitutionally conduct a frisk. Nor do we hold that public safety officials in quarters where the reasonable expectation of Fourth Amendment privacy is diminished, such as airports, see Florida v. Rodriguez, 469 U.S. 1, 105 S.Ct. 308, 83 L.Ed.2d 165 (1984) (per curiam ), and schools, see New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985), cannot conduct protective searches on the basis of information insufficient to justify searches elsewhere.

Finally, the requirement that an anonymous tip bear standard indicia of reliability in order to justify a stop in no way diminishes a police officer's prerogative, in accord with Terry, to conduct a protective search of a person who has already been legitimately stopped. We speak in today's decision only of cases in which the officer's authority to make the initial stop is at issue. In that context, we hold that an anonymous tip lacking indicia of reliability of the kind contemplated in Adams and White does not justify a stop and frisk whenever and however it alleges the illegal possession of a firearm.

The judgment of the Florida Supreme Court is affirmed.

It is so ordered.

Concurrence

Hide all concurrence and dissent visual indicators.

Justice KENNEDY, with whom THE CHIEF JUSTICE joins, concurring.

On the record created at the suppression hearing, the Court's decision is correct. The Court says all that is necessary to resolve this case, and I join the opinion in all respects. It might be noted, however, that there are many indicia of reliability \*\*1381 respecting anonymous tips that we have yet to explore in our cases.

When a police officer testifies that a suspect aroused the officer's suspicion, and so justifies a stop and frisk, the courts can weigh the officer's credibility and admit evidence seized pursuant to the frisk even if no one, aside from the officer and defendant themselves, was present or observed the seizure. \*275 An anonymous telephone tip without more is different, however; for even if the officer's testimony about receipt of the tip is found credible, there is a second layer of inquiry respecting the reliability of the informant that cannot be pursued. If the telephone call is truly anonymous, the informant has not placed his credibility at risk and can lie with impunity. The reviewing court cannot judge the credibility of the informant and the risk of fabrication becomes unacceptable.

On this record, then, the Court is correct in holding that the telephone tip did not justify the arresting officer's immediate stop and frisk of respondent. There was testimony that an anonymous tip came in by a telephone call and nothing more. The record does not show whether some notation or other documentation of the call was made either by a voice recording or tracing the call to a telephone number. The prosecution recounted just the tip itself and the later verification of the presence of the three young men in the circumstances the Court describes.

It seems appropriate to observe that a tip might be anonymous in some sense yet have certain other features, either supporting reliability or narrowing the likely class of informants, so that the tip does provide the lawful basis for some police action. One such feature, as the Court recognizes, is that the tip predicts future conduct of the alleged criminal. There may be others. For example, if an unnamed caller with a voice which sounds the same each time tells police on two successive nights about criminal activity which in fact occurs each night, a similar call on the third night ought not be treated automatically like the tip in the case now before us. In the instance supposed, there would be a plausible argument that experience cures some of the uncertainty surrounding the anonymity, justifying a proportionate police response. In today's case, however, the State provides us with no data about the reliability of anonymous tips. Nor do we know whether the dispatcher or arresting officer had any \*276 objective reason to believe that this tip had some particular indicia of reliability.

If an informant places his anonymity at risk, a court can consider this factor in weighing the reliability of the tip. An instance where a tip might be considered anonymous but nevertheless sufficiently reliable to justify a proportionate police response may be when an unnamed person driving a car the police officer later describes stops for a moment and, face to face, informs the police that criminal activity is occurring. This too seems to be different from the tip in the present case. See United States v. Sierra–Hernandez, 581 F.2d 760 (C.A.9 1978).

Instant caller identification is widely available to police, and, if anonymous tips are proving unreliable and distracting to police, squad cars can be sent within seconds to the location of the telephone used by the informant. Voice recording of telephone tips might, in appropriate cases, be used by police to locate the caller. It is unlawful to make false reports to the police, e.g., Fla. Stat. Ann. § 365.171(16) (Supp.2000); Fla. Stat. § 817.49 (1994), and the ability of the police to trace the identity of anonymous telephone informants may be a factor which lends reliability to what, years earlier, might have been considered unreliable anonymous tips.

These matters, of course, must await discussion in other cases, where the issues are presented by the record.

**Florida v. J.L. 529 US 266 (2000)**

**Facts: Anonymous caller reported that young black male standing at specific bus stop wearing a plaid shirt was carrying a gun. No info about how long after the tip the police responded. They saw 3 black males at bus stop, one wearing plaid shirt. Told JL to put hands on bus stop, frisked him and seized gun. Trial court suppressed, appellate court reversed, Florida Supreme Court reversed again. State appeals.**

**Issue: was the seizure of the gun a violation of the 4th Amendment?**

**Yes (affirmed). Insufficient indicia of anonymous tipster’s reliability. Anonymous tip might be sufficient for reasonable suspicion if some police corroboration exists. For example, predictions of future movements corroborated by police.**

**Alabama v. White**

United States Supreme Court  
496 U.S. 325 (1990)

**Rule of Law**

**To determine whether an informant’s tip provides reasonable suspicion, the totality of the circumstances must be analyzed, with attention given to the veracity, reliability, and basis of knowledge of an informant.**

**Facts**

The police received an anonymous tip that Vanessa White (defendant) would be leaving her apartment complex carrying a briefcase with cocaine inside. The informant gave the police White’s address and a description of her car, and said that White would be heading to a certain hotel. The police immediately set up a surveillance team at the apartment complex and saw a car matching the description given by the informant outside the specified apartment building. The police soon observed White exit the building without the briefcase, get in her car, and head toward the hotel. Just before White arrived at the hotel, the police stopped the car. They informed White of what they were looking for and asked to search the car. She consented to the search, and when the police found a briefcase, she gave them the combination to the lock. The police found marijuana in the briefcase and arrested her. Later, at the police station, the police found three milligrams of cocaine in White's purse. White was charged with possession of marijuana and possession of cocaine. White moved to suppress the marijuana and cocaine. The trial court denied the motion, and White pleaded guilty but reserved her right to appeal the denial of her suppression motion. The Alabama Court of Criminal Appeals held that the stop was unconstitutional because the officers lacked reasonable suspicion to make an investigatory stop of the car. The court reversed White's conviction, and the Alabama Supreme Court denied the State of Alabama's (plaintiff's) petition for certiorari. The United States Supreme Court granted certiorari.

**Issue**

To determine whether an informant’s tip provides reasonable suspicion, must the totality of the circumstances be analyzed?

**Holding and Reasoning (White, J.)**

Yes. In *Illinois v. Gates*, 462 U.S. 213 (1983), this Court held that when determining whether an informant’s tip amounts to probable cause, the totality of the circumstances must be analyzed. The same test applies when deciding whether an informant’s tip constitutes reasonable suspicion allowing the police to stop a car. Reasonable suspicion is a lesser standard than probable cause, requiring only that the police be able to articulate specific facts supporting their suspicion. Therefore, the quantity and quality of the informant’s information can be less than that demanded for probable cause. Furthermore, the information can be less reliable than that needed to show probable cause. In this case, the totality of the circumstances amounts to reasonable suspicion because, like in *Gates*, parts of the informant’s tip were corroborated by the ensuing police investigation. A woman left the address the informant had provided at about the time that the informant said, in a car matching the informant’s description. It is reasonable to assume White was headed to the hotel, though the police stopped her just shy of it. Because the informant was right about these details, specifically White’s future behavior, it was reasonable for the police to assume the informant was correct about the other details concerning drug possession. Therefore, when the police stopped White’s car, the informant’s tip had been sufficiently corroborated to support reasonable suspicion, and the stop was lawful. The judgment of the Alabama Court of Criminal Appeals is reversed, and the matter is remanded for further proceedings.

**Dissent (Stevens, J.)**

The Court’s holding is not consistent with the Fourth Amendment because the police did not have reasonable suspicion to stop White in her car. The informant provided no more information than a prankster or an angry neighbor would have. The Court’s holding makes citizens vulnerable to those who know their schedule and overzealous officers who will simply testify that a stop was based on information gained from an anonymous informant.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

# Navarette v. California

#### United States Supreme Court 572 U.S. 393 (2014)

#### Rule of Law

**An anonymous tip of reckless driving can support the reasonable suspicion necessary for a traffic stop if the tip is accompanied by adequate indicia of reliability.**

#### Facts

A person called 9-1-1 reporting that a truck driver was driving dangerously and had just run the person off the road. The person gave the make, model, color, and license plate number of the truck to the State of California (plaintiff) highway patrol. A police officer saw the truck, driven by Lorenzo Navarette (defendant), on the highway and followed it for five minutes before pulling it over. The officer did not note any reckless driving in the time he was following the truck. Upon approaching the truck, the officer smelled marijuana. The officer searched the truck and found 30 pounds of marijuana. Navarette challenged the constitutionality of the traffic stop and incident search. The trial court found the stop and search to be constitutional. The California Court of Appeal affirmed. The California Supreme Court denied review. The United States Supreme Court granted certiorari.

#### Issue

Can an anonymous tip of reckless driving support the reasonable suspicion necessary for a traffic stop if the tip is accompanied by adequate indicia of reliability?

#### Holding and Reasoning (Thomas, J.)

Yes. An anonymous tip of reckless driving can support the reasonable suspicion necessary for a traffic stop if the tip is accompanied by adequate indicia of reliability. Indicia of reliability include a detailed description of the vehicle in question and a detailed account of the reckless conduct. The anonymous tipster in such a case is effectively claiming personal, eyewitness knowledge of the conduct. If this detail is provided, it will often lead an objectively reasonable officer to have reasonable suspicion that the driver is engaging in criminal activity. In this case, the lower court did not err in finding that the officer had reasonable suspicion of a crime necessary to pull over Navarette. The anonymous tipster stated that Navarette was driving recklessly and gave the 9-1-1 dispatcher the make, model, color, and license plate number of Navarette’s truck. These were sufficient indicia of reliability to serve as a basis for the officer’s reasonable suspicion that Navarette was driving drunk, thus justifying the traffic stop and, in turn, the subsequent search of the truck. Although the officer did not witness Navarette driving recklessly in the time he was following the truck, a drunk driver, upon seeing a police car, will often focus and drive more carefully. This fact thus does not mitigate or eradicate the officer’s reasonable suspicion. As the officer had reasonable suspicion that Navarette was driving drunk, the stop and subsequent search were constitutional. The judgment of the court of appeal is affirmed.

#### Dissent (Scalia, J.)

Anonymous tips must be corroborated to support a traffic stop. The majority’s opinion effectively will permit traffic stops and searches incident thereto upon an uncorroborated, anonymous tip describing an isolated incident of reckless driving. There was no ongoing crime in this case that would have warranted the officer stopping Navarette. Indeed, the officer followed Navarette for five minutes and did not witness any reckless driving or suspicious activity. The traffic stop and subsequent search violated Navarette’s Fourth Amendment rights.

**Key Terms:**

**Reasonable Suspicion** - Generally, a quantum of proof sufficient to justify an objectively reasonable person in suspecting, but not necessarily believing, that someone has committed, is committing, or is about to commit a crime. Reasonable suspicion is usually the lowest quantum of proof that the law will recognize for any purpose. It is sufficient to justify brief investigatory detentions, but not full-blown arrests, by the police.

**Indicia of Reliability** - Characteristics of an anonymous crime report that entitle law enforcement officers to treat the report as credible and imply the reasonableness of a subsequent search and seizure based on the report.

**Search and Seizure** - A law enforcement officer's search of a suspect's premises or property, followed by a seizure of incriminating evidence found during the search.

**\*\*FLORIDA v. ROYER\*\***

United States Supreme Court  
460 U.S. 491 (1983)

**Rule of Law**

**(1) Under the Fourth Amendment, police officers cannot move a suspect to another location during a *Terry* stop without a legitimate law enforcement purpose, such as ensuring the safety and security of the officers and the suspect.  
(2) Under the Fourth Amendment, a suspect's consent to a warrantless search is invalid if the suspect was illegally detained at the time it was given.**

**Facts**

Royer (defendant) bought a one-way plane ticket and checked luggage under a fake name. In the airport concourse, law enforcement agents stopped Royer because they suspected he was a drug courier. Without verbally consenting, Royer gave the officers his ticket and identification. The officers kept the documents and asked Royer to come to a small room forty feet away. Royer followed. The officers then, without Royer’s consent, retrieved his luggage from the airline. Royer did not answer the officers when they asked to search the luggage; he did, however, unlock one of the suitcases. Royer permitted the officers to pry open the other. Drugs were found in both bags. Royer was charged with felony drug possession. Royer moved to suppress the evidence found in the luggage. The trial court denied the motion on the ground that Royer consented to search. The court concluded the search would have been reasonable without consent or a warrant, because the plane was about to depart. Royer was convicted, and he appealed the denial of his motion. The Florida District Court of Appeal, en banc, reversed, concluding Royer’s involuntary detention without probable cause violated *Terry v. Ohio*, 392 U. S. 1 (1968). Florida petitioned the United States Supreme Court for certiorari, which was granted.

**Issue**

(1) Are police offers permitted under the Fourth Amendment to move a suspect to another location during a *Terry* stop without a legitimate law enforcement purpose?  
(2) Will a suspect's consent to a warrantless search be valid under the Fourth Amendment if the consent was given while the suspect was illegally detained?

**Holding and Reasoning (White, J.)**

(1) No. During a *Terry* stop, moving a suspect to another location is improper if the officer’s interests in doing so are not legitimate law enforcement purposes. Ensuring the safety and security of officers and bystanders might be a legitimate reason to move a suspect. Officers are not barred from approaching a person and asking questions, so long as the person is free to leave. The Fourth Amendment is only implicated if there has been a detention. Under *Terry*, officers may stop and frisk a suspect if they have an “articulable suspicion that the person has committed or is about to commit a crime.” *Terry* stops are limited. An “investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop.” Here, the officers had an articulable suspicion sufficient to justify a *Terry* stop of Royer. However, there is no evidence of any legitimate purpose for moving him to the small room. The *Terry* stop turned into an investigatory procedure in an interrogation room, and Royer effectively was under arrest. Accordingly, Royer’s detention was unconstitutional.  
(2) No. When police officers conduct a search without a warrant, probable cause, or exigent circumstances, the search will only be valid under the Fourth Amendment if the suspect consented. The government bears the burden of proving that consent was voluntary. The suspect’s submission is not enough. Voluntary statements made during an illegal detention are inadmissible in court. Here, before Royer consented to the search of his luggage, the detention was already more intrusive than the Fourth Amendment allows on a mere suspicion of criminal activity. Because Royer’s detention was unlawful, his consent to the search was invalid. The ruling of the Florida District Court of Appeal is affirmed.

**Key Terms:**

**Reasonable Suspicion** - Generally, a quantum of proof sufficient to justify an objectively reasonable person in suspecting, but not necessarily believing, that someone has committed, is committing, or is about to commit a crime. Reasonable suspicion is usually the lowest quantum of proof that the law will recognize for any purpose. It is sufficient to justify brief investigatory detentions, but not full-blown arrests, by the police.

**Totality of the Circumstances Test** - A standard that considers all of the relevant facts and circumstances, rather than a few specific factors.

***Florida v. Royer*, 460 US 491 (1983)**

**Defendant had one way ticket paid in cash, flying under assumed name and checking bags. D was flying from Miami to NYC. Police asked for his ticket and license – noticed name discrepancies which he said was bc friend made the ticket reservation. Without returning ticket or license, asked him to come to small room off concourse. Without asking for consent, had his luggage brought to room. Without consent but with key provided by defendant, opened one bag and found weed. Police pried open the second suitcase with defendant’s consent and found more weed. Royer filed motion to suppress, it was denied, he was convicted. Florida appeals court reversed. State appeals.**

**Issues:**

(1) Whether the police had specific, articulable suspicion to justify a brief seizure of Royer and his luggage? **YES**

(2) Whether the seizure exceeded the scope of a permissible Terry stop and became a full-blown 4th Amendment seizure which required probable cause? **YES. “Terry and the cases following it did not justify the restraint to which Royer was then subjected. As a practical matter, Royer was under arrest.”**

**Investigative detention must be temporary and last no longer that is necessary to effectuate the purpose of the stop.**

**Investigative methods should be the least intrusive means reasonably available to verify or dispel the officer’s suspicion in a short period of time.**

**State bears burden of showing that the seizure was sufficiently limited in scope and duration.**

**Royer was seized when officers took his ID and ticket and moved him to the police room. Show of authority and reasonable person would not have felt free to leave. Officers had his luggage when he “consented” to the search.**

**Police did not use the least intrusive means to determine if Royer was engaged in criminal conduct. Could have used a drug dog on the luggage without ever detaining Royer.**

**Primary inquiry since this case has been on the length of time of the detention. A seizure may become illegal if it lasts too long. How long is too long?**

**Terry v. Ohio**

United States Supreme Court  
392 U.S. 1 (1968)

**Rule of Law**

**When an officer observes unusual conduct that reasonably leads him to assume that criminal activity is afoot and that the people he is interacting with are armed, the police officer may conduct a limited search for weapons.**

# *Terry* was the first time the Court permitted a warrantless search for less than probable cause.

**Dunaway v. New York**

United States Supreme Court  
442 U.S. 200 (1979)

**Rule of Law**

**Except in the case of temporary stops on the street where the police need only have reasonable suspicion of criminal activity, the police may only seize a citizen based upon probable cause.**

**Facts**

A police detective received information that Dunaway (defendant) was responsible for an armed robbery that resulted in the death of one person. The information was insufficient to get a warrant but the detective found Dunaway at a friend’s apartment and requested that he come to the police station for questioning. Dunaway complied. Dunaway was not under arrest but he was read his *Miranda* warnings and would have been restrained had he tried to leave. Eventually, Dunaway made incriminating statements and drew incriminating sketches.

**Issue**

Can the police seize a suspect and bring him to the police station based only on reasonable suspicion?

**Holding and Reasoning (Brennan, J.)**

No. In order to lawfully bring a suspect into formal police custody and interrogate him at the police station, the police must have probable cause. The rule in *Terry v. Ohio*, 392 U.S. 1 (1969), that the police may stop and search a citizen on the street based on reasonable suspicion, does not extend to situations where the suspect is brought into the police station. In *Terry*, because the intrusion into a citizen’s privacy is limited in terms of scope and timing, a balancing of the government’s interest and a citizen’s interests was appropriate. However, bringing someone to a police station where they are not free to leave, and subjecting them to formal interrogation, is a far greater intrusion and demands probable cause to be reasonable under the Fourth Amendment. To hold otherwise would all but make the Fourth Amendment’s warrant and probable cause requirements obsolete. Therefore, the police conduct in this case constitutes a violation of the Fourth and Fourteenth Amendments.

**Concurrence (White, J.)**

The Fourth Amendment is grounded in reasonableness and the balancing of interests. It is impractical to do such a weighing of interests on a case-by-case basis and a categorical approach is better. Therefore, because the police conduct in this case is so similar to an arrest, the two should be treated alike and probable cause is necessary to bring a suspect into the police station.

**Dissent (Rehnquist, J.)**

The situation here does not represent a Fourth Amendment seizure because Dunaway willingly went to the police station, absent any coercive or physically threatening police conduct. Dunaway’s statements should therefore be admitted.

**Key Terms:**

**Miranda Warnings** - The notices of constitutional rights set forth in the opinion of the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436(1966) that law enforcement authorities must provide to a suspect in a criminal investigation prior to initiation of a custodial interrogation. The suspect must be advised that the suspect has the right to remain silent, anything the suspect says may be used against the suspect, and the suspect has the right to an attorney.

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

***Dunaway v. New York***

**You must have probable cause to arrest.** (Detectives get a tip about Dunaway possibly being the killer in a pizza parlor robbery/murder. Not enough information in the tip to get a warrant. Police go to Dunaway’s house and ask him to come to police headquarters to answer questions. He agrees. They put him in patrol car, go to station, and read him his *Miranda* rights. He waives his right to an attorney and implicates himself in the murder. He is convicted of murder and robbery. He loses in trial court, intermediate appeals court, and NY Ct of Appeals. The issue was whether the Fourth Amendment allows for the seizure of a person for reasonable suspicion of a crime. The answer is that you must have probable cause.)

**Davis v. Mississippi**

United States Supreme Court  
394 U.S. 721 (1969)

**Rule of Law**

**Fingerprints obtained during an illegal detention may not be used as evidence.**

**Facts**

The police were investigating a rape and had only a general description of the suspect and a set of fingerprints taken from the scene of the crime. Davis (defendant), along with 24 other individuals fitting the description, was detained at a police station for interrogation and fingerprinting. Davis’s prints were found to match those at the scene. At trial, Davis argued that his fingerprints should be excluded from evidence because his seizure violated his Fourth Amendment rights. The state court disagreed, admitted the fingerprints into evidence, and convicted Davis. The Mississippi Supreme Court affirmed the conviction. The United States Supreme Court granted certiorari.

**Issue**

May fingerprints obtained during an illegal detention be used as evidence?

**Holding and Reasoning (Brennan, J.)**

No. Fingerprints obtained during a detention that was illegal under the Fourth Amendment may not be used as evidence. The Fourth Amendment applies to investigatory seizures, including seizures done for the sole purpose of obtaining fingerprints. While it is possible that, in some situations, fingerprinting may be a less-serious intrusion than other types of police searches, there is nothing about fingerprint evidence that would exempt it from the restrictions of the Fourth and Fourteenth Amendments. The Mississippi Supreme Court was incorrect in concluding that the particular trustworthiness of fingerprint evidence would make it not subject to constitutional requirements. Illegally seized evidence is not admissible at trial, regardless of how trustworthy it may be. Here, the fingerprint evidence was obtained while Davis was being held following an arrest that was based on neither a warrant nor probable cause. There was no authorization by a judicial officer, Davis underwent not one but two fingerprinting sessions, and Davis was also interrogated. There was no attempt to comply with Fourth Amendment requirements. This detention was thus constitutionally invalid. Accordingly, the Court determines that Davis’s seizure on less than probable cause violated his Fourth Amendment rights, and the lower court should have excluded his fingerprints from evidence. The lower court is reversed.

**Concurrence (Harlan, J.)**

There may be some circumstances in which fingerprinting, even without a warrant, does not violate the Fourth Amendment.

**Dissent (Stewart, J.)**

Davis was arrested and detained without probable cause. His fingerprints, however, were properly admitted at trial because fingerprints are inherent and unchanging and can always be identically reproduced. This makes them distinct from wrongful confessions or wrongfully seized property.

**Dissent (Black, J.)**

This decision is an unreasonable expansion of the Fourth Amendment. The police performed a lawful investigation with Davis’s cooperation, and Davis’s fingerprints were present on the victim’s window sill. Restricting application of the Fourth Amendment would make cities safer.

**Key Terms:**

**Probable Cause** - A reasonable basis, amounting to more than mere suspicion, to believe that a person has committed a crime or is about to commit a crime, or that evidence relevant to a crime exists in a particular location.

**Reasonable Suspicion** - Generally, a quantum of proof sufficient to justify an objectively reasonable person in suspecting, but not necessarily believing, that someone has committed, is committing, or is about to commit a crime. Reasonable suspicion is usually the lowest quantum of proof that the law will recognize for any purpose. It is sufficient to justify brief investigatory detentions, but not full-blown arrests, by the police.

**United States v. Sharpe**

United States Supreme Court  
470 U.S. 675 (1985)

**Rule of Law**

**A detention is not too long in duration to be justified as an investigative stop if police diligently pursue a means of investigation that is likely to confirm or dispel their suspicions quickly, during which time it is necessary to detain the suspect.**

**Facts**

A federal agent patrolling a highway suspected that a truck and a car driving together were trafficking drugs. The agent radioed a highway patrolman and attempted to pull over both vehicles. The agent was able to get the car to pull over, but the truck, driven by Savage (defendant), did not pull over immediately. The patrolman followed the truck and eventually got it to pull over. The agent, still at the car he originally pulled over, called for more assistance. When local police showed up at the car, the agent left the police to watch the car and the suspect. The agent then drove to where the patrolman had pulled over the truck. The agent smelled marijuana, searched the truck, and found marijuana in the truck. Savage was detained for approximately 20 minutes from when he was pulled over to when the drugs were found. The court of appeals held that the extended detention without probable cause violated the defendants’ Fourth Amendment rights. The United States Supreme Court granted certiorari.

**Issue**

Is a detention justified as an investigative stop if police diligently pursue a means of investigation that is likely to confirm or dispel their suspicions quickly?

**Holding and Reasoning (Burger, C.J.)**

Yes. A detention is not too long in duration to be justified as an investigative stop if police diligently pursue a means of investigation that is likely to confirm or dispel their suspicions quickly, during which time it is necessary to detain the suspect. In performing this analysis, courts should not engage in “unrealistic second-guessing. . . . The question is not simply whether some other alternative was available, but whether police acted unreasonably in failing to recognize or to pursue it.” In the case at bar, the detention of Savage on the side of the road was not unreasonable. The federal agent acted as quickly as could be expected to get to the truck and perform the search that uncovered the marijuana. Indeed, Savage himself caused most of the delay in his 20-minute detention as he failed to pull over immediately with the other car. The detention did not violate Savage’s Fourth Amendment rights. The court of appeals is reversed.

**Concurrence (Marshall, J.)**

The intrusiveness of a *Terry* stop must be determined independently of law enforcement interests. However, the length of the detention of Savage in this case was caused by Savage improperly evading the police.

**Dissent (Brennan, J.)**

The record in this case does not conclusively show that Savage tried to elude the police. Given that, the prosecution did not meet its burden under *Florida v. Royer*, 460 U.S. 491 (1983), to prove that the least intrusive means were used in the detention.

**United States v. Hensley**

United States Supreme Court  
469 U.S. 221 (1985)

**Rule of Law**

**If police have a reasonable suspicion, grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony, a *Terry* stop may be made to investigate that suspicion.**

**Hayes v. Florida**

United States Supreme Court  
470 U.S. 811 (1985)

**Rule of Law**

**Absent probable cause and a warrant, the Fourth Amendment prohibits an involuntary removal of a suspect from the suspect’s home to a police station for a temporary detention for investigative purposes.**

**Facts**

Hayes (defendant) was a suspect in a burglary-rape. After the police pulled a latent fingerprint from the victim’s bedroom door, the police went to Hayes’s home and spoke to him on the front porch. The officers told Hayes that he could voluntarily accompany them to the police station to be fingerprinted, or he would be arrested. After initially refusing, Hayes consented to go to the station because he did not want to be arrested. At the station, Hayes was fingerprinted, and his fingerprints matched the one from the victim’s bedroom. Hayes was formally arrested and charged with burglary and sexual assault. Prior to trial, Hayes filed a motion to suppress his fingerprints taken at the police station, claiming that the fingerprints were fruit of an illegal detention. The trial court denied the motion. Hayes was convicted, and the Florida District Court of Appeal affirmed. The United States Supreme Court granted certiorari.

**Issue**

Absent probable cause and a warrant, does the Fourth Amendment prohibit an involuntary removal of a suspect from the suspect’s home to a police station for a temporary detention for investigative purposes?

**Holding and Reasoning (White, J.)**

Yes. Absent probable cause and a warrant, the Fourth Amendment prohibits an involuntary removal of a suspect from the suspect’s home to a police station for a temporary detention for investigative purposes, such as fingerprinting. Such a removal and temporary detainment is outside the scope of a *Terry* stop and is more akin to an actual arrest requiring probable cause. However, a temporary detention in the field for purposes of fingerprinting may not violate the Fourth Amendment if there is reasonable suspicion the suspect has committed a crime. In this case, the lower courts erred in upholding Hayes’s conviction. Hayes was involuntarily removed from his home and taken to a police station to be temporarily detained and fingerprinted. Because the officers did not have probable cause or a warrant, this detention violated Hayes’s Fourth Amendment right against unreasonable seizure. As a result, the fingerprints obtained pursuant to this detention are inadmissible. The judgment of the appellate court is reversed, and the case is remanded.

**Concurrence (Brennan, J.)**

The majority correctly reverses Hayes’s conviction. However, the Court goes too far in essentially offering an advisory opinion on the Fourth Amendment’s application to on-site fingerprinting when no facts supporting such a rule are before the Court.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Terry Stop** - From *Terry v. Ohio*, 392 U.S. 1 (1968), a brief seizure by law enforcement that falls short of a traditional arrest. A *Terry* stop, or investigatory stop, is lawful if officers have a reasonable suspicion that a person is engaged in criminal activity. The stop must be limited to the amount of time reasonably necessary for officers to confirm or dispel the reasonable suspicion, and officers must use the least intrusive means to confirm or dispel the suspicion. The investigatory stop is often followed by an investigatory frisk, which is a brief patdown of the person's outer clothing in search of a deadly weapon, if the circumstances would justify a reasonable person to suspect that the person poses a danger to the officers or other people. The frisk must be strictly confined to what is necessary to discover a deadly weapon; officers may not search for contraband or other evidence of a crime.

# Illinois v. Caballes

#### United States Supreme Court 543 U.S. 405 (2005)

#### Rule of Law

**The Fourth Amendment does not require reasonable, articulable suspicion to administer a canine sniff test during a routine traffic stop.**

# Muehler v. Mena

#### United States Supreme Court 544 U.S. 93 (2005)

#### Rule of Law

**(1) Officers may detain innocent occupants of a home in which a search warrant is being executed for the duration of the search.**

**(2) An officer's questioning of a detainee about a matter unrelated to the alleged crimes covered in the search warrant is not an unreasonable seizure under the Fourth Amendment.**

#### Facts

Officers Darren Muehler and Robert Brill (defendants) obtained a warrant to search for weapons and evidence of gang activity in the home of a gang member suspected of a drive-by shooting. On February 3, 1998, a Special Weapons and Tactics (SWAT) team secured the home and detained Iris Mena (plaintiff) and the other occupants at gunpoint. The occupants were handcuffed and held in the garage for two to three hours while the search was completed. Officers found weapons, drugs, and other evidence of gang activity. An Immigration and Naturalization Service (INS) Officer questioned the occupants and asked for immigration documentation. Mena filed suit in district court against Muehler and Brill under 42 U.S.C. § 1983 for violations of her constitutional rights. The jury found that the length of the detention and amount of force used were unreasonable and violated the Fourth Amendment and awarded Mena $60,000 in damages. The court of appeals affirmed, holding (1) that it was unreasonable to keep Mena handcuffed in the garage for the length of the search, (2) that Mena should have been released when it became apparent that she was not dangerous, and (3) that questioning Mena about her immigration status was also a violation of the Fourth Amendment. The United States Supreme Court granted certiorari.

#### Issue

(1) Do officers violate the Fourth Amendment by detaining innocent occupants of a home in which a search warrant is being executed for the duration of the search?

(2) Does an officer's questioning of a detainee about a matter unrelated to the alleged crimes covered in the search warrant constitute an unreasonable seizure under the Fourth Amendment?

#### Holding and Reasoning (Rehnquist, C.J.)

(1) No. Under *Michigan v. Summers*, 452 U.S. 692 (1981),*o*fficers may detain innocent occupants of a home in which a search warrant is being executed for the duration of the search. The government interest in this type of detention greatly outweighs the minimal added infringement of privacy. Specifically, this type of detention prevents escape attempts, protects police, and ensures the search is completed efficiently. This rule grants law enforcement the authority to use the force reasonably necessary to detain the occupants. Here, because there was a valid warrant to search the home where Mena resided, it was reasonable for Muehler and Brill to detain her for the length of the search. The potential danger inherent in the search of the home of an armed gang member justified the additional intrusion caused by the use of the handcuffs. Further, the officer’s ongoing safety concerns justified the length of the detention.

(2) No. An officer's questioning of a detainee about a matter unrelated to the alleged crimes covered in the search warrant is not an unreasonable seizure under the Fourth Amendment. This Court has previously held that mere police questioning is not a seizure. If officers are detaining someone during a lawful search, the officers may question the detainee about any issue so long as the questioning does not prolong the detention. Furthermore, an officer does not need reasonable suspicion to question someone who has already been detained. Here, because the INS agent's questioning of Mena did not prolong her detention, the questioning was reasonable under the Fourth Amendment. Because the detention and questioning were reasonable, there was no Fourth Amendment violation. The appellate court's judgment is vacated, and the case is remanded for further proceedings.

**Key Terms:**

# 42 U.S.C. § 1983 - Federal law that allows individuals to sue state officials for violating their constitutional rights while acting under “color” of state law.

**Detain -** Stopping or holding a person briefly without making a formal arrest.

**Terry v. Ohio**

United States Supreme Court  
392 U.S. 1 (1968)

**Rule of Law**

**When an officer observes unusual conduct that reasonably leads him to assume that criminal activity is afoot and that the people he is interacting with are armed, the police officer may conduct a limited search for weapons.**

# *Terry* was the first time the Court permitted a warrantless search for less than probable cause.

**Dunaway v. New York**

United States Supreme Court  
442 U.S. 200 (1979)

**Rule of Law**

**Except in the case of temporary stops on the street where the police need only have reasonable suspicion of criminal activity, the police may only seize a citizen based upon probable cause.**

# \*\*United States v. Drayton\*\*

#### United States Supreme Court 536 U.S. 194 (2002)

#### Rule of Law

**The police may request consent to search a person, even if they have no basis for suspecting that individual of illegal activity, and the citizen is not subject to a Fourth Amendment seizure if a reasonable person would feel that he is free to leave.**

#### Facts

The Greyhound bus that Drayton and Brown (defendants) were riding on made a scheduled stop. While the bus was stopped, three police officers boarded the bus, explained they were conducting an inspection, requested cooperation, and began asking the passengers for permission to search their bags for drugs and weapons. One officer remained at the front of the bus, while the other two, starting in the back, worked their way down the aisle talking to the passengers. The officers were in plain clothes, carried concealed weapons, and wore visible badges. The officers never blocked the aisle or the exit to the bus and testified that any passenger who refused to give consent or chose to exit the bus was free to do so. Drayton and Brown gave the officers permission to search the bag they shared and the police found nothing incriminating inside. One of the officers then noticed that both men were wearing baggy clothes which he found suspicious. The officer asked Brown if he may conduct a search of his person and Brown consented. The officer discovered packages of drugs hidden on Brown’s person and Brown was then arrested. The officer then asked Drayton if he would consent to a body search. Drayton lifted his arms up as a sign of his consent and upon patting him down the officer discovered packets of drugs on Drayton’s person as well. Drayton was also arrested. The trial court held that the police did not act in a coercive manner, that Drayton’s consent was voluntary, and therefore allowed the drug evidence to be admitted at trial. The court of appeals reversed, holding the evidence should be suppressed because people do not feel free to decline a police request unless told they may do so, and remanded the case back to the trial court. The United States Supreme Court granted certiorari.

#### Issue

Is a person subject to a Fourth Amendment seizure where the totality of the circumstances would indicate to a reasonable person that he is free to leave?

#### Holding and Reasoning (Kennedy, J.)

No. A citizen is not subject to a Fourth Amendment seizure if a reasonable person would feel that he is free to leave. Similarly, when the police request permission to search a person, consent is voluntarily given provided no coercive means are used and a reasonable person would feel free to decline the request. In this case, the totality of the circumstances indicates that Drayton and Brown were not subject to a Fourth Amendment seizure because nothing the officers did or said indicated that they were not free to leave. The officers neither brandished their weapons nor blocked the aisle, and they testified that passengers were free to exit the bus at any time. While one officer remained in the front of the bus, he did not block the exit and the mere fact that the officers displayed their badges is not coercive because officers frequently wear uniforms in their encounters with the public. Furthermore, if the encounter had occurred on the street it would be completely constitutional and nothing about the nature of the bus would change this. While a passenger’s movements may be limited by the confined space of a bus and he may not wish to get off for fear the bus will leave without him, these concerns deal with the nature of traveling by bus and do not reflect coercive tactics by the police. Finally, Drayton was not subject to a Fourth Amendment seizure after Brown had been arrested because the arrest of one person does not subject those around him to a seizure. In addition, the totality of the circumstances indicates that Drayton and Brown consented voluntarily. The officer specifically asked if they would consent to the pat-down. In *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), the Court held that officers need not specifically inform a citizen of his right to refuse consent. Therefore, because there was no Fourth Amendment seizure and Drayton’s consent was voluntarily given, the judgment of the court of appeals is reversed and the case is remanded.

#### Dissent (Souter, J.)

The passengers on the bus had no reason to believe that they could refuse to cooperate with the police. Three police officers entered the confined space of the bus, flanked the passengers from all sides, told the passengers what they were doing, and then requested the passengers’ cooperation. Nothing in this initial encounter would lead a reasonable passenger to believe that he was free to ignore the police or decline their request for cooperation.

***Drayton*** – If officers speak in a nonconfrontational way, don’t display weapons, ask permission to search, the Fourth Amendment doesn’t require officers to inform passengers that they aren’t obliged to cooperate.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**United States v. Dayton** 536 U.S. 194, 122 S. Ct. 2105

Justice Kennedy delivered the opinion of the court

**Facts**: (from the book)

On February 4th, 1999, Christopher Dayton and Clifton Brown, Jr. were traveling on a greyhound bus from Ft. Lauderdale to Detroit. The bus made a scheduled stop in Tallahassee. The passengers were told to disembark for the bus to be refueled and cleaned. When the passengers reboarded the driver checked their tickets and then left to do paperwork inside the terminal. As he left, 3 police from the Tallahassee Police Department boarded the bus as a routine drug and weapons *interdiction* (the act of intercepting and preventing the movement of a prohibited commodity or person) effort. The officers were in plain clothes and had concealed weapons and visible badges. Once on board, Officer Hoover knelt on the driver’s seat and the faced the rear of the bus. He could see the passengers and ensure the safety of the other 2 officers without blocking the aisle or the bus exit. Officers Blackburn and Lang went to the back of the bus. Blackburn faced the front of the bus and stayed in the back and Lang moved forward to speak with individual passengers. He asked the passengers about their travel plans, and sought to match each passenger with their luggage in the overhead racks. He did not block the aisle and stood next to or behind each passenger. According to Lang, passengers who chose not to cooperate with him or exited the bus would have been allowed to do so without argument. Lang felt most people cooperated. Lang could recall 5-6 times in the previous year when passengers declined the luggage search. It was common for passengers to get off the bus for snacks, etc while the police were on the bus. Lang sometimes told passengers of their right to refuse to cooperate. On this day, he did not tell them.

Drayton and Brown were seated next to each other on the bus. Drayton on the aisle, Brown by the window. Lang leaned over Drayton’s shoulder from the rear of the seat and showed them his badge. With his face about a foot to a little more than a foot away from them, he spoke in a voice just loud enough for them to hear and identified himself, told them what he was doing – “attempting to deter drugs and illegal weapons being transported on the bus”- and said, “Do you have any bags on the bus?” Both pointed to a single green bag in the overhead. Lang asked if he could check it and Brown said to go ahead. Lang handed him the bag to Officer Blackburn. There was no contraband in the bag. Lang noticed both men had on heavy jackets and baggy pants. He asked Brown if he could check his person. Brown said sure and opened up his jacket and pulled a cell phone out of his pocket. Lang patted down his jacket and pockets including his waist area, sides and upper thighs. Lang detected hard small objects similar to drug packets he had found on other occasions. Lang arrested and handcuffed Brown and Hoover escorted Brown off the bus. Lang then asked Drayton for if he could check his person. Drayton responded by lifting his hands about 8 inches from his legs. Lang patted down Drayton and detected the same hard objects similar to those of Brown. He arrested Drayton and escorted him off the bus. A further search found plastic bundles of cocaine between several pairs of boxer shorts. Brown had

483 grams, Drayton had 295 grams.

Brown and Drayton were charged with conspiring to distribute cocaine and with possession with the intent to distribute.

They moved to suppress the cocaine. The motion was denied, but they prevailed on appeal.

#### Analysis

#### The Court has addressed the specific question of interdiction efforts on buses. In Florida v. Bostick, the officers asked to check a passengers luggage resulting in a find of cocaine. The Florida Supreme Court suppressed the cocaine. In doing so, it adopted the per se rule that due to the cramped confines aboard a bus, the act of questioning would deprive a person of his/her freedom of movement and so constitute a seizure under the 4th Amendment. This Court reversed. Bostick made clear for the most part that per se rules are inappropriate in the 4th Amendment context. The proper inquiry necessitates a consideration of “all the circumstances surrounding the encounter. The idea that a reasonable person would feel free to “disregard the police and go about his business” is not an accurate measure of the coercive effect of a bus encounter. The bus might leave before the person can get back on the bus.

#### The proper inquiry is “whether a reasonable person would feel free to decline the officers requests or otherwise terminate the encounter.” Finally, the court rejected the Bosticks argument that he must have been seized because no reasonable person would consent to a search of luggage containing drugs.

#### In Bostick, The Court identified 2 factors worth noting on remand:

#### Although it was obvious the officer was armed, he did not remove the gun from its ouch or use it in a threatening way.

#### The officer advised the passenger that he could refuse consent to the search.

#### Applying the Bostick framework to the facts of this case, we conclude that the police did not seize respondents when they boarded the bus and began questioning passengers and the officers gave the passengers no reason to believe they were required to answer the officers’questions. Lang did not brandish a weapon. He left the aisle free so respondents could exit. He spoke to the passengers one by one and in a quiet voice. Nothing he said would suggest to a reasonable person that he/she was being barred from leaving the bus.

#### There are ample grounds that everything that took place was cooperative and nothing was coercive.

#### The respondents make much of the fact Officer Lang displayed his badge. In Florida v Rodriguez the Court rejected the claim that the defendant was seized when an officer showed his badge and asked him to answer some questions. In INS v. Delgado the Court held that INS wearing badges and questioning workers in a factory did not constitute a seizure.

Officer Hoover’s position in the front of the bus does not tip the scales for the respondents. He did nothing to intimidate them. In *Delgado,* the Court determined there was no seizure even though several uniformed INS were stationed near the exits of the factory. (I say BS on this.)

And finally, experiences from the past in this situation does not suggest a reasonable person would not feel free to terminate the bus encounter.

Drayton said once Brown was arrested, no reasonable person would feel free to terminate the encounter. The Court of Appeals did NOT address this claim. However, the arrest of person does not mean everyone around him has been seized to police. If anything, Brown’s arrest should have put Drayton on notice of the consequences of continuing the encounter by answering the officers’ questions. (The majority went on to hold (based on Scheneckloth v Bustamante) that the consents to search by Brown and Drayton were voluntary even though the police did not advise them of their rights to refuse. The dissenters believed the consents were tainted by prior illegal seizures and thus did not discuss the voluntariness issue.

**DISSENT:** Justice Souter with Justices Stevens and Ginsberg joining (page 309)

Anyone who travels by air submits to searches of the person and baggage. This is universally accepted. However, the common place precautions of air travel have not been justified for ground transportation.

Before applying the Bostick standard, it may be worth getting some perspective from different sets of facts:

1. When the passengers left the bus and then got back on, the driver kept their tickets.
2. There were 3 officers, not in uniform, in a small space. The quarters were cramped.
3. The officers had to look down to talk to the passengers and they had to look up.
4. Essentially, the bus driver had yielded the bus to the police and the police took control of the bus
5. There was no reason for the passengers to believe the bus driver would return and the trip resume until the police were satisfied

It is very hard to believe that either Brown and Drayton would have believed he stood to lose nothing if he refused to cooperate with the police, or that he had any free choice to ingnore the police altogether. In this case, Brown and Drayton were seemingly pinned in by the officers, the bus was going nowhere and one officer was in the driver’s seat.

…(I have to) ask whether a passenger would reasonable have felt free to end his encounter with the 3 officers by saying no and ignoring them thereafter. In my view, this is clear, The Court’s contrary conclusion tells me the majority cannot see what Justice Stewart saw, and I respectfully dissent.

**United States v. Drayton, 536 US 194 (2002)**

**Three police officers boarded bus after driver departed with passengers’ tickets and one officer stood at the front, one at the back and one went row to row asking passengers about their travel plans, their luggage and for permission to search luggage or their persons. Brown and Drayton were sitting together and when asked, indicated one bag for both of them in the overhead compartment. They gave permission to search it and nothing was found. Officer noticed they wore heavy coats and baggy pants and asked permission to search Brown. Brown consented and 483 grams of cocaine was found strapped to his thighs. Drayton was asked and consented and 295 grams of cocaine was found strapped to his thighs**

**Issue: Was the search and seizure reasonable?**

**Yes, because there was no seizure, and D consented to the search. Whether a seizure has occurred is an objective test based on whether police use physical control or force so that a reasonable person would not feel free to leave or terminate the encounter with police. Here, the badge and physical positioning is relevant but not dispositive. Court finds that a reasonable person would’ve felt free to terminate the encounter based largely on officer’s testimony that others have.**

**Florida v. Bostick**

United States Supreme Court  
501 U.S. 429 (1991)

**Rule of Law**

**A police request for identification and consent to search private belongings does not amount to a seizure when the police inform the subject of the right to refuse consent to questioning and search.**

**Facts**

Bostick (defendant) was riding a bus when two uniformed sheriff’s officers boarded. The officers singled out Bostick and asked him for identification. The officers told Bostick that they were narcotics agents searching for drugs and asked to search his luggage. The officers informed Bostick that he had a right to refuse to consent to the search. Bostick consented to the search and the officers discovered drugs in his luggage. Bostick appealed a trial court judgment and the state supreme court concluded that the officers had engaged in an unreasonable seizure that violated Bostick’s constitutional rights. The state court further held that the unconstitutional seizure negated Bostick’s consent to the search of his luggage. The state of Florida (plaintiff) petitioned the United States Supreme Court for review.

**Issue**

Does a police request for identification and consent to search private belongings amount to a seizure when the police inform the subject of the right to refuse consent to questioning and search?

**Holding and Reasoning (O’Connor, J.)**

No. A police request for identification and consent to search private belongings does not amount to a seizure when the police inform the subject of the right to refuse consent to questioning and search. Police are entitled to question an individual, request identification, and request consent to search personal belongings as long as they do not also suggest that an individual is obligated to comply with those requests. We have previously determined that similar requests made in public settings, such as airports, do not amount to a seizure. A consensual encounter does not implicate Fourth Amendment protections. Bostick asserts that the confining conditions of the bus made him feel that he was not at liberty to walk away from the encounter with the sheriff’s officers. In reality, Bostick would not have felt free to leave in any case, because the bus was scheduled to leave the station. To the extent that Bostick’s freedom was restricted, it was by virtue of his choice to board the bus for passage to his destination. In *INS v. Delgado*, 466 U.S. 210 (1984), we held that INS questioning of factory workers did not amount to a seizure. The employees may not have been at liberty to leave the building due to restrictions imposed by their employer, but they had no reason to believe that they would otherwise be prevented from leaving freely if they truthfully answered or refused to answer the officers’ questions. We cannot determine whether a seizure occurred in this case, because we have no express findings of fact from the trial court. The state supreme court based its conclusion on the exclusive fact that the encounter occurred on a bus. We do, however, reject Bostick’s proposition that the encounter constitutes a seizure by virtue of the fact that no reasonable person would consent to the search of a container known to hold incriminating materials. When we consider the reasonableness of consent to a search, we view it from the standpoint of an innocent person. The matter is remanded to the state courts for a determination of whether the officers’ conduct, in the totality of the circumstances, amounted to a seizure.

**Dissent (Marshall, J.)**

I disagree with the conclusion that the sweeping search of a bus with no foundation for suspicion is constitutionally permissible. In this case, the officers boarded the bus in full display of uniform and with a clearly visible weapon. The officers singled out and approached Bostick, partially blocking his ability to exit from his seat. The facts before the Court do not demonstrate that the officers informed Bostick that he was free to terminate the interview. The evidence simply demonstrates that Bostick was informed that he was at liberty to refuse consent to the luggage search. The pivotal question is whether Bostick felt at liberty to walk away from the interview. If not, he was subjected to an illegal seizure and any subsequent search would be equally unconstitutional. Bostick could have refused to answer questions, but under the circumstances it would not be unreasonable for him to expect that refusal would only result in more demanding interrogation. If Bostick was not informed of his right to terminate the interview, he cannot be expected to know that refusal to cooperate could not worsen his situation. Bostick’s only other option was to get up and leave the bus. The fact that no officer actually pointed a weapon at Bostick does not make their armed physical presence any less coercive. The additional fact that Bostick’s ability to leave the scene was hindered by his need to be on board the bus at the scheduled departure time only supports the conclusion that Bostick was seized for all practical purposes. Interstate travelers under similar situations are particularly vulnerable to feelings of coercion when confronted by police. The officers should be required to demonstrate that they had probable cause to detain Bostick or, at the very least, that they adequately informed him of his right to terminate the interview. Instead, the majority pins responsibility on Bostick for unnecessarily feeling constrained against taking his liberty to leave. The majority opines that law enforcement must respect the rights of individuals in order to succeed in the war on drugs while simultaneously relieving law enforcement of the responsibility to demonstrate that it has lived up to that mandate.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Probable Cause** - A reasonable basis, amounting to more than mere suspicion, to believe that a person has committed a crime or is about to commit a crime, or that evidence relevant to a crime exists in a particular location.

**California v. Hodari D.**

United States Supreme Court  
499 U.S. 621 (1991)

**Rule of Law**

**A Fourth Amendment seizure occurs where the police exercise physical force over a subject or where a subject submits to an officer’s show of authority.**

**Facts**

Two police officers were on patrol. As they were approaching a small car, the youths huddled around the car saw the officers and took off running. Suspicious, the officers gave chase. Just before one officer caught up with him, Hodari D. (defendant), tossed the crack cocaine he had been carrying. Hodari D. moved to have the drug evidence excluded at trial and the motion was denied.

**Issue**

Does a Fourth Amendment seizure occur where an officer makes a show of authority but the subject does not succumb or surrender?

**Holding and Reasoning (Scalia, J.)**

No. A Fourth Amendment seizure occurs when a citizen submits to a show of police authority or is physically restrained by an officer. While an arrest can occur by the slightest application of physical force, if the subject frees himself from such restraint the arrest and seizure come to an end until the subject is brought back into police custody. The common definition of “seizure,” meaning taking possession, supports this position. From a policy standpoint, the definition of seizure should not be extended to include times when an officer makes a show of authority but has yet to apprehend a subject because a fleeing subject should be encouraged to obey the police orders to “stop.” Finally, while *United States v. Mendenhall*, 446 U.S. 544 (1980), held that a seizure occurs when a reasonable person would feel he is not free to go, this is a necessary element but does not itself justify a finding of a Fourth Amendment seizure. Therefore, when Hodari D. was fleeing the police, he was not yet subject to a Fourth Amendment seizure. Hence, when he threw the drugs away before the officer caught him, he abandoned the drugs and the confiscation was not the fruit of a seizure. Accordingly, the drugs were properly admitted at trial.

**Dissent (Stevens, J.)**

The majority’s holding that the *Mendenhall* rule is a necessary but not a sufficient condition to finding a Fourth Amendment seizure is counter to all previous jurisprudence. An initial show of police authority will inform a subject that he is not free to go. However, under the Court’s holding, the subject will not be “seized” until the police exercise physical control over him, regardless of how much time lapses. Such a rule will significantly impede on citizens’ Fourth Amendment rights. An officer may signal a citizen to stop and either rely on the citizen’s response to justify his stop, or use the time it takes the citizen to come under his control to come up with a reason to justify his actions.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**County of Sacramento v. Lewis**

United States Supreme Court  
523 U.S. 833 (1998)

**Rule of Law**

**A specific action by a state official violates substantive due process under the Fourteenth Amendment when it is deliberate and thus constitutes “arbitrary conduct shocking to the conscience” and violates the “decencies of civilized conduct.”**

**Facts**

James Everett Smith, a Sacramento County sheriff’s deputy, and another officer, Murray Stapp, responded to a call to break up a fight. Upon returning to their patrol car, Stapp saw a motorcycle approaching at a very high speed which was operated by Brian Willard, age 18, and carried Philip Lewis, age 16. Willard sped off and Smith pursued at speeds in excess of one hundred miles per hour. The chase ended when the motorcycle tipped over, causing Smith to strike and kill Lewis who could not get out of the way. Lewis’ parents (plaintiffs) brought suit in district court alleging Smith and the County of Sacramento Police Department (defendants) violated Lewis’ substantive due process right to life under the Fourteenth Amendment. The district court denied Lewis’ request for relief. The court of appeals reversed, and the United States Supreme Court granted certiorari.

**Issue**

Whether a police officer violates the Fourteenth Amendment’s guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender.

**Holding and Reasoning (Souter, J.)**

No. The core concept involved in the right to substantive due process is the protection against arbitrary action by the government. However, the criteria used to identify what action is fatally arbitrary differs depending on whether the arbitrary act originates from legislation or a specific act of a governmental officer. For specific acts by a governmental officer, only the most egregious official conduct can be said to be arbitrary in the constitutional sense. Basic tort liability for negligence is not sufficient to meet this standard. Rather, state officials’ conduct has to be “deliberate” to justify Fourteenth Amendment liability. Police officials such as Smith frequently face situations on the job that require prompt action. A decision to engage in the high-speed chase of a fleeing suspect is an instance that involves a hurried and pressured decision without the luxury of a second chance. Thus Smith should not be held liable for a non-deliberate choice made in the heat of the moment. When a police officer causes death in a high-speed automobile chase aimed at apprehending a suspected offender, the element of “arbitrary conduct shocking to the conscience” that is necessary for a substantive due process violation only exists if the police officer acted with a purpose to cause harm unrelated to the legitimate object of arrest. The decision of the court of appeals is affirmed.

**Concurrence (Stevens, J.)**

The majority should have declined to resolve the difficult constitutional questions presented in the case. The §1983 claims at issue can be sufficiently resolved by a finding that Smith is entitled to qualified immunity due to his official position.

**Concurrence (Rehnquist, C.J.)**

The majority is correct to apply the “shocks the conscience” standard in determining whether official conduct violates substantive due process. This high standard was not met in the present case.

**Concurrence (Kennedy, J.)**

While the majority’s “shocks the conscience” standard implicates significant subjective connotations, the standard is useful as a starting point for courts to examine objectively whether state action is consistent with the traditions, precedents, and historical understanding of the Constitution. These traditions recognize the need for police officers to employ significant discretion in making quick judgments in pursuing suspects.

**Concurrence (Breyer, J.)**

Lower courts should have the flexibility to decide such cases on the basis of qualified immunity and thus avoid wrestling with difficult constitutional questions poorly presented.

**Concurrence (Scalia, J.)**

The majority’s holding is correct, but the majority’s reasoning departs significantly from its prior treatment of substantive due process issues. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Court declined to recognize a right as fundamental unless founded in history and tradition. Here, the majority adopts a broad view of the nature of substantive due process rights and articulates a standard that invalidates any state action shocking the conscience, regardless of the nature of the right at stake. A state action is invalid only if the action unduly burdens a fundamental right rooted in history and tradition. No such right is asserted by Lewis in the present case.

**Key Terms:**

**Substantive Due Process -** Provides that the government may not deprive a person of certain fundamental liberties.

**Florida v. Rodriguez**

**Rule of Law**

**Arrest**

**Temporary detention for questioning in case of airport search is reviewed under standard of whether there is articulable suspicion that person has committed or is about to commit a crime and is permissible because of public interest involved in suppression of illegal transactions in drugs or of any other serious crime.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=I2e2fb65c9bf211d9bc61beebb95be672&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Arrest**

**Initial contact between police officers and suspect, where they simply asked if he would step aside and talk with them in airport concourse, was the sort of consensual encounter that implicated no Fourth Amendment interest.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=I2e2fb65c9bf211d9bc61beebb95be672&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Arrest**

**Assuming that, after suspect agreed to talk with police in airport concourse, moved over to where his cohorts and another detective was standing and ultimately granted permission to search his baggage, there was “seizure” for purposes of Fourth Amendment, that seizure was justified by “articulable suspicion” where before officers even spoke to the confederates, one by one they had sighted plain clothes officers and had spoken furtively to one another, one was twice overheard urging others to “get out of here,” suspect's strange movements in his attempt to evade officers aroused further justifiable suspicion, as did contradictory statements concerning identities, one officer had special training in narcotic surveillance and apprehension and suspect was approached in major international airport where, due in part to extensive hijacking surveillance and equipment, reasonable privacy expectations were of significantly lesser magnitude.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=I2e2fb65c9bf211d9bc61beebb95be672&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Arrest**

**Criminal Law**

**State trial court was incorrect both in its conclusion that there was no articulable basis for detaining suspect at airport and in its conclusion that there was “taint” resulting from that stop which rendered cocaine seized following examination of suspect's luggage inadmissible.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=I2e2fb65c9bf211d9bc61beebb95be672&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

105 S.Ct. 308

Supreme Court of the United States

**FLORIDA,**

**v.**

**Damasco Vincente RODRIGUEZ.**

No. 83–1367.

Nov. 13, **1984**.

## Synopsis

A suspect was charged with possession of cocaine with intent to distribute. After a **Florida** trial court suppressed the cocaine seized from the suspect following an examination of his luggage at an airport, the [**Florida** District Court of Appeals, 389 So.2d 4,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&pubNum=735&cite=389SO2D4&originatingDoc=I2e2fb65c9bf211d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed without opinion. Although certiorari was originally denied, a rehearing was granted, the judgment was vacated and the case was remanded for reconsideration [103 S.Ct. 2115.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&pubNum=708&cite=103SCT2115&originatingDoc=I2e2fb65c9bf211d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) The **Florida**District Court of Appeal again affirmed. State petitioned for certiorari. The Supreme Court held that: (**1**) the initial contact between police officers and the suspect, when the officer simply asked the suspect if he would step aside and talk with them in an airport concourse, was the sort of consensual encounter that implicated no Fourth Amendment interest, and (2) assuming that there had been a “seizure” for purposes of the Fourth Amendment after the suspect agreed to talk to the police, moved over to where his cohorts and another detective were standing and ultimately granted permission to search his baggage, any such seizure was justified by “articulable suspicion.”

Certiorari granted, judgment reversed and cause remanded.

Justice Marshall dissented.

Justice Stevens, with whom Justice Brennan joined, dissented with opinion.

Order on remand, [426 So.2d 69](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1983106197&pubNum=735&originatingDoc=I2e2fb65c9bf211d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

# INS v. Delgado

#### United States Supreme Court 466 U.S. 210 (1984)

**Rule of Law**

**A law enforcement officer “seizes” an individual in violation of the Fourth Amendment if he uses physical force, or by show of authority, to restrict the liberty of the individual or if a reasonable person in the same situation would have believed that the individual was not free to leave the presence of the officer.**

**Facts**

Acting on lawfully-obtained warrants, the Immigration and Nationalization Service (INS) (defendant) conducted two searches of a garment factory called Southern California Davis Pleating Company (Davis Pleating), in search of illegal aliens. A separate search was conducted at Mr. Pleat, another garment factory. During the searches, INS agents positioned themselves near exits and conducted a thorough sweep of the building, questioning factory employees regarding their citizenship status. While the INS questioned employees at their work stations, other employees continued with their work and were allowed to freely walk around within the factory. Delgado and three other employees as well as their union representative (collectively Plaintiffs) filed suit against the INS in federal district court and claimed that the searches violated their Fourth Amendment rights and requested declaratory relief. The district court dismissed the union from the suit for lack of standing and held for the INS. The court concluded that none of the Plaintiffs had been detained under the Fourth Amendment during the searches and therefore no unconstitutional activity took place. Plaintiffs appealed. The court of appeals reversed and held that the entire workforce had been seized for the duration of each INS search because agents had been stationed near building exits, leading a reasonable worker to believe that he or she was not free to leave. The U.S. Supreme Court granted certiorari to review.

**Issue**

Does a law enforcement officer “seize” an individual in violation of the Fourth Amendment if he uses physical force, or by show of authority, to restrict the liberty of the individual or if a reasonable person in the same situation would have believed that the individual was not free to leave the presence of the officer?

**Holding and Reasoning (Rehnquist, J.)**

Yes. Not every interaction between a law enforcement officer and a civilian raises Fourth Amendment concerns. It is only when the officer uses physical force, or by show of authority, to restrict the liberty of a citizen that a “seizure” may have occurred in violation of the Fourth Amendment. See *Terry v. Ohio*, 392 U.S. 1 (1968). That restriction of liberty need only occur for a brief period of time. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). Further, a constitutionally permissible encounter between officer and civilian may turn into an unlawful seizure if “in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” *United States v. Mendenhall*, 446 U.S. 544, 544 (1980). Here, Plaintiffs argue that the INS created an environment that would lead a reasonable person in the same situation to believe that he was not free to leave the factory during the search and questioning of employees. However, the agents allowed the workers to freely move about the factory and to continue to conduct their work freely. Further, Plaintiffs’ claims that INS agents were stationed at factory exits to prevent employees from leaving are not based in evidence. Clearly, agents wanted to ensure that factory employees were questioned. The record indicates that the agents’ conduct was restricted to questioning employees and arresting only those that were unlawfully in the United States. If mere questioning does not constitute a seizure when it occurs inside the factory, it is no more a seizure when it occurs at the factory exits. Likewise, the possibility that employees would be questioned if they were to leave the building should not have resulted in any reasonable fear that they would be seized or detained in any meaningful way. Therefore, no unconstitutional seizure of the workforce occurred. Additionally, there was no unlawful detention of each individual worker. INS agents spent a minimal amount of time questioning Plaintiffs and other factory workers. The judgment of the court of appeals is reversed and the matter is remanded for further proceedings consistent with the opinion.

**Concurrence AND DISSENT: (Brennan, J.)** The majority turns a blind eye to the record and intimates that the Plaintiffs were involved in brief and consensual encounters with INS agents with no threat to their personal security and freedom. It is clear from the record that INS agents demonstrated a “show of authority” when they entered the factory in large numbers and questioned employees regarding their right to remain in the United States. Faced with such tactics, a reasonable person could not help but feel compelled to stop and provide answers to the agents’ questions. Further, the Court has consistently held that law enforcement officers may not detain and interrogate an individual unless they have reasonable grounds for suspecting that the person is involved in some unlawful activity. Here, the INS agents did not question specific workers. Instead, they questioned all factory workers in hopes of finding illegal aliens. The agents’ conducted their questioning indiscriminately and in violation of the Fourth Amendment.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Schneckloth v. Bustamonte**

United States Supreme Court  
412 U.S. 218 (1973)

**Rule of Law**

**The court must look at the totality of the circumstances in order to determine whether consent to a warrantless search absent probable cause was freely and voluntarily given.**

# \*\*BRENDLIN v. CALIFORNIA\*\*

#### United States Supreme Court 551 U.S. 249 (2007)

#### Rule of Law

**The passenger of a vehicle in a traffic stop is seized within the meaning of the Fourth Amendment.**

#### Facts

On November 27, 2001, police officers pulled Karen Simeroth (defendant) over to check on her vehicle’s permit. The state admitted that the stop was unfounded. One of the officers recognized the passenger, Bruce Brendlin (defendant), and thought he might be a parole violator. After verifying that Brendlin was a parole violator with an outstanding warrant, the officer ordered Brendlin out of the car and placed him under arrest. During a search, the officers found drug paraphernalia. The officers also found drugs and paraphernalia on Simeroth and in the car. Brendlin was charged with drug possession and manufacture. Brendlin moved to suppress the evidence on the grounds that the initial traffic stop was an unlawful seizure. The trial court denied the motion and held that Brendlin was only seized when ordered out of the car and arrested. Brendlin pled guilty and was sentenced to four years incarceration. The Supreme Court of California affirmed.

#### Issue

Is the passenger of a vehicle in a traffic stop seized within the meaning of Fourth Amendment?

#### Holding and Reasoning (Souter, J.)

Yes. The passenger of a vehicle in a traffic stop is seized and may challenge the validity of the stop. An intentional detention by police, whether by physical restraint or show of authority, that impedes a person’s freedom of movement is a seizure under the Fourth Amendment. Seizures may not be unintentional and do not occur until the individual submits. Under *United States v. Mendenhall*, 466 U.S. 544 (1980), the test for determining whether a seizure has occurred is whether in light of the surrounding circumstances “a reasonable person would have believed that he was free to leave” or end the encounter. A traffic stop is a seizure of all of the occupants of a car. A reasonable passenger in Brendlin’s place would conclude that the vehicle was under police control, that he was under police scrutiny, and that he was not free to leave. The Supreme Court of California concluded that (1) Brendlin was not seized during the initial stop because the officer only intended to seize Simeroth, (2) the stop was not a seizure because only the driver could submit to the seizure, and (3) a rule that the passengers of a car are seized during a traffic stop would apply to all vehicles stuck in traffic behind such a stop. These arguments fail. The *Mendenhall* test makes clear that the test of whether a seizure has occurred is not based on the subjective intent of the officer but the objective belief of the passenger. Brendlin submitted to the seizure by remaining in the vehicle. Finally, occupants of other vehicles would know that the officers’ show of force is directed only at the vehicle stopped. Thus, passengers of a vehicle are seized during a traffic stop and may challenge the constitutionality of the stop. Ruling otherwise would encourage illegal stops. Brendlin’s motion to suppress should have been granted. The ruling of the lower court is reversed.

***Brendlin v. California*** makes it clear that if a car is stopped by police, anyone in the car may challenge the stop’s constitutionality.

**Key Terms:**

**Mendenhall Test** - The test for determining whether a seizure has occurred under the Fourth Amendment is whether, in light of the surrounding circumstances, “a reasonable person would believe he was free to leave.”

**Seizure** - An intentional detention through physical restraint or show of authority that impedes a person’s freedom of movement.

**Brendlin v. California (2007)**

**Facts:** Brendlin was a passenger in a car that was stopped by police. The stop was later conceded to be illegal for lack of reasonable suspicion. He was found to have an outstanding arrest warrant. He was arrested and the car was searched. Drug and drug paraphernalia were found on him and in the car. Brendlin claims the evidence was the fruit of his illegal seizure by stopping the car. This was rejected by the California Supreme Court on the ground that he was a mere passenger and had not been seized by virtue of the vehicle being stopped.

**Issue:** Would a reasonable person in Brendlin’s position, when the car was stopped by police, would have believed himself free to “terminate the encounter” between police and himself”.

**Rule:** No. A reasonable passenger would have understood the police officers to be exercising control to the point that no one in the car was free to leave without police permission. A passenger may bring a fourth amendment challenge to the legality of the traffic stop.

**Analysis:** A traffic stop interferes with the travel of a passenger just as much as it stops the driver. A passenger will expect to be subjected to some scrutiny, and his attempt to leave the scene would obviously likely prompt an objection from the officer. No passenger would feel free to leave.

The law is settled that in fourth amendment terms a traffic stop in tails a seizure of the driver even though the purpose of the stop is limited and the result in detention is brief.

The state supreme court argued 1) Brendlin was not seized during the initial stop because the officer only intended to seize the driver, (2) the stop was not a seizure because only the driver could submit to the seizure, and (3) a rule that the passengers of a car are seized during a traffic stop would apply to all vehicles stuck in traffic behind such a stop. United States Supreme Court said this fails the *Menhall* test of what a reasonable passenger would belief. It’s about about the subjective intent of the officer. All occupants of the car are subject to control by the stop.

*Florida v. Bostick*- police are entitled to question an individual, request identification, and request consent to search personal belongings as long as they do not also suggest the individual is obligated to comply. A seizure occurs when a reasonable person feels his freedom has been terminated or restrained by police.

*Brower v. County of Inyo*- Since Brower was stopped by police roadblock, this constituted a seizure… there was a governmental termination of his movement through intentionally applied means.

*United States v. Mendhall*- A seizure occurs if in view of all the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.

*Maryland v. Wilson*- during a lawful traffic stop an officer may order a passenger out of the car as a precautionary measure, without reasonable suspicion that the passenger poses a safety risk. In these situations there is a social expectation of “unquestioned police command”. This is at odds with any notion that a passenger would feel free to leave or terminate the encounter any other way without advance permission.

1). California defends the state supreme courts ruling by citing our cases holding that seizure requires a purposeful, deliberate act of detention. But the intent that counts under the fourth amendment is the intent that has been conveyed to the person confronted. The issue is whether a reasonable passenger would have perceived that the show of authority was at least partly directed at him, and that he was not free to ignore the police presence and go about his business.

2). The state supreme court assumed that Brendlin as the passenger had no ability to submit to the deputies show of authority because only the driver was in control of the moving vehicle. What may amount to submission depends on what a person was doing before the show of authority. Here Brendlin had no effective way to signal submission while the car was still moving on the roadway, but once it came to a stop, he could and apparently did submit by staying inside.

3).The state supreme court shied away from the rule the United States Supreme Court applies in this case for fear that it would encompass motorists following the vehicle subject to the traffic stop, who are forced to slow down and even perhaps come to a halt in order to accommodate that vehicle submission to police authority….they could claim a “seizure”. We feel the occupant of a car knows that he is stuck in traffic because another car has been pulled over. He would not perceive this as a show of authority directed at him or his car. Such incidental restrictions on freedom of movement would not tend to affect the individual sense of security and privacy in traveling in an automobile.

The Supreme court stated if they don’t rule this way….. If they said passengers in a private car is not a seizure in a traffic stop, this would invite police officers to stop cars with passengers regardless of probable cause or reasonable suspicion of anything illegal. The evidence uncovered as a result of an arbitrary traffic stop would still be admissible against any passenger. This would be a powerful incentive to run the kind of “roving patrols” that would still violate the drivers fourth amendment right....but not the passenger’s.

**Westlaw: Brendlin v. California (2007)**

After officers stopped a car to check its registration without reason to believe it was being operated unlawfully, one of them recognized petitioner Brendlin, a passenger in the car. Upon verifying that Brendlin was a parole violator, the officers formally arrested him and searched him, the driver, and the car, finding, among other things, methamphetamine paraphernalia. Charged with possession and manufacture of that substance, Brendlin moved to suppress the evidence obtained in searching his person and the car, arguing \*\*2402 that the officers lacked probable cause or reasonable suspicion to make the traffic stop, which was an unconstitutional seizure of his person. The trial court denied the motion, but the California Court of Appeal reversed, holding that Brendlin was seized by the traffic stop, which was unlawful. Reversing, the State Supreme Court held that suppression was unwarranted because a passenger is not seized as a constitutional matter absent additional circumstances that would indicate to a reasonable person that he was the subject of the officer's investigation or show of authority.

**Held:** When police make a traffic stop, a passenger in the car, like the driver, is seized for Fourth Amendment purposes and so may challenge the stop's constitutionality. Pp. 2405 – 2410.

(a) A person is seized and thus entitled to challenge the government's action when officers, by physical force or a show of authority, terminate or restrain the person's freedom of movement through means intentionally applied. Florida v. Bostick, 501 U.S. 429, 434, 111 S.Ct. 2382, 115 L.Ed.2d 389; Brower v. County of Inyo, 489 U.S. 593, 597, 109 S.Ct. 1378, 103 L.Ed.2d 628. There is no seizure without that person's actual submission. See, e.g., California v. Hodari D., 499 U.S. 621, 626, n. 2, 111 S.Ct. 1547, 113 L.Ed.2d 690. When police actions do not show an unambiguous intent to restrain or when an individual's submission takes the form of passive acquiescence, the test for telling when a seizure occurs is whether, in light of all the surrounding circumstances, a reasonable person would have believed he was not free to leave. E.g., United States v. Mendenhall, 446 U.S. 544, 554, 100 S.Ct. 1870, 64 L.Ed.2d 497 (principal opinion). But when a person “has no desire to leave” for reasons unrelated to the police presence, the “coercive effect of the encounter” can be measured better by asking whether “a reasonable person would feel free to decline the officers' requests or otherwise terminate the encounter.” Bostick, supra, at 435–436, 111 S.Ct. 2382. Pp. 2405 – 2407.

\*250 b) Brendlin was seized because no reasonable person in his position when the car was stopped would have believed himself free to “terminate the encounter” between the police and himself. Bostick, supra, at 436, 111 S.Ct. 2382. Any reasonable passenger would have understood the officers to be exercising control to the point that no one in the car was free to depart without police permission. A traffic stop necessarily curtails a passenger's travel just as much as it halts the driver, diverting both from the stream of traffic to the side of the road, and the police activity that normally amounts to intrusion on “privacy and personal security” does not normally (and did not here) distinguish between passenger and driver. United States v. Martinez–Fuerte, 428 U.S. 543, 554, 96 S.Ct. 3074, 49 L.Ed.2d 1116. An officer who orders a particular car to pull over acts with an implicit claim of right based on fault of some sort, and a sensible person would not expect the officer to allow people to come and go freely from the physical focal point of an investigation into faulty behavior or wrongdoing. If the likely wrongdoing is not the driving, the passenger will reasonably feel subject to suspicion owing to close association; but even when the wrongdoing is only bad driving, the passenger will expect to be subject to some scrutiny, and his attempt to leave would be so obviously likely to prompt an objection from the officer that no passenger would feel free to leave in the first place. It is also reasonable for passengers to expect that an officer at the scene of a crime, arrest, or investigation will not let people move around in ways that could jeopardize his safety. See, e.g., \*\*2403 Maryland v. Wilson, 519 U.S. 408, 414–415, 117 S.Ct. 882, 137 L.Ed.2d 41. The Court's conclusion comports with the views of all nine Federal Courts of Appeals, and nearly every state court, to have ruled on the question. Pp. 2406 – 2408.

(c) The State Supreme Court's contrary conclusion reflects three premises with which this Court respectfully disagrees. First, the view that the police only intended to investigate the car's driver and did not direct a show of authority toward Brendlin impermissibly shifts the issue from the intent of the police as objectively manifested to the motive of the police for taking the intentional action to stop the car. Applying the objective Mendenhall test resolves any ambiguity by showing that a reasonable passenger would understand that he was subject to the police display of authority. Second, the state court's assumption that Brendlin, as the passenger, had no ability to submit to the police show of authority because only the driver was in control of the moving car is unavailing. Brendlin had no effective way to signal submission while the car was moving, but once it came to a stop he could, and apparently did, submit by staying inside. Third, there is no basis for the state court's fear that adopting the rule this Court applies would encompass even those motorists whose movement has been impeded due \*251 to the traffic stop of another car. An occupant of a car who knows he is stuck in traffic because another car has been pulled over by police would not perceive the show of authority as directed at him or his car. Pp. 2408 – 2410.

(d) The state courts are left to consider in the first instance whether suppression turns on any other issue. P. 2410.

38 Cal.4th 1107, 45 Cal.Rptr.3d 50, 136 P.3d 845, vacated and remanded.

SOUTER, J., delivered the opinion for a unanimous Court.

**Brendlin v. California, 551 US 249 (2007)**

**Brendlin was the passenger in a car illegally stopped (illegally stopped because the police had no reasonable suspicion to stop the car). Brendlin was arrested for an outstanding warrant and was searched incident to arrest. Police found drugs and paraphernalia during the search and he was convicted of the drugs and paraphernalia. California Appeals Court reversed, CA Supreme Court reversed again.**

**Issue: Was the passenger “seized” pursuant to the 4th Amendment?**

Reversed. A person is seized by the police and entitled to challenge the government’s action under the 4th Amendment when the officer by means of physical force or show of authority, restrains a person’s freedom of movement. To hold otherwise would "invite police officers to stop cars with passengers regardless of probable cause or reasonable suspicion of anything illegal."

**Objective test: whether a reasonable person would believe that he was not free to leave or whether a reasonable person would fee free to decline the officer’s request or terminate the encounter.**

**Florida v. Bostick**

United States Supreme Court  
501 U.S. 429 (1991)

**Rule of Law**

**A police request for identification and consent to search private belongings does not amount to a seizure when the police inform the subject of the right to refuse consent to questioning and search.**

**Brower v. County of Inyo**

**Rule of Law**

**Arrest**

**Fourth Amendment seizure does not occur whenever there is governmentally caused termination of individual's freedom of movement even if desirable, such as in case of fleeing felon, but only when there is governmental termination of freedom of movement through means intentionally applied.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=If5be02d09c1f11d9bdd1cfdd544ca3a4&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Arrest**

**Driver of stolen car who was attempting to elude police was “seized” for purposes of Fourth Amendment, when police officers placed 18–wheel truck completely across highway in path of flight.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=If5be02d09c1f11d9bdd1cfdd544ca3a4&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Civil Rights**

**“Seizure” alone is not enough for § 1983 liability; seizure must also be unreasonable.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=If5be02d09c1f11d9bdd1cfdd544ca3a4&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**;**[**42 U.S.C.A. § 1983**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=42USCAS1983&originatingDoc=If5be02d09c1f11d9bdd1cfdd544ca3a4&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Civil Rights**

[**Section 1983**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=42USCAS1983&originatingDoc=If5be02d09c1f11d9bdd1cfdd544ca3a4&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**complaint which alleged that police officers, acting under color of state law, violated rights of decedent who was killed when stolen car he had been driving at high speeds to elude pursuing police crashed into police roadblock, stated cause of action under Fourth Amendment on basis that seizure was unreasonable due to excessive force; complaint alleged that roadblock was placed in such manner as to be likely to kill decedent.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=If5be02d09c1f11d9bdd1cfdd544ca3a4&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**;**[**42 U.S.C.A. § 1983**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=42USCAS1983&originatingDoc=If5be02d09c1f11d9bdd1cfdd544ca3a4&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Arrest**

**Alleged use of roadblock to stop driver of stolen car constituted “seizure” within meaning of Fourth Amendment.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=If5be02d09c1f11d9bdd1cfdd544ca3a4&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

109 S.Ct. 1378

Supreme Court of the United States

**Georgia BROWER, Individually and as Administrator of the Estate of William James Caldwell (Brower), Deceased, et al., Petitioners**

**v.**

**COUNTY OF INYO et al.**

No. 87–248.

Argued Jan. 11, 1989.Decided March 21, 1989.

**Synopsis**

Section 1983 action was brought alleging that police officers, acting under color of state law, violated rights of decedent who was killed when stolen car he was driving at high speeds to elude pursuing police crashed into police roadblock, on basis that roadblock constituted unreasonable seizure due to excessive force. The United States District Court for the Eastern District of California, Robert E. Coyle, J., dismissed action and appeal was taken. The Court of Appeals, Ninth Circuit, Goodwin, Circuit Judge, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I4f5a2894951911d9a707f4371c9c34f0&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[817 F.2d 540,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1987062190&pubNum=350&originatingDoc=If5be02d09c1f11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) reversed in part, affirmed in part and remanded. The Supreme Court, Justice Scalia, held that: (1) decedent was subject to Fourth Amendment seizure by placement of roadblock, and (2) complaint adequately alleged unreasonable seizure for purposes of § 1983 liability.

**Reversed and remanded.**

Justice Stevens filed opinion concurring in judgment in which Justices Brennan, Marshall and Blackmun joined.

Opinion on remand, [884 F.2d 1316](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989132515&pubNum=350&originatingDoc=If5be02d09c1f11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

Petitioners' decedent (Brower) was killed when the stolen car he had been driving at high speeds to elude pursuing police crashed into a police roadblock. Petitioners brought suit under 42 U.S.C. § 1983 in Federal District Court, claiming, inter alia, that respondents, acting under color of law, violated Brower's Fourth Amendment rights by effecting an unreasonable seizure using excessive force. Specifically, the complaint alleges that respondents placed an 18–wheel truck completely across the highway in the path of Brower's flight, behind a curve, with a police cruiser's headlights aimed in such fashion as to blind Brower on his approach. It also alleges that the fatal collision was a “proximate result” of this police conduct. The District Court dismissed for failure to state a claim, concluding that the roadblock was not unreasonable under the circumstances, and the Court of Appeals affirmed on the ground that no “seizure” had occurred.

**Held:**

1. Consistent with the language, history, and judicial construction of the Fourth Amendment, a seizure occurs when governmental termination of a person's movement is effected through means intentionally applied. Because the complaint alleges that Brower was stopped by the instrumentality set in motion or put in place to stop him, it states a claim of Fourth Amendment “seizure.” Pp. 1380–1382.

2. Petitioners can claim the right to recover for Brower's death because the \*\*1380 unreasonableness alleged consists precisely of setting up the roadblock in such a manner as to be likely to kill him. On remand, the Court of Appeals must determine whether the District Court erred in concluding that the roadblock was not “unreasonable.” Pp. 1382–1383.

817 F.2d 540 (CA9 1987), reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, O'CONNOR, and KENNEDY, JJ., joined. STEVENS, J., filed an opinion concurring in the judgment, in which BRENNAN, MARSHALL, and BLACKMUN, JJ., joined, post, p. ––––.

**United States v. Mendenhall**

United States Supreme Court  
446 U.S. 544 (1980)

**Rule of Law**

**A Fourth Amendment “seizure” occurs when a reasonable person would believe that he is not free to leave police custody.**

**Facts**

Upon exiting her plane, Mendenhall (defendant) was approached in the airport by two plain clothes Drug Enforcement Administration (DEA) agents who asked to see her plane ticket and identification. The agents testified that they decided to question Mendenhall because she was behaving in a way typical of people illegally transporting drugs. Mendenhall showed the police her identification and ticket which they then gave back to her. After identifying themselves as DEA agents, the agents then asked if she would come with them to their office and she complied. The agents did not brandish their weapons but at trial, one of the agents testified that at this point if she had wanted to leave, Mendenhall would have been restrained. Once at the office, the agents asked if she would consent to a search of her bag and her person. She agreed. As she was undressing, two packages of heroin that Mendenhall was hiding on her person were discovered. The district court held that the consent to search was freely and voluntarily given while the court of appeals held that consent to the search was not voluntary and the result of prior government misconduct.

**Issue**

Has a Fourth Amendment seizure occurred where the totality of the circumstances indicate that the citizen was free to leave police custody?

**Holding and Reasoning (Stewart, J.)**

No. A Fourth Amendment seizure does not occur unless the totality of the circumstances would lead a reasonable person to believe he was not free to leave. In this case, there was no Fourth Amendment seizure. When the agents first approached Mendenhall, she was in a public space. The agents were not in uniform, and they did not display any weapons. The agents simply approached her, identified themselves and asked for her identification and ticket. There was no reason to believe she could not simply walk away from the conversation. Furthermore, when Mendenhall agreed to follow the agents to their office, her consent was not the product of any coercion or duress. The police neither told her she had to go nor threatened her if she did not. Finally, her consent to the search is valid because it was freely and voluntarily given and was not the result of an illegal seizure. Therefore, the judgment of the court of appeals is reversed and the case is remanded.

**Concurrence (Powell, J.)**

The Court did not need to go so far as to hold that the agents’ actions did not amount to a Fourth Amendment seizure of Mendenhall. The agents stopped Mendenhall based on reasonable and articulable suspicion that she was engaged in criminal activity. Therefore, the search can be upheld as constitutional because the agents acted pursuant to the Fourth Amendment.

**Dissent (White. J.)**

When the DEA agents stopped Mendenhall as she was exiting her plane, she was “seized” within the meaning of the Fourth Amendment and the stop was unconstitutional because the agents lacked reasonable suspicion that she was engaged in criminal activity. The Court’s opinion wrongly relies on the lack of evidence indicating that Mendenhall was not free to leave because the issue of whether or not she was in fact seized was not decided at trial and is therefore not part of the record. Furthermore, when she went with the agents to their office, Mendenhall was subject to a Fourth Amendment seizure. The DEA agent testified that at that point she was no longer free to leave, and her mere willingness to go with the agents does not satisfy the legal requirement for consent.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Arizona v. Johnson**

United States Supreme Court  
555 U.S. 323 (2009)

**Rule of Law**

**To justify a pat down of a driver or passenger during a lawful traffic stop, the police must have reasonable suspicion that the person subjected to the frisk is armed and dangerous.**

**Facts**

Police officers stopped a car because its registration had been suspended. One of the officers asked Johnson (defendant), one of the passengers, to get out of the car. The officer feared that Johnson might have a gun, so she patted him down, and the frisk revealed a gun. The state court held that because the officer had no suspicion that Johnson was involved in criminal activity, the frisk was not constitutional. The United States Supreme Court granted certiorari.

**Issue**

May an officer frisk a passenger during a traffic stop based on mere suspicion that the person subjected to the frisk is armed and dangerous?

**Holding and Reasoning**

Yes. To justify a pat down of a driver or passenger during a lawful traffic stop, the police must have reasonable suspicion that the person subjected to the frisk is armed and dangerous. Importantly, the officer’s inquiries into matters unrelated to the justification for the traffic stop do not necessarily terminate the lawful seizure. In this case, the pat down of Johnson was constitutional. The officers did not give any indication to Johnson that he was free to go or that the stop had ended, and one of the officers had reasonable suspicion that Johnson had a gun. This reasonable suspicion during the lawful stop makes the pat down constitutional. The state court is reversed.

**Key Terms:**

**Reasonable Suspicion** - Generally, a quantum of proof sufficient to justify an objectively reasonable person in suspecting, but not necessarily believing, that someone has committed, is committing, or is about to commit a crime. Reasonable suspicion is usually the lowest quantum of proof that the law will recognize for any purpose. It is sufficient to justify brief investigatory detentions, but not full-blown arrests, by the police.

**Terry v. Ohio**

*Rule of Law*

**When an officer observes unusual conduct that reasonably leads him to assume that criminal activity is afoot and that the people he is interacting with are armed, the police officer may conduct a limited search for weapons.**

# *Terry* was the first time the Court permitted a warrantless search for less than probable cause.

# Marlyand v. Wilson

**Rule of Law**

**Arrest**

**Police officer may, as a matter of course, order passenger of lawfully stopped automobile to exit vehicle.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=Ibdd906309c2511d9bc61beebb95be672&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Automobiles**

**Police officer making traffic stop may order passengers to get out of car pending completion of stop.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=Ibdd906309c2511d9bc61beebb95be672&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

117 S.Ct. 882

Supreme Court of the United States

**MARYLAND, Petitioner,**

**v.**

**Jerry Lee WILSON.**

No. 95–1268.

Argued Dec. 11, 1996.Decided Feb. 19, 1997.

**Synopsis**

Passenger in automobile moved to suppress crack cocaine obtained after police officer ordered him to step out of car during traffic stop. The Circuit Court, Baltimore County, [Thomas J. Bollinger](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0106623601&originatingDoc=Ibdd906309c2511d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ibdd906309c2511d9bc61beebb95be672), J., granted motion. State appealed. The Maryland Court of Special Appeals, Moylan, J., [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Iacc482b2359111d986b0aa9c82c164c0&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[106 Md.App. 24, 664 A.2d 1,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995177342&pubNum=162&originatingDoc=Ibdd906309c2511d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed. State sought and the Maryland Court of Appeals denied certiorari. State sought certiorari. After granting certiorari, the Supreme Court, Chief Justice [Rehnquist](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0238463201&originatingDoc=Ibdd906309c2511d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ibdd906309c2511d9bc61beebb95be672), held that police officer making traffic stop may order passengers to get out of car pending completion of stop.

Reversed and remanded.

Justice [Stevens](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0156277701&originatingDoc=Ibdd906309c2511d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ibdd906309c2511d9bc61beebb95be672) filed dissenting opinion in which Justice [Kennedy](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0243105201&originatingDoc=Ibdd906309c2511d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ibdd906309c2511d9bc61beebb95be672) joined.

Justice [Kennedy](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0243105201&originatingDoc=Ibdd906309c2511d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ibdd906309c2511d9bc61beebb95be672) filed separate dissenting opinion.

After stopping a speeding car in which respondent Wilson was a passenger, a Maryland state trooper ordered Wilson out of the car upon noticing his apparent nervousness. When Wilson exited, a quantity of cocaine fell to the ground. He was arrested and charged with possession of cocaine with intent to distribute. The Baltimore County Circuit Court granted his motion to suppress the evidence, deciding that the trooper's ordering him out of the car constituted an unreasonable seizure under the Fourth Amendment. The Maryland Court of Special Appeals affirmed, holding that the rule of Pennsylvania v. Mimms, 434 U.S. 106, 98 S.Ct. 330, 54 L.Ed.2d 331, that an officer may as a matter of course order the driver of a lawfully stopped car to exit his vehicle, does not apply to passengers.

**Held:** An officer making a traffic stop may order passengers to get out of the car pending completion of the stop. Statements by the Court in Michigan v. Long, 463 U.S. 1032, 1047–1048, 103 S.Ct. 3469, 3480, 77 L.Ed.2d 1201 (Mimms “held that police may order persons out of an automobile during a [traffic] stop” (emphasis added)), and by Justice Powell in Rakas v. Illinois, 439 U.S. 128, 155, n. 4, 99 S.Ct. 421, 436, n. 4, 58 L.Ed.2d 387 (Mimms held “that passengers ... have no Fourth Amendment right not to be ordered from their vehicle, once a proper stop is made” (emphasis added)), do not constitute binding precedent, since the former statement was dictum, and the latter was contained in a concurrence. Nevertheless, the Mimms rule applies to passengers as well as to drivers. The Court therein explained that the touchstone of Fourth Amendment analysis is the reasonableness of the particular governmental invasion of a citizen's personal security, 434 U.S., at 108–109, 98 S.Ct., at 332, and that reasonableness depends on a balance between the public interest and the individual's right to personal security free from arbitrary interference by officers, id., at 109, 98 S.Ct., at 332. On the public interest side, the same weighty interest in officer safety is present regardless of whether the occupant of the stopped car is a driver, as in Mimms, see id., at 109–110, 98 S.Ct., at 332–333, or a passenger, as here. Indeed, the danger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in the stopped car. On the personal liberty side, the case for passengers is stronger than that for the driver in the sense that there is probable cause to believe that the driver has committed a minor vehicular offense, see id., at 110, 98 S.Ct., at 333, but there is no such reason to stop or detain \*409 passengers. But as a practical matter, passengers are already stopped by virtue of the stop of the vehicle, so that the additional intrusion upon them is minimal. Pp. 884–886.

We therefore hold that an officer making a traffic stop may order passengers to get out of the car pending completion of the stop.3

106 Md.App. 24, 664 A.2d 1, reversed and remanded.\*\*884 REHNQUIST, C.J., delivered the opinion of the Court, in which O'CONNOR, SCALIA, SOUTER, THOMAS, SCALIA, SOUTER, THOMAS, GINSBURG, and BREYER, JJ., joined. STEVENS, J., filed a dissenting opinion, in which KENNEDY, J., joined. KENNEDY, J., filed a dissenting opinion.

**\*\*RODRIGUEZ v. UNITED STATES\*\***

United States Supreme Court  
575 U.S. 348 (2015)

**Rule of Law**

**Under the Fourth Amendment, a police officer may not prolong a routine traffic stop to have a drug-sniffing dog walk around the vehicle.**

**Facts**

A Nebraska K-9 police officer conducted a traffic stop of Dennys Rodriguez (defendant) at 12:06 a.m. after Rodriquez drove his vehicle onto the shoulder of a highway in violation of state law. The officer questioned Rodriguez and his passenger and collected their driver’s licenses, as well as the vehicle registration and proof of insurance. The officer requested backup, ran background checks of both men, and issued both men written warnings. The officer then requested permission to walk his dog around the vehicle, but Rodriguez refused. At 12:33 a.m., seven or eight minutes after the warnings were issued and backup arrived, the officer led his dog around the vehicle. The dog indicated a hit, the vehicle was searched, and drugs were found in the vehicle. Rodriguez was convicted in federal district court on charges brought by the United States government (plaintiff), and his suppression motion was denied by the United States Court of Appeals for the Eighth Circuit. The court based its ruling on Eighth Circuit precedent that permitted drug sniffs within a short time after completion of a traffic stop, as long as the intrusion was deemed to have been *de minimis*. The United States Supreme Court granted certiorari.

**Issue**

Under the Fourth Amendment, may a police officer prolong a routine traffic stop to have a drug-sniffing dog walk around the vehicle?

**Holding and Reasoning (Ginsburg, J.)**

No. Once a routine traffic stop has concluded, an officer may not conduct a drug sniff without reasonable suspicion or a search warrant. A routine traffic stop is analogous to a *Terry* stop, the duration of which may only last as long as necessary to complete the mission of the stop and address any safety concerns. *See Terry v. Ohio*, 392 U.S. 1 (1968). The authority for the seizure ends when the tasks tied to the traffic violation are completed or should have been completed. An officer may conduct certain unrelated checks during a lawful traffic stop only if those checks do not prolong the stop. *See Arizona v. Johnson*, 555 U.S. 323 (2009); *Illinois v. Caballes*, 543 U.S. 405 (2005). Beyond issuing a traffic ticket, other permissible inquiries during a stop include checking driver’s licenses, vehicle registration, and insurance, as well as checking for outstanding warrants for the occupants. A drug sniff, unlike a routine check, is not relevant to roadway safety and cannot be described as part of the mission of the stop. In *Pennsylvania v. Mims*, 434 U.S. 106 (1977), this Court held that requiring a lawfully stopped driver to exit the vehicle was a *de minimis* intrusion compared to the legitimate government interest in protecting officer safety. A dog sniff cannot be justified on the same basis, because officer safety is not directly addressed by a drug sniff. Even if an officer is diligent and expeditious in completing the mission of a traffic stop, the stop still may not be prolonged in order to conduct a drug sniff. The issue is not whether the drug sniff occurs before or after the ticket is issued, but whether the sniff prolongs the stop. The judgment of the court of appeals is therefore vacated, and the case is remanded for a determination of whether a reasonable suspicion of criminal activity existed to justify detaining Rodriguez beyond the traffic stop.

**Dissent (Alito, J.)**

The majority’s ruling will have a small effect on officer conduct moving forward, as officers will learn the sequence of events to follow during traffic stops to avoid prolonging the stop.

**Dissent (Thomas, J.)**

The length of time for this traffic stop, even with the drug sniff, was entirely reasonable. The majority improperly and arbitrarily links the constitutionality of the sniff to the length of time that an individual officer takes to conduct a traffic stop. A defendant stopped by a particularly efficient officer is entitled to be released much more quickly than a defendant stopped by a slower officer. A drug sniff is not unlike the permissible warrant check, in that neither is directly related to the mission of the traffic stop. Traffic stops based on probable cause afford an officer greater leeway and should allow for drug sniffs.

***Rodriguez*** held that a dog sniff that prolongs a traffic stop, not supported by at least reasonable suspicion, violates the Fourth Amendment.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**De Minimis** - Something that is too minor to be considered.

**Rodriguez v. United States (2015)**

**Nebraska K-9 officer saw car drive onto highway shoulder which violates state law. Officer stopped car at 12:06 a.m. Officer questioned Rodriguez, ran his license, registration and proof of insurance, ran a record check on him and then did the same for the passenger. Officer wrote a warning ticket, returned their documents to them and then asked for permission to walk his dog around car. They declined. 7-8 minutes later at 12:33 another officer arrived and the K-9 officer walked his dog around the car and dog alerted leading to probable cause search of car revealing methamphetamine. Federal prosecution for meth. Convicted, affirmed on appeal.**

**Issue: Was the search and seizure reasonable pursuant to the 4th Amendment?**

**No. Reversed. A seizure for a traffic violation, which is more akin to a Terry Stop than a formal arrest, justifies enough time to deal with the traffic violation which normally involves running the license, the registration and proof of insurance. Probably involves running for warrants. These checks serve to make sure the laws are followed, the driver is licensed, the car is properly on the road and ensure officer safety. Dog sniff has nothing to do with any of these goals. Once the traffic stop purpose is completed the seizure should be over. Prolonging the seizure after the traffic investigation is over is unlawful unless the police have specific and articulable reasons for believing the driver is engaged in other criminal activity.**

# Terry v. Ohio

#### United States Supreme Court 392 U.S. 1 (1968)

#### Rule of Law

**When an officer observes unusual conduct that reasonably leads him to assume that criminal activity is afoot and that the people he is interacting with are armed, the police officer may conduct a limited search for weapons.**

# *Terry* was the first time the Court permitted a warrantless search for less than probable cause.

**Illinois v. Caballes**

United States Supreme Court  
543 U.S. 405 (2005)

#### Rule of Law

**The Fourth Amendment does not require reasonable, articulable suspicion to administer a canine sniff test during a routine traffic stop.**

**Arizona v. Johnson**

United States Supreme Court  
555 U.S. 323 (2009)

**Rule of Law**

**To justify a pat down of a driver or passenger during a lawful traffic stop, the police must have reasonable suspicion that the person subjected to the frisk is armed and dangerous.**

**Pennsylvania v. Mimms**

United States Supreme Court  
434 U.S. 106 (1977)

**Rule of Law**

**In assessing the reasonableness of a search and seizure, a court must weigh the incremental intrusiveness of the search against the public policy justifying the search.**

# United States v. Holt

**Rule of Law**

**Criminal Law**

**In reviewing a district court order granting a motion to suppress, Court of Appeals accepts the district court's factual findings unless clearly erroneous, and views the evidence in the light most favorable to those findings.**

**Criminal Law**

**Court of Appeals reviews de novo the ultimate determination of the reasonableness of police conduct under the Fourth Amendment.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=If855a5d579be11d98c82a53fc8ac8757&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Searches and Seizures**

**No one factor is determinative in analyzing reasonableness of search or seizure under the Fourth Amendment; instead, reasonableness is measured in objective terms by examining the totality of the circumstances.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=If855a5d579be11d98c82a53fc8ac8757&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Searches and Seizures**

**In considering the individual-rights side of the balance for determining whether a search or seizure was reasonable under the Fourth Amendment, courts consider the individual's reasonable expectations of privacy and liberty.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=If855a5d579be11d98c82a53fc8ac8757&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Automobiles**

**Courts assess the reasonableness of a traffic stop based on an observed traffic violation by considering the scope of the officer's actions and balancing the motorist's legitimate expectation of privacy against the government's law-enforcement-related interests.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=If855a5d579be11d98c82a53fc8ac8757&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Automobiles**

**During routine traffic stop, officer may ask about the driver's authority to operate the vehicle.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=If855a5d579be11d98c82a53fc8ac8757&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Automobiles**

**Government's general interest in criminal investigation, without more, is generally insufficient to outweigh the individual interest in ending the detention during a routine traffic stop.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=If855a5d579be11d98c82a53fc8ac8757&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Automobiles**

**During routine traffic stop, once a motorist has produced a valid license and proof that he is entitled to operate the car, he must be allowed to proceed on his way, without being subject to further delay by police for additional questioning; further delay is justified only if the officer has reasonable suspicion of illegal activity or if the encounter has become consensual.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=If855a5d579be11d98c82a53fc8ac8757&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Automobiles**

**Motorist may be detained for a short period during traffic stop while the officer runs a background check to see if there are any outstanding warrants or criminal history pertaining to the motorist, even though the purpose of the stop had nothing to do with such prior criminal history.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=If855a5d579be11d98c82a53fc8ac8757&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Automobiles**

**During traffic stop, officer may order the driver and passengers out of the vehicle in the interest of officer safety, even in the absence of any particularized suspicion of personal danger.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=If855a5d579be11d98c82a53fc8ac8757&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Automobiles**

**While a motorist retains some reasonable expectation of privacy during traffic stop, when officer safety is at stake, the motorist's expectations are necessarily diminished.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=If855a5d579be11d98c82a53fc8ac8757&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Automobiles**

**Officer conducting traffic stop was justified in asking motorist about presence of weapons in vehicle, even if officer lacked particularized suspicion that the motorist possessed loaded weapons and regardless of whether the officer subjectively feared the motorist; overruling**[**UnitedStatesv. Lee, 73 F.3d 1034.**](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996028209&pubNum=506&originatingDoc=If855a5d579be11d98c82a53fc8ac8757&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=If855a5d579be11d98c82a53fc8ac8757&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Arrest**

**Availability of a search incident to arrest for officer safety does not depend on the subjective mindset of the arresting officer.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=If855a5d579be11d98c82a53fc8ac8757&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Arrest**

**Under Terry, courts determine the reasonableness of a search or seizure by conducting a dual inquiry, asking 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.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=If855a5d579be11d98c82a53fc8ac8757&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

264 F.3d 1215

**United** **States** Court of Appeals,

Tenth Circuit.

**UNITED STATES of America, Plaintiff–Appellant,**

**v.**

**Dennis Dayton HOLT, Defendant–Appellee.**

No. 99–7150.

Sept. 5, **2001**.

**Synopsis**

Defendant was indicted for possession of methamphetamine with intent to distribute, manufacturing methamphetamine, and possession of a firearm in connection with a drug trafficking offense. The **United** **States**District Court for the Eastern District of Oklahoma, [Michael Burrage](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0341894901&originatingDoc=If855a5d579be11d98c82a53fc8ac8757&refType=MC&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=If855a5d579be11d98c82a53fc8ac8757), Chief Judge, granted defendant's motions to suppress evidence. The government appealed, and a panel of the Court of Appeals, [229 **F**.**3d** 931,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&pubNum=506&cite=229FE3D931&originatingDoc=If855a5d579be11d98c82a53fc8ac8757&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) reversed and remanded. On rehearing en banc, the Court of Appeals, per [Ebel](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0164150401&originatingDoc=If855a5d579be11d98c82a53fc8ac8757&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=If855a5d579be11d98c82a53fc8ac8757), Circuit Judge, held that: (1) overruling[](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Iae7b4f5691e711d9bdd1cfdd544ca3a4&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=220045649dd546929be5e08f96cc5210&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[***UnitedStates****v. Lee,* 73 **F**.**3d** 1034,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996028209&pubNum=506&originatingDoc=If855a5d579be11d98c82a53fc8ac8757&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) officer conducting traffic stop was justified in asking motorist about presence of weapons in vehicle, and per [Briscoe](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0244155901&originatingDoc=If855a5d579be11d98c82a53fc8ac8757&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=If855a5d579be11d98c82a53fc8ac8757), Circuit Judge, held that: (2) Fourth Amendment reasonableness of a traffic stop based on probable cause must be judged by examining both the length of the detention and the manner in which it is carried out.

Reversed and remanded.

[Henry](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0211745101&originatingDoc=If855a5d579be11d98c82a53fc8ac8757&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=If855a5d579be11d98c82a53fc8ac8757), Circuit Judge, concurred and filed an opinion.

[Kelly](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0229168101&originatingDoc=If855a5d579be11d98c82a53fc8ac8757&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=If855a5d579be11d98c82a53fc8ac8757), Circuit Judge, filed opinion concurring in part and dissenting in part.

[Lucero](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0255848601&originatingDoc=If855a5d579be11d98c82a53fc8ac8757&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=If855a5d579be11d98c82a53fc8ac8757), Circuit Judge, filed opinion concurring in part and dissenting in part, in which [Seymour](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0174671001&originatingDoc=If855a5d579be11d98c82a53fc8ac8757&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=If855a5d579be11d98c82a53fc8ac8757), Circuit Judge, joined.

[Murphy](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0184466101&originatingDoc=If855a5d579be11d98c82a53fc8ac8757&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=If855a5d579be11d98c82a53fc8ac8757), Circuit Judge, filed opinion concurring in part and dissenting in part.

# State v. Daniel, 12 S.W.3d 420 (Tenn. 2000)

# State v. Daniel

**Rule of Law**

**Criminal Law**

**Trial court's conclusion that a seizure did not occur was a conclusion of law derived from an application of the law to the undisputed facts, and thus, the Supreme Court would apply de novo review to denial of motion to suppress, where trial court heard the testimony of only one witness at suppression hearing.**

**Arrest**

**Neither the Fourth Amendment nor a similar provision of the State Constitution limit all contact between police and citizens; instead these constitutional provisions are designed to prevent arbitrary and oppressive interference with the privacy and personal security of individuals.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**;**[**Const. Art. 1, § 7**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S7&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Searches and Seizures**

**Constitutional protections against unreasonable searches and seizures are implicated only when a police officer's interaction with a citizen impermissibly intrudes upon the privacy or personal security of the citizen.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**;**[**Const. Art. 1, § 7**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S7&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Arrest**

**Three distinct types of police-citizen interactions implicate Fourth Amendment protections: (1) a full scale arrest which must be supported by probable cause; (2) a brief investigatory detention which must be supported by reasonable suspicion; and (3) brief police-citizen encounters which require no objective justification.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**;**[**Const. Art. 1, § 7**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S7&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Arrest**

**While arrests and investigatory detentions implicate varying degrees of constitutional protection, 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.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**;**[**Const. Art. 1, § 7**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S7&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Arrest**

**Even when police have no basis for suspecting that an individual has committed or is about to commit a crime, the officer may approach an individual in a public place and ask questions without implicating constitutional protections.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**;**[**Const. Art. 1, § 7**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S7&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Arrest**

**A seizure implicating constitutional concerns occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**;**[**Const. Art. 1, § 7**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S7&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Arrest**

**In order to determine whether a particular encounter constitutes a seizure of the person, a court must consider all the circumstances surrounding the encounter to determine whether police conduct would have communicated to a reasonable person that the person was not free to decline the officer's request or otherwise terminate the encounter.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**;**[**Const. Art. 1, § 7**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S7&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Arrest**

**Police-citizen encounters do not become seizures simply because citizens may feel an inherent social pressure to cooperate with police.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**;**[**Const. Art. 1, § 7**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S7&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Arrest**

**Some of the factors which are relevant and should be considered by courts when applying totality of the circumstances test to determine whether a Fourth Amendment seizure of the person has occurred include the following: the time, place and purpose of the encounter; the words used by the officer; the officer's tone of voice and general demeanor; the officer's statements to others who were present during the encounter; the threatening presence of several officers; the display of a weapon by an officer; and the physical touching of the person of the citizen.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**;**[**Const. Art. 1, § 7**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S7&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Arrest**

**The Fourth Amendment is not implicated and no seizure of the person occurs when police approach an individual, in a public place, or in a parked car, ask questions, and request to search, so long as police do not convey a message that compliance with their requests is required.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**;**[**Const. Art. 1, § 7**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S7&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Arrest**

**Although police need not have reasonable suspicion of illegal activity to approach a vehicle stopped in a public place and ask the occupant questions, when police stop a moving vehicle, a seizure implicating the protection of both the State and Federal Constitutions has occurred.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**;**[**Const. Art. 1, § 7**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S7&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

12 S.W.3d 420

Supreme Court of Tennessee,

at Knoxville.

**STATE of Tennessee, Plaintiff–Appellee,**

**v.**

**Brian DANIEL, Defendant–Appellant.**

Jan. 31, 2000.

**Synopsis**

Defendant was convicted in the Criminal Court, Knox County, [Richard Baumgartner](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0106607901&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=If8fc78e5e7b611d9bf60c1d57ebc853e), J., of possession of marijuana pursuant to guilty plea. Having reserved right to seek appellate review of denial of his motion to suppress, defendant appealed. The Court of Criminal Appeals affirmed. Defendant applied for permission to appeal. The Supreme Court, [Drowota](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0259789701&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=If8fc78e5e7b611d9bf60c1d57ebc853e), J., held that: (1) officer's conduct in merely approaching defendant in parking lot, inquiring what was going on, and asking to see his identification did not constitute a seizure of the person, but (2) officer's retention of defendant's identification to run a computer warrants check following this consensual police-citizen encounter effectively immobilized defendant, and thus amounted to a seizure.

Reversed and vacated.

Byers, Special Judge, filed opinion concurring in part and dissenting in part, in which [Birch](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0259809301&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=If8fc78e5e7b611d9bf60c1d57ebc853e), J., joined.

***O P I N I O N***

[DROWOTA](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0259789701&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=If8fc78e5e7b611d9bf60c1d57ebc853e), J.

The dispositive issue in this appeal is whether a “seizure” within the meaning of the Fourth Amendment to the United States Constitution and [Article I, section 7](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S7&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) of the Tennessee Constitution occurred when a police officer approached the defendant, Brian Daniel, in the parking lot of a convenience store, asked Daniel to produce some identification, and retained Daniel's identification to run a computer check for outstanding warrants.

The trial court found that no seizure took place prior to the time the officer placed Daniel under arrest on an outstanding warrant which was revealed by the computer check of Daniel's identification. Accordingly, the trial court denied Daniel's motion to suppress the marijuana which was discovered while the officer was searching Daniel's person incident to the arrest. Thereafter, Daniel pled guilty to possession of marijuana, but reserved the right to seek appellate review pursuant to [Tennessee Rule Criminal Procedure 37(b)(2)(i)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1008875&cite=TNRRCRPR37&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).1 The Court of Criminal Appeals affirmed the trial court's denial of the motion to suppress.

For the reasons stated herein, we conclude that the defendant was seized when the police officer retained his identification to run a computer check for outstanding warrants. Because the officer lacked reasonable suspicion for the seizure,2 the judgment of the Court of Criminal Appeals upholding the trial court's denial of the motion to suppress is reversed; the defendant's conviction is vacated, and the charge is dismissed.

***FACTUAL BACKGROUND***

The facts in this appeal are not in dispute. The only witness to testify at the **\*423** suppression hearing was Deputy Jim Wright of the Knox County Sheriff's Department. Deputy Wright stated that while on patrol at approximately 9:00 p.m. on August 16, 1995, he observed an automobile parked in an unlighted area beside Bengie's Market in Knox County. Four men were standing around the outside of the vehicle. The sun was setting and it was “dusky dark” outside.

Deputy Wright drove up to the men in his patrol car “to see what the individuals were doing” because he thought it was peculiar for four young men to be standing around an automobile in the dark. Deputy Wright asked the men what was going on and requested that they provide some identification. The men complied. Deputy Wright examined the identification and retained the identification to run a computer check for outstanding warrants. While waiting for the computer check, two of the young men asked for and received permission from Deputy Wright to go inside the market to use the restroom and buy a soft drink.

After the computer check revealed an outstanding warrant for Daniel's arrest, Deputy Wright handcuffed Daniel and placed him under arrest. Before conducting a search of Daniel incident to the arrest, Deputy Wright asked if Daniel had anything sharp in his pockets. Daniel replied that he had a bag of marijuana in his pocket.

Daniel was indicted for possession of a controlled substance, and he moved to suppress the marijuana. In support of his motion, Daniel argued that the evidence had been discovered as a result of an unlawful seizure and was thereby tainted. Daniel asserted that the initial police questioning constituted an illegal seizure because he was not violating any law when the officer initiated the questioning, and the officer had no reasonable suspicion to believe that he had violated the law or was about to violate the law.

The trial court denied Daniel's motion, finding that no seizure took place. Daniel pled guilty to the charged offense,3 but was permitted, with the consent of the District Attorney General, to preserve the suppression issue as a certified question of law for appeal pursuant to [Tennessee Rule Criminal Procedure 37(b)(2)(i)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1008875&cite=TNRRCRPR37&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)). The Court of Criminal Appeals affirmed the trial court's denial of the motion to suppress. Thereafter, this Court granted Daniel's application for permission to appeal. For the reasons that follow, the judgments of the lower courts are reversed.

***STANDARD OF REVIEW***

1

The standard by which an appellate court reviews a trial court's findings of fact on suppression issues is as follows:

Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact. The party prevailing in the trial court is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence. So long as the greater weight of the evidence supports the trial court's findings, those findings shall be upheld. In other words, a trial court's findings of fact in a suppression hearing will be upheld unless the evidence preponderates otherwise.

[*State v. Odom,* 928 S.W.2d 18, 23 (Tenn.1996)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996170724&pubNum=713&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_713_23&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_713_23). The application of the law to the facts found by the trial court, however, is a question of law which this Court reviews de novo. [*State v. Yeargan,* 958 S.W.2d 626, 629 (Tenn.1997)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997231341&pubNum=713&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_713_629&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_713_629); [*Beare v. Tennessee Dept. of Revenue,* 858 S.W.2d 906, 907 (Tenn.1993)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1993156524&pubNum=713&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_713_907&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_713_907). In this case, the trial court heard the testimony of only one witness. The facts are not disputed. As a result, the trial court's conclusion that a seizure **\*424** did not occur is a conclusion of law derived from an application of the law to the undisputed facts of this case. Therefore, in determining whether the trial court and the Court of Criminal Appeals erred in denying the defendant's motion to suppress, we apply de novo review. *Id.; see also* [*State v. Crutcher,* 989 S.W.2d 295, 303](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999099146&pubNum=713&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_713_303&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_713_303) (Drowota, J., dissenting).

***ANALYSIS***

2

3

The Fourth Amendment4 to the United States Constitution provides that the people shall “be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures....” Similarly, [Article 1, section 7 of the Constitution of Tennessee](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S7&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) guarantees “that the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures....” However, neither the Fourth Amendment nor [Article I, section 7](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S7&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) limit all contact between police and citizens. Instead these constitutional provisions are designed “to prevent arbitrary and oppressive interference with the privacy and personal security of individuals.” [*INS v. Delgado,* 466 U.S. 210, 216, 104 S.Ct. 1758, 1762, 80 L.Ed.2d 247 (1984)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984118842&pubNum=708&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_708_1762&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_1762) (quoting [*United States v. Martinez–Fuerte,* 428 U.S. 543, 554, 96 S.Ct. 3074, 3081, 49 L.Ed.2d 1116 (1976)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1976141321&pubNum=708&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_708_3081&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_3081)); [*Yeargan,* 958 S.W.2d at 629;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997231341&pubNum=713&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_713_629&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_713_629) [*State v. Downey,* 945 S.W.2d 102, 106 (Tenn.1997)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997107642&pubNum=713&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_713_106&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_713_106) (“[A]rticle I, [section 7](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S7&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) is identical in intent and purpose with the Fourth Amendment.”). Thus, these constitutional protections are implicated only when a police officer's interaction with a citizen impermissibly intrudes upon the privacy or personal security of the citizen. *See generally* [4 Wayne R. LaFave, *Search & Seizure,* § 9.3 (3d ed. 1996 & Supp.1999)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&pubNum=0102077&cite=4SEARCHSZRs9.3&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=TS&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) (hereafter LaFave § \_\_ at \_\_.)

4

5

In construing the demands of the Fourth Amendment, courts have recognized three distinct types of police-citizen interactions: (1) a full scale arrest which must be supported by probable cause, *see* [*Brown v. Illinois,* 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416 (1975)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1975129823&pubNum=708&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)); (2) a brief investigatory detention which must be supported by reasonable suspicion, *see* [*Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1968131212&pubNum=708&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)); and (3) brief police-citizen encounters which require no objective justification, *see* [*Florida v. Bostick,* 501 U.S. 429, 434, 111 S.Ct. 2382, 2386, 115 L.Ed.2d 389 (1991)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991112171&pubNum=708&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_708_2386&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_2386). *See, e.g.,* [*Crutcher,* 989 S.W.2d at 300;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999099146&pubNum=713&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_713_300&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_713_300) [*United States v. Berry,* 670 F.2d 583 (5th Cir.1982)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1982109513&pubNum=350&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) (discussing the three types of police-citizen interactions). While arrests and investigatory detentions implicate varying degrees of constitutional protection, “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.” [*Terry,* 392 U.S. at 19 n. 16, 88 S.Ct. 1868, at 1879 n. 16, 20 L.Ed.2d 889;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1968131212&pubNum=708&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_708_1879&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_1879) [*Crutcher,* 989 S.W.2d at 300;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999099146&pubNum=713&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_713_300&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_713_300) [*State v. Moore,* 776 S.W.2d 933, 937 (Tenn.1989)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989132008&pubNum=713&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_713_937&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_713_937).5

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Indeed, courts have repeatedly held that even when police have no basis for suspecting that an individual has committed or is about to commit a crime, the officer may approach an individual in a public place and ask questions without implicating constitutional protections. [*Bostick,* 501 U.S. at 434, 111 S.Ct. at 2386;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991112171&pubNum=708&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_708_2386&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_2386) [*Florida v. Royer,* 460 U.S. 491, 497, 103 S.Ct. 1319, 1324, 75 L.Ed.2d 229 (1983)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1983113926&pubNum=708&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_708_1324&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_1324) (plurality opinion); [*Crutcher,* 989 S.W.2d at 300;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999099146&pubNum=713&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_713_300&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_713_300) [*State v. Pulley,* 863 S.W.2d 29, 30 (Tenn.1993)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1993189263&pubNum=713&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_713_30&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_713_30); [*Moore,* 776 S.W.2d at 938;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989132008&pubNum=713&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_713_938&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_713_938) [*State v. Butler,* 795 S.W.2d 680, 685 (Tenn.Crim.App.1990)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990119224&pubNum=713&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_713_685&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_713_685). The rule has been further explained as follows:

law enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objective justification. The person approached, however, need not answer any question put to him; indeed, he may decline to listen to the questions at all and may go on his way. He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or answer does not, without more, furnish those grounds.

[*Royer,* 460 U.S. at 497, 103 S.Ct. at 1324;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1983113926&pubNum=708&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_708_1324&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_1324) *see also* [*Bostick,* 501 U.S. at 434, 111 S.Ct. at 2386;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991112171&pubNum=708&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_708_2386&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_2386) [*Delgado,* 466 U.S. at 216–17, 104 S.Ct. at 1762–63;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984118842&pubNum=708&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_708_1762&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_1762) [*Brown v. Texas,* 443 U.S. 47, 50–53, 99 S.Ct. 2637, 2640–42, 61 L.Ed.2d 357 (1979)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979135160&pubNum=708&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_708_2640&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_2640); [*Moore,* 776 S.W.2d at 938.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989132008&pubNum=713&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_713_938&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_713_938)

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Accordingly, a “seizure” implicating constitutional concerns occurs only if, in view of all the circumstances surrounding the incident, a reasonable person would have believed that he or she was not free to leave. *See* [*Bostick,* 501 U.S. at 437, 111 S.Ct. at 2387;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991112171&pubNum=708&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_708_2387&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_2387) [*Michigan v. Chesternut,* 486 U.S. 567, 574, 108 S.Ct. 1975, 1979, 100 L.Ed.2d 565 (1988)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988077057&pubNum=708&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_708_1979&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_1979); [*Delgado,* 466 U.S. at 215, 104 S.Ct. at 1762;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984118842&pubNum=708&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_708_1762&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_1762) [*Royer,* 460 U.S. at 502, 103 S.Ct. at 1326–27;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1983113926&pubNum=708&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_708_1326&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_1326) [*Mendenhall,* 446 U.S. at 554, 100 S.Ct. at 1877;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980116749&pubNum=708&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_708_1877&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_1877) [*Moore,* 776 S.W.2d at 937;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989132008&pubNum=713&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_713_937&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_713_937) [*State v. Wilhoit,* 962 S.W.2d 482, 486 (Tenn.Crim.App.1997)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1998046120&pubNum=713&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_713_486&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_713_486); [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I74962957e7c211d98ac8f235252e36df&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[*State v.Bragan,* 920 S.W.2d 227, 243 (Tenn.Crim.App.1995)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995141200&pubNum=713&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_713_243&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_713_243); [*State v. Darnell,* 905 S.W.2d 953, 957 (Tenn.Crim.App.1995)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995190904&pubNum=713&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_713_957&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_713_957); LaFave § 5.1(a). “In order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether police conduct would have communicated to a reasonable person that the person was not free to decline the officer's request or otherwise terminate the encounter.” [*Bostick,* 501 U.S. at 440, 111 S.Ct. at 2389;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991112171&pubNum=708&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_708_2389&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_2389) *see also* [*Chesternut,* 486 U.S. at 569, 108 S.Ct. at 1977.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988077057&pubNum=708&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_708_1977&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_1977)

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Application of this objective standard ensures that the scope of these constitutional protections does not vary depending upon the subjective state of mind of the particular citizen being approached. *Id.* Under this analysis police-citizen encounters do not become “seizures” simply because citizens may feel an inherent social pressure to cooperate with police. [*People v. Paynter,* 955 P.2d 68, 72 (Colo.1998)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1998070904&pubNum=661&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_661_72&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_661_72). “While most citizens will respond to a police request, the fact that people do so, and do so without being told they are free not to respond, hardly eliminates the consensual nature of the response.” [*Delgado,* 466 U.S. at 216, 104 S.Ct. at 1762.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984118842&pubNum=708&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_708_1762&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_1762) Some of the factors which are relevant and should be considered by courts when applying this totality of the circumstances **\*426** test include the time, place and purpose of the encounter; the words used by the officer; the officer's tone of voice and general demeanor; the officer's statements to others who were present during the encounter; the threatening presence of several officers; the display of a weapon by an officer; and the physical touching of the person of the citizen. *See generally* [*Chesternut,* 486 U.S. at 575, 108 S.Ct. at 1980;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988077057&pubNum=708&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_708_1980&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_1980) [*Mendenhall,* 446 U.S. at 554, 100 S.Ct. at 1877;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980116749&pubNum=708&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_708_1877&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_1877) [*People v. Pancoast,* 659 P.2d 1348 (Colo.1982)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1983115701&pubNum=661&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)); LaFave § 5.1(a).

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This test is “necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation. Moreover, what constitutes a restraint on liberty prompting a person to conclude that he is not free to ‘leave’ will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs.” [*Chesternut,* 486 U.S. at 573, 108 S.Ct. at 1979;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988077057&pubNum=708&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_708_1979&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_1979) [*Moore,* 776 S.W.2d at 937.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989132008&pubNum=713&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_713_937&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_713_937) However, under the analysis delineated above, courts have consistently held that the Fourth Amendment is *not* implicated and no seizure occurs when police approach an individual, in a public place, or in a parked car,6 ask questions, and request to search, so long as police do not convey a message that compliance with their requests is required.7 On the other hand, courts have typically held that an encounter becomes a “seizure” if an officer: (1) pursues an individual who has attempted to terminate the contact by departing; (2) continues to interrogate a person who has clearly expressed a desire not to cooperate; (3) renews interrogation of a person who has earlier responded fully to police inquiries; (4) verbally orders a citizen to stop and answer questions; (5) retains a citizen's identification or other property; (6) physically restrains a citizen or blocks the citizen's path; (7) displays a weapon during the encounter. *See generally* LaFave § 9.3(a), at 104 (collecting cases).

Applying these governing principles to the facts in this case, we must determine whether the interaction between Officer Wright and Daniel constituted a seizure prior to the time Officer Wright arrested Daniel pursuant to the outstanding warrant. The State concedes that if a seizure occurred prior to the arrest, the evidence must be suppressed because the officer had no reasonable suspicion to justify the seizure.

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Under the circumstances of this case, we conclude that Officer **\*427** Wright's conduct in merely approaching the defendant, inquiring what was going on, and asking to see Daniel's identification did not constitute a seizure as that term is defined in the constitutional context.8 Although the evidence in the record is minimal, it appears that the initial encounter was not accompanied by physical force or a show of authority. There was no evidence that Officer Wright either drew a weapon, ordered Daniel to stop and answer questions, or demanded that Daniel produce identification. Moreover, there was no evidence that Wright physically restrained Daniel, instructed him not to walk away, or blocked his path. The encounter did not become a seizure simply because Daniel may have felt inherent social pressure to cooperate with Officer Wright. [*Delgado,* 466 U.S. at 216, 104 S.Ct. at 1762;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984118842&pubNum=708&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_708_1762&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_1762) [*Paynter,* 955 P.2d at 72.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1998070904&pubNum=661&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_661_72&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_661_72)

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However, what begins as a consensual police-citizen encounter may mature into a seizure of the person. While many of the circumstances in this case point in the direction of a consensual police-citizen encounter, one circumstance reflects a distinct departure from the typical consensual encounter—Officer Wright's retention of Daniel's identification to run a computer warrants check. Without his identification, Daniel was effectively immobilized. Abandoning one's identification is simply not a practical or realistic option for a reasonable person in modern society. [*Royer,* 460 U.S. at 501–02, 103 S.Ct. at 1326;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1983113926&pubNum=708&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_708_1326&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_1326) [*United States v. Jordan,* 958 F.2d 1085, 1087 (D.C.Cir.1992)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992056815&pubNum=350&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_350_1087&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_350_1087).

Contrary to the State's assertion, when an officer retains a person's identification for the purpose of running a computer check for outstanding warrants, no reasonable person would believe that he or she could simply terminate the encounter by asking the officer to return the identification.

Accordingly, we hold that a seizure within the meaning of the Fourth Amendment and [Article 1, section 7](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S7&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) occurred when Officer Wright retained Daniel's identification to run a computer warrants check. *See* [*Butler,* 795 S.W.2d at 685](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990119224&pubNum=713&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_713_685&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_713_685) (“When the officer conveyed an intent to detain Riggins until everything ‘checked out,’ the defendant was seized within the meaning of the Fourth Amendment”); *Cf.* [*Royer,*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1983113926&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) (holding that when officers took Royer to a small room, while retaining his ticket and identification, this show of authority was sufficient to transform the initial consensual encounter into a Fourth Amendment seizure); [*United States v. Chan–Jimenez,* 125 F.3d 1324, 1326 (9th Cir.1997)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997198960&pubNum=506&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_506_1326&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_1326) (holding that defendant was seized when officer obtained and failed to return defendant's driver's license and registration); [*United States v. Lambert,* 46 F.3d 1064, 1068 (10th Cir.1995)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995040801&pubNum=506&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_506_1068&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_506_1068) (stating that “when law enforcement officials retain an individual's driver's license in the course of questioning him, that individual, as a general rule will not reasonably feel free to terminate the encounter”); [*United States v. Glover,* 957 F.2d 1004, 1009 (2d Cir.1992)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992045139&pubNum=350&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_350_1009&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_350_1009) (concluding that the officer's failure to return identification papers together with failure to tell defendant he was free to leave constituted seizure); [*Jordan,* 958 F.2d at 1088](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992056815&pubNum=350&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_350_1088&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_350_1088) (holding that “what began as a consensual encounter ... graduated into a seizure when the officer asked [the defendant's] consent to a search of his bag after he had taken and still retained [the defendant's] driver's license”); [*United States v. Winfrey,* 915 F.2d 212, 216 (6th Cir.1990)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990138460&pubNum=350&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_350_216&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_350_216) (holding that seizure occurred when officer retained defendant's keys, driver's license, and automobile registration); [*United States v.* ***\*428*** *Low,* 887 F.2d 232, 235 (9th Cir.1989)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989141413&pubNum=350&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_350_235&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_350_235) (holding that retention of airline ticket longer than necessary for a brief scrutiny constituted a seizure); [*United States v. Battista,* 876 F.2d 201, 205 (D.C.Cir.1989)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989082475&pubNum=350&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_350_205&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_350_205) (stating that “once the identification is handed over to police and they have had a reasonable opportunity to review it, if the identification is not returned to the detainee we find it difficult to imagine that any reasonable person would feel free to leave without it”); [*United States v. Cordell,* 723 F.2d 1283, 1285 (7th Cir.1983)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1983158023&pubNum=350&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_350_1285&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_350_1285) (holding that encounter became a detention when officer obtained defendant's driver's license and airline ticket, handed them to another officer, and told defendant they were conducting a narcotics investigation); [*United States v. Thompson,* 712 F.2d 1356, 1359 (11th Cir.1983)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1983136466&pubNum=350&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_350_1359&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_350_1359) (holding that police officer's retention of identification is indicative of a Fourth Amendment seizure); [*United States v. Elmore,* 595 F.2d 1036, 1041–42 (5th Cir.1979)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979112394&pubNum=350&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_350_1041&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_350_1041) (holding that seizure occurred when DEA agent carried defendant's airline ticket to the airline counter); [*Rogers v. State,* 206 Ga.App. 654, 426 S.E.2d 209, 212 (1992)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1993058043&pubNum=711&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_711_212&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_711_212) (expressing agreement “with appellant that when [the officer] retained appellant's license, the encounter matured into an investigative stop protected by the Fourth Amendment”); [*State v. Frost,* 374 So.2d 593, 598 (Fla.Dist.Ct.App.1979)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979133853&pubNum=735&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_735_598&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_735_598) (holding that seizure occurred when officers retained possession of the defendant's airline ticket and driver's license); [*State v. Godwin,* 121 Idaho 491, 826 P.2d 452, 454 (1992)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992035110&pubNum=661&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_661_454&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_661_454) (holding that seizure occurred when officer retained defendant's driver's license and told defendant to remain in the vehicle); [*State v. Holmes,* 569 N.W.2d 181, 185 (Minn.1997)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997193654&pubNum=595&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_595_185&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_595_185) (holding that seizure occurred when officer retained possession of the defendant's college student identification card); [*State v. Painter,* 296 Or. 422, 676 P.2d 309, 311 (1984)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984108663&pubNum=661&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_661_311&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_661_311) (holding that seizure occurred where officer retained defendant's license and credit card while making a radio check); [*Richmond v. Commonwealth,* 22 Va.App. 257, 468 S.E.2d 708, 710 (1996)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996087306&pubNum=711&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_711_710&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_711_710) (holding “that what began as a consensual encounter quickly became an investigative detention once the [officer] received [appellant's] driver's license and did not return it to him”); [*State v. Thomas,* 91 Wash.App. 195, 955 P.2d 420, 423 (1998)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1998112615&pubNum=661&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RP&fi=co_pp_sp_661_423&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_661_423) (stating that “[o]nce an officer retains the suspect's identification or driver's license and takes it with him to conduct a warrants check, a seizure within the meaning of the Fourth Amendment has occurred”). *See generally,* LaFave, § 9.3, at 103 n.74 (collecting cases where courts have held that retention of a person's identification papers or other property constitutes a seizure).

***CONCLUSION***

Accordingly, for the reasons stated herein, we conclude that Daniel was seized when Officer Wright retained his identification to run a computer check for outstanding warrants. The State concedes, and we accept for purposes of this decision, that the officer lacked the reasonable suspicion necessary to justify the seizure, and that the drugs discovered as a result of the illegal seizure must be suppressed as “fruit of the poisonous tree”9 since no intervening event or other attenuating circumstance purged the taint of the initial illegal seizure. Accordingly, we reverse the judgment of the Court of Criminal Appeals which upheld the trial court's denial of the motion to suppress, vacate the defendant's conviction, and dismiss the charge of possession of a controlled substance. Costs of this appeal are taxed against the State of Tennessee.

[ANDERSON](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0157496001&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=If8fc78e5e7b611d9bf60c1d57ebc853e), C.J., [BARKER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0459300201&originatingDoc=If8fc78e5e7b611d9bf60c1d57ebc853e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=If8fc78e5e7b611d9bf60c1d57ebc853e), J., concur.

BYERS, Special Justice, Concurring/Dissenting With Separate Opinion, joined by

Close

**Concurrence in Part/Dissent: Byers**

He feels the correct question is whether a police officer may approach a citizen and require that person to produce identification when the officer has no reasonable basis for the approach.

There is not the slightest suggestion in this case that Daniel had violated or was about to violate the law when the officer requested that Daniel produce his identification.

If police officers may approach citizens under circumstances shown in this case, it means that citizens may at any time and any place for any reason or no reason whatsoever be stopped by the police and asked what they are doing and who they are. I find this notion intolerable in a government such as we have created where we each have appropriated unto ourselves the right to be free of unreasonable interference into our most basic freedom to go where we wish and retain the right to do so anonymously, i.e. to protect who we are, unless the state shows a reasonable basis for intruding upon these rights.

These cases, like all search and seizure cases, must be decided on the factual bases of each case. However, when the facts in the case under consideration so closely fit the facts of Brown v. Texas and Hughes v. State, it seems clear that the court should hold the seizure occurred when the officer \*432 demanded that Daniel show his identification.6

***State v. Daniel* (2000)**

**Deputy saw 4 men standing around a car in an unlighted area outside a market. He drove up to the men the “see what the individuals were doing” because he thought it was peculiar to stand around in the dark (it was dusk). The Deputy asked the men “what was going on” and requested they provide identification. He then retained the identification and checked the men for outstanding warrants. The Deputy found an outstanding warrant for Daniel, handcuffed him and arrested him. The deputy asked if he had anything sharp in his pocket, and Daniel responded that he had marijuana. Daniel charged with possession of marijuana. He moved to suppress, was denied, and pled guilty with a certified question of law. Appellate court affirmed, he appeals here.**

**Court: reversed. Initial encounter was consensual and not a seizure. 3 of the 5 Justices agreed that asking for the license was not a seizure insofar as the officer did not demand the license and the possibility that Daniel felt inherent social pressure to comply does not affect the objective test standard. 2 Justices opined that merely asking for the license without reasonable suspicion was a seizure. Factors:**

1. **Time, place and purpose of the encounter**
2. **Words, tone and demeanor of the officer**
3. **Threatening presence of more than one officer**
4. **Display of a weapon by the officer**
5. **Physical touching of citizen by the officer**

**Consensual encounter may become a seizure based on totality. E.G., if the police**

**-Pursue one who has attempted to terminate the contact by leaving**

**-Continue to question person who has expressed desire not to cooperate**

**-Renew questioning of one who has already been fully questioned**

**-Order person to stop and answer questions**

**-Retain person’s ID or property**

**-Physically retrains or blocks person’s path**

**-Displays weapon during encounter**

**Kinds of Citizen – Police Encounters:**

**1. Arrest which requires probable cause.**

**2. Brief detention which requires reasonable suspicion that the person is engaged in criminal conduct.**

**3. Consensual encounters that require no justification**

**When Has a Seizure Occurred?**

**Answer: When an officer, by means of *physical force* or *show of authority*, has in some way restrained the liberty of a citizen.**

**Test for whether a seizure has occurred is OBJECTIVE TEST BASED ON TOTALITY OF THE CIRCUMSTANCES: Whether a reasonable person would believe that he is not free to decline the officer’s request or terminate the encounter. Does not matter what the officer or citizen subjectively believe. If in doubt, ask “AM I FREE TO LEAVE”.**

# Chapter 3, Section 9 – Consent Searches

# \*\*SCHNECKLOTH v. BUSTAMONTE\*\*

#### United States Supreme Court 412 U.S. 218 (1973)

#### Rule of Law

**The court must look at the totality of the circumstances in order to determine whether consent to a warrantless search absent probable cause was freely and voluntarily given.**

#### Facts

A police officer made a routine traffic stop, lacking any probable cause, and asked for permission to search the car. The brother of the car's owner gave consent. Upon searching the vehicle, the officer discovered three stolen checks, which were later linked to Robert Bustamonte (defendant), one of the six passengers riding in the car. Over Bustamonte’s objections, the state trial court allowed the evidence of the checks to be admitted at trial, and Bustamonte was convicted of theft. The state appellate court upheld the conviction. Bustamonte petitioned the federal district court for a writ of habeas corpus, but the district court denied Bustamonte's petition. The federal appellate court reversed and set aside the district court's order, holding that in order to prove voluntariness, the prosecution had to establish that the person giving consent knew he had the right to withhold consent. The United States Supreme Court granted certiorari.

#### Issue

Must the court look at the totality of the circumstances in order to determine whether consent to a warrantless search absent probable cause was freely and voluntarily given?

#### Holding and Reasoning (Stewart, J.)

Yes. If officers conduct a warrantless search of a subject not in custody, the prosecution can meet its burden of proving that consent to the search was freely and voluntarily given by looking at the totality of the circumstances. Although knowledge of the right to refuse to give consent is one factor of many to consider, it is not a prerequisite to proving that consent was given voluntarily. The definition of “voluntary” has been developed throughout the case law focusing on the voluntariness of confessions. In that respect, it has come to mean a confession made absent police coercion. This line of cases focus on the totality of the circumstances to determine whether there was implied or express coercion that made the confession not truly voluntary. There is no reason why “voluntary” should be defined differently for Fourth Amendment purposes. The totality of circumstances surrounding the consent must be analyzed to determine if consent to search was voluntarily given without police coercion. Not only should “voluntary” be defined consistently for consent cases and confession cases, but other arguments support a totality-of-the-circumstances approach as well. First, in most situations, it would be all but impossible for the prosecution to prove that the person giving consent knew of his right to refuse. It is also impractical, and inconsistent with prior rulings, to expect law enforcement officers to educate people of their rights while conducting standard investigations outside the structure of a court room. Second, the argument that consent amounts to a waiver of a constitutional right is misplaced. The requirement for a “knowing and intelligent waiver” of constitutional rights applies once a criminal trial has begun; it does not apply to routine police questioning governed by the Fourth Amendment. Furthermore, interpreting consent to search as a waiver of a constitutional right is inconsistent with the third-party consent jurisprudence. Finally, the holding in *Miranda v. Arizona*, 384 U.S. 436 (1966), in which the Court determined that knowledge of the right to refuse is necessary for consent, does not support the argument that people must be informed of their right to withhold consent in the present situation. *Miranda* is premised on the presumption that questioning conducted while in police custody is inherently coercive and a violation of the Fifth Amendment. In contrast, the issue here involves police questioning during a temporary and relatively minor detention, free of formal police custody. In this type of situation, no presumption arises that the questioning is inherently coercive, and therefore no knowledge of the right to refuse is necessary. For all these reasons, the voluntariness of consent to a warrantless search is to be determined by a totality-of-the-circumstances test. The prosecution need not prove that the person giving consent knew of his right to refuse. The appellate court's judgment is reversed.

#### Dissent (Brennan, J.)

The Fourth Amendment guarantees the right to be free from unreasonable searches and seizures. The Court's holding means that someone can waive this Fourth Amendment right by consenting to a search, even if the person does not know that the search would be prohibited by the Constitution if he refused to consent. This type of waiver of a constitutional right cannot properly be considered meaningful.

#### Dissent (Douglas, J.)

The appellate court correctly noted that an individual's consent to a search does not mean that the individual knew he could refuse to give consent. It is unclear whether the consent to search the car in this matter was given with the knowledge that it could have been refused, and the case should have been remanded for a finding on that issue.

#### Dissent (Marshall, J.)

The issue here is of consent, not coercion as the Court’s opinion suggests. Even if there is no police coercion, it is impossible for someone to give meaningful consent if he is unaware of his constitutional right to refuse. It is not impractical to expect the police to inform a person that he may refuse to give consent to a search. The prosecution should be required to prove that consent was given with the knowledge that it could have been refused.

***Schneckloth v. Bustamonte –*** Courts must assess the **totality of the circumstances** in deciding whether consent was voluntary.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Fifth Amendment** - An amendment added to the U.S. Constitution as part of the Bill of Rights that provides important protections from government actions, including a guarantee that no person will be required to answer for a capital crime unless first indicted by a grand jury; no one will suffer double jeopardy; no one must testify against himself or herself; no one will be deprived of life, liberty, or property without due process of law; and no property will be taken for public use without just compensation.

**Sine qua non –** Latin: “(cause) without which not” - an essential condition; a thing that is absolutely necessary.

***Schneckloth v. Bustamonte* (1973)**

**On routine patrol, Police stopped a car for bad license plate light and headlight. There were six men in the car, including Bustamonte. Driver did not have a license. Only one passenger had a drivers license, and he claimed that his brother owned the car. The officer asked this man if he could search the car. The man said, “Sure, go ahead.” Inside the car, the officer found stolen checks. Checks were used to convict Bustamonte, and the California Appeals Court affirmed. The California Supreme Court denied review. Bustamonte filed a petition for a writ of habeas corpus, which the district court denied. The U.S. Court of Appeals for the Ninth Circuit reversed, holding that consent is not voluntary unless it is proven that the person who consented to the search knew he had the right to refuse consent. State appeals here.**

**Issue: Was the search voluntary?**

**Reversed. Test for determining voluntariness of consent is totality, not a bright line demanding proof that consenter knew he could refuse. Knowledge of right to refuse is one factor. Here, no proof of coercion.**

# Miranda v. Arizona

#### United States Supreme Court 384 U.S. 436 (1966)

#### Rule of Law

**Without certain hallmark warnings regarding the right to remain silent and the right to counsel, statements made during custodial interrogation are inadmissible at trial.**

# Johnson v. Zerbst

#### United States Supreme Court 304 U.S. 458 (1938)

#### Rule of Law

**The Sixth Amendment guarantees the right of a criminal defendant to a lawyer's assistance, unless the defendant knowingly and intelligently waives that right.**

#### Facts

The federal government prosecuted Johnson (plaintiff) for counterfeiting. Trial in the United States District Court for the Eastern District of South Carolina commenced after Johnson told the judge he was willing to proceed without a lawyer. Johnson was convicted and sent to prison, where he was deprived of legal representation to help in filing an appeal; consequently, he missed the appeal deadline. Johnson then petitioned the district court to issue a writ of habeas corpus to Zerbst (defendant), the prison warden, on the grounds Johnson was tried without the assistance of counsel guaranteed him by the Sixth Amendment to the United States Constitution. The district court did not determine whether Johnson waived his right to counsel. The court dismissed Johnson's petition, ruling that Johnson's failure to file a timely appeal, whether from ignorance or negligence, was insufficient to give the court habeas corpus jurisdiction to reopen Johnson's case. Johnson appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed the district court's ruling. The United States Supreme Court granted certiorari to hear Johnson's appeal.

#### Issue

Does the Sixth Amendment guarantee the right of a criminal defendant to a lawyer's assistance, unless the defendant knowingly and intelligently waives that right?

#### Holding and Reasoning (Black, J.)

Yes. The Sixth Amendment guarantees the right of a criminal defendant to a lawyer's assistance, unless the defendant knowingly and intelligently waives that right. The Sixth Amendment recognizes that a lay defendant may lack the professional skills needed to conduct an effective legal defense. Without a lawyer to represent the defendant, the court loses its jurisdiction to try the defendant, unless the defendant waives representation. It is up to the trial judge to determine whether the defendant's waiver is knowing and intelligent, given all the facts and circumstances surrounding the case, including the defendant's background, experience, and conduct. On appeal, if the trial record does not show that the trial judge made this determination, the appellate court itself must hear evidence as to whether the defendant's waiver of counsel was competent. Here, Johnson should have challenged his conviction by filing a timely appeal. Having missed the filing deadline, Johnson petitioned for habeas corpus. Ordinarily, habeas corpus is an inappropriate procedure for challenging a trial court's errors. However, if Johnson had no lawyer and did not waive his right to counsel, the trial court had no jurisdiction to try him. If Johnson's failure to file a timely appeal was due to his lack of access to a lawyer, then habeas corpus proceedings are the only remaining and effective way to protect Johnson's Sixth Amendment right. Under these circumstances, the district court erred in ruling it had no habeas corpus jurisdiction. The court of appeals judgment affirming that ruling is reversed. The case is remanded for the district court to determine, from the trial record or its own inquiry, whether Johnson knowingly and intelligently waived his right to counsel.

#### Dissent (Butler, J.)

The record shows that Johnson waived his right to counsel. Therefore, the trial court had jurisdiction to try Johnson, and the court of appeals judgment upholding the district court's dismissal of Johnson's petition for a writ of habeas corpus should be affirmed.

#### Dissent (McReynolds, J.)

The court of appeals ruling upholding the district court's dismissal of Johnson's petition for a writ of habeas corpus should be affirmed.

# Key Terms:

**Remand** - Returning a case back to the previous court, such as the trial court or the state court, for some additional action.

**Sixth Amendment Right to Counsel** - Right of a person accused of a crime to have the help of an attorney throughout any criminal prosecution.

# United States v. Wade

#### United States Supreme Court 388 U.S. 218 (1967)

**Rule of Law**

**A post-indictment witness identification of a criminal suspect, conducted without notice to and in the absence of the suspect's counsel, violates the Sixth Amendment right to the assistance of counsel.**

**Facts**

Wade (defendant) was arrested under suspicion of involvement in a bank robbery. The court appointed counsel for Wade. An FBI agent subsequently arranged a lineup to have two bank employees identify the man they remembered from the robbery. The agent did not notify Wade’s attorney prior to conducting the lineup. At the lineup, both employees identified Wade as the bank robber. At trial, the employees identified Wade when asked if they saw the robber present in the courtroom. On cross-examination, the employees confirmed that they had previously picked Wade out of the lineup and testified that prior to the lineup, they had seen Wade in the hallway with the FBI agent before the other lineup participants were brought in. Wade moved for a judgment of acquittal or to strike the courtroom identifications, claiming that because the lineup was conducted without notice to and in the absence of Wade's appointed counsel, the lineup violated his Fifth Amendment privilege against self-incrimination and his Sixth Amendment right to counsel. The trial court denied the motion. Wade was convicted. The appellate court held that the lineup did not violate the Wade’s Fifth Amendment rights but did violate his Sixth Amendment right to counsel. The court of appeals reversed the conviction and remanded for a new trial that excluded the employees’ courtroom identifications. The United States Supreme Court granted certiorari.

**Issue**

Does a post-indictment witness identification of a criminal suspect, conducted without notice to and in the absence of the suspect's counsel, violate the Sixth Amendment right to the assistance of counsel?

**Holding and Reasoning (Brennan, J.)**

Yes. The Sixth Amendment right to counsel is intended to afford the accused protection against state action during any critical stage of criminal proceedings, formal or otherwise, at which the right to a fair trial might be jeopardized by the lack of legal representation. A post-indictment witness identification is a critical stage of the proceedings. Witness identifications are notoriously unreliable, and conducting a lineup without the oversight of counsel allows the opportunity for suggestion to influence witness identification. A defendant’s ability to identify infirmities in the identification process is severely limited, and the defendant labors under an inherent deficiency in credibility as compared to the police officers who would likely testify as to the soundness of the identification process. Here, the witnesses who identified Wade testified that they had seen him standing alone with the FBI agent before other lineup participants were brought in. Wade’s conviction may have been decided well before he had the opportunity to present a defense at trial. The lineup clearly constituted a critical stage in the proceedings leading to his conviction, and the lineup should not have been conducted without notice to Wade's attorney or in his attorney's absence, unless Wade waived the right to have his counsel present. However, the absence of counsel at Wade’s lineup does not necessarily require a new trial and the exclusion of the courtroom identification. Rather, the state should have the opportunity to prove that there was an independent source for the courtroom identification. In other words, the court must determine whether the courtroom identification arose exclusively from the impermissible lineup or whether it arose from circumstances sufficiently distinct from the lineup to remove it from exclusion as the fruit of illegal procedure. Accordingly, the appellate court's judgment is vacated, and the appellate court is directed to enter a new judgment vacating the convictions and remanding to the district court for further proceedings.

**Concurrence/Dissent (White, J.)**

In practice, the rule announced by the majority prohibits courtroom identification any time a pretrial identification has been conducted without the presence of counsel. The scope of the rule is not limited to lineup identifications; it would apply to any contact between the defendant and a witness in the absence of counsel. However, the majority rule allows courtroom identifications when no pretrial identification has occurred, even though a witness will obviously know that the defendant has been identified as a prime suspect. The majority additionally indicates that states might implement legislation or procedural safeguards that would remove a pretrial identification from the category of a critical stage in proceedings. That being the case, the court should simply set forth guidelines for establishing acceptable procedures rather than impose a rule of general application. Additionally, the majority rule invalidates any identification made without the presence of counsel in situations in which video or audio recording would suffice to give counsel knowledge of the manner in which the identification was conducted. The ostensible benefits of legal representation to the criminal justice process do not justify intrusion upon the states’ interests in determining their own processes for conducting criminal proceedings. Finally, this rule likely will not increase the reliability of witness identification. Police have a duty to avoid convicting the innocent, but defense counsel has no obligation to ensure the conviction of a guilty client. The majority rule, in the absence of some reciprocal limitations on the conduct of defense counsel, is likely to have a negative impact on the reliability of witness identifications.

**Concurrence/Dissent (Black, J.)**

The court correctly determined that the lineup without representation violated Wade’s Sixth Amendment right to counsel. However, the case should not be remanded for determination of whether the courtroom identifications arose from sources independent of the lineup identification. This type of determination appears practically impossible because it requires the witness to search for clear distinctions between memories based on the lineup identification as opposed to memories derived from other observations. It is difficult to perceive what type of evidence the prosecution will be able to present in support of an independent source of identification. Furthermore, the Fifth and Sixth Amendments are not violated if lineup identification is not used either as the sole source of identification or as a source of additional support for a courtroom identification. In this case, the prosecution never introduced evidence of the lineup identification. The jury only learned about the lineup because the defense brought it up on cross-examination. The defendant’s rights are not infringed when the defense has the opportunity to use prior lineup evidence to challenge the witness’ credibility. In addition, the majority rule effectively imposes a federal rule of evidence upon state courts. The Constitution grants states broad authority to individually govern criminal procedures, and this decision infringes upon that authority.

# Key Terms:

**6th Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

**5th Amendment** - An amendment added to the U.S. Constitution as part of the Bill of Rights that provides important protections from government actions, including a guarantee that no person will be required to answer for a capital crime unless first indicted by a grand jury; no one will suffer double jeopardy; no one must testify against himself or herself; no one will be deprived of life, liberty, or property without due process of law; and no property will be taken for public use without just compensation.

# Gilbert v. California

**Rule of Law**

**Criminal Law**

**Taking of exemplars of defendant's handwriting, containing no testimonial or communicative matter, did not violate defendant's Fifth Amendment privilege against self-incrimination.**[**U.S.C.A.Const. Amend. 5**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDV&originatingDoc=I9886aac29c1c11d9bc61beebb95be672&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Criminal Law**

**Not every compulsion of defendant to use his voice or write compels communication within Fifth Amendment privilege; a mere handwriting exemplar, in contrast to content of what is written, like voice or body itself, is an identifying physical characteristic outside constitutional protection.**[**U.S.C.A.Const. Amend. 5**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDV&originatingDoc=I9886aac29c1c11d9bc61beebb95be672&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Criminal Law**

**Preindictment taking of handwriting exemplars from defendant was not a critical stage of criminal proceedings at which defendant was entitled to assistance of counsel, since there was minimal risk that absence of counsel might derogate from his right to fair trial.**[**U.S.C.A.Const. Amend. 6**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDVI&originatingDoc=I9886aac29c1c11d9bc61beebb95be672&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Criminal Law**

**Accomplice's pretrial statement to police, referring to defendant 159 times in course of reciting defendant's role in offenses, was inadmissible hearsay as to defendant.**

**Constitutional Law**

**Supreme Court had no occasion to pass on contention that defendant had been denied due process by admission of accomplice's pretrial statements which referred to defendant, where state Supreme Court, which had on appeal determined that erroneous admission of statements was harmless error, might review application of harmless error standard on remand.**

**Federal Courts**

**Certiorari was granted to consider important question of extent to which “hot pursuit” and “exigent circumstances” exceptions may permit warrantless searches without violation of Fourth Amendment.**[**U.S.C.A.Const. Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=I9886aac29c1c11d9bc61beebb95be672&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Federal Courts**

**Certiorari, granted to review search and seizure problem, would be vacated as having been improperly granted where closer examination of record revealed that facts did not appear with sufficient clarity to enable court to decide that question.**

**Criminal Law**

**Admission of in-court identifications, by witnesses who had earlier identified defendant at lineup, without first determining that identifications were not tainted by illegal lineup but were of independent origin, was constitutional error.**

**Criminal Law**

**State defendant, on certiorari was entitled only to vacation of his conviction, despite determination that admission of in-court identifications without determination that they were not tainted by illegal lineup was constitutional error, pending holding of such proceedings as state supreme court might deem appropriate to afford state opportunity to establish that in-court identifications had independent source or that their introduction was harmless error.**

**Criminal Law**

**Post indictment pretrial lineup at which defendant was exhibited to identifying witnesses was critical stage of criminal prosecution at which defendant was entitled to counsel, and conduct of lineup without notice to and in absence of counsel denied defendant his Sixth Amendment rights.**[**U.S.C.A.Const. Amend. 6**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDVI&originatingDoc=I9886aac29c1c11d9bc61beebb95be672&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Criminal Law**

**Testimony, at guilt and penalty stages, of witnesses that they had identified defendant at lineup, which was illegal in having been conducted without notice to counsel, was per se inadmissible, and state was not entitled to opportunity to show that testimony had independent source.**

**Criminal Law**

**State defendant was entitled on remand to new trial or, if no prejudicial error should be found on guilt stage but only in penalty stage, to whatever relief state law might afford where penalty stage must be set aside, where there had been error in admission of testimony that witnesses had identified defendant at illegal lineup.**

87 S.Ct. 1951

Supreme Court of the United States

**Jesse James GILBERT, Petitioner,**

**v.**

**STATE OF CALIFORNIA.**

No. 223.

Argued Feb. 15 and 16, 1967.Decided June 12, 1967.

**Synopsis**

Prosecution for armed robbery and murder. The Superior Court, Los Angeles County, rendered judgment, and defendant appealed. The [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I43403974fad911d9bf60c1d57ebc853e&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[California Supreme Court, 63 Cal.2d 690, 47 Cal.Rptr. 909, 408 P.2d 365,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966111780&pubNum=661&originatingDoc=I9886aac29c1c11d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed in part and reversed in part, and defendant obtained certiorari. The Supreme Court, Mr. Justice Brennan, held that the taking of a handwriting exemplar in absence of counsel did not deny Fifth or Sixth Amendment rights, but that admission of in-court identifications without determination that they were not tainted by illegal lineup was constitutional error, and that testimony that witnesses had identified defendant at illegal lineup was per se inadmissible.

Judgment and conviction vacated and case remanded.

Mr. Justice Black, Mr. Justice White, Mr. Justice Fortas, Mr. Chief Justice Warren, Mr. Justice Harlan, and Mr. Justice Stewart dissented in part.

# Miranda v. Arizona

#### Rule of Law

**Without certain hallmark warnings regarding the right to remain silent and the right to counsel, statements made during custodial interrogation are inadmissible at trial.**

# Wolf v. Colorado

#### United States Supreme Court 338 U.S. 25 (1949)

#### Rule of Law

**It is a violation of the Due Process Clause of the Fourteenth Amendment for state actors to gather evidence through unreasonable searches and seizures, but such evidence need not be excluded from state criminal proceedings.**

**Florida v. Jimeno**

United States Supreme Court  
500 U.S. 248 (1991)

**Rule of Law**

**The Fourth Amendment allows a law enforcement officer to open a closed container within a suspect’s vehicle if, under the circumstances, it is objectively reasonable to believe the scope of the suspect's consent permits the officer to do so.**

**Facts**

A Florida police officer stopped a car driven by Enio Jimeno (defendant) after Jimeno ran a red light. The officer suspected Jimeno of transporting illegal drugs and asked Jimeno for permission to search the car for drugs. Jimeno consented. Next to passenger Luz Jimeno's (defendant) seat, the officer found a closed paper bag, the contents of which were not visible. The officer opened the bag and found drugs inside. Florida (plaintiff) prosecuted the couple on drug charges. The trial court ruled the drugs found in the bag were inadmissible evidence because Jimeno's consent did not extend to the officer's search of the closed bag. The state appealed, and both the Florida District Court of Appeal and the Florida Supreme Court affirmed the trial judge's ruling. The latter court based its decision on a Florida case in which, despite the suspect's general consent to a search of his car, it was held unreasonable for an officer to pry open a locked briefcase found in the car's trunk without the suspect's specific permission to do so. The state petitioned the United States Supreme Court, which granted certiorari.

**Issue**

Does the Fourth Amendment allow a law enforcement officer to open a closed container within a suspect’s vehicle if, under the circumstances, it is objectively reasonable to believe the scope of the suspect’s consent permits the officer to do so?

**Holding and Reasoning (Rehnquist, C.J.)**

Yes. The Fourth Amendment allows a law enforcement officer to open a closed container within a suspect’s vehicle if, under the circumstances, it is objectively reasonable to believe the scope of the suspect’s consent permits the officer to do so. An officer’s belief is objectively reasonable if a typical reasonable person would interpret the exchange between the officer and the suspect to permit the search, considering the expressed purpose of the officer's search. In this case, when the officer requested Jimeno's consent to a search, the officer informed Jimeno that the expressed purpose of the search would be illegal drugs. Jimeno could have withheld or limited the scope of his consent, but he did not do so. A typical reasonable person understands that illegal drugs are usually kept in containers, rather than left open to casual view, and therefore would think it reasonable for the officer to search containers for suspected drugs. It might be unreasonable for an officer to pry open a locked briefcase without specific permission, but that situation is different from opening a paper bag. The officer's search was reasonable, and the Florida Supreme Court is reversed. The case is remanded for further proceedings consistent with this decision.

**Dissent (Marshall, J.)**

A driver's expectation of privacy in a vehicle is relatively low, given the public visibility of a vehicle's interior. However, a higher expectation attaches to the driver's person and items the driver keeps in a closed container. Placing items in a closed container marks them as separate from the vehicle, whether the container is a paper bag or a locked briefcase. Therefore, contrary to the majority's holding, an officer should be required to ask a driver's specific permission to search his or her person or any closed containers within the vehicle.

**\*\*GEORGIA v. RANDOLPH\*\***

United States Supreme Court  
547 U.S. 103 (2006)

**Rule of Law**

**The police may not enter a home without a warrant to search for evidence where they obtain consent from an occupant but a co-occupant is present and objects to the search.**

**Facts**

The police, responding to a domestic disturbance call made by his wife, arrived at Randolph’s (defendant) house. When the police arrived at the house, Randolph’s wife proceeded to tell them that Randolph used cocaine. The police asked for permission to search the home for evidence. Randolph’s wife gave consent but Randolph, who was present with his wife, refused. Based on the wife’s consent, the police proceeded to search the home despite Randolph’s objections and discovered cocaine in Randolph’s bedroom. Over Randolph’s objections, the cocaine was admitted into evidence at trial because, the court reasoned, Randolph’s wife had the authority to consent to the search. The court of appeals reversed and the state supreme court affirmed. The United States Supreme Court granted certiorari.

**Issue**

Under the Fourth Amendment, may police conduct a warrantless search of a home when one occupant gives consent to search the premises while another occupant is present and is expressly refusing to consent to the search?

**Holding and Reasoning (Souter, J.)**

No. When there are two occupants of a dwelling present and one is consenting to a search by the police and the other is objecting to the search, the police may not enter the home and conduct a warrantless search for evidence. The holding in *United States v. Matlock*, 415 U.S 164 (1974), that the police may search a home with consent of a co-occupant even when another occupant later objects, is premised on social expectations and commonly held assumptions about people sharing a home. In *Matlock*, the primary assumptions at issue involved the equal authority of all of the occupants and the assumption of risk when living with others. Here, the primary assumptions again include the equal authority of all of the occupants but also assumptions about how people act in light of this equal authority: a guest is unlikely to enter when invited by one occupant but expressly told to stay away by another. Furthermore, *Minnesota v. Olson,*495 U.S. 91 (1990), holds that an overnight guest has a reasonable expectation of privacy in the house in which he is staying because his host is unlikely to invite someone into the home over his objection. This Fourth Amendment right easily transfers to co-inhabitants when they are present and expressly objecting to someone’s entry. In such situations, one occupant has no authority over the other to demand a resolution in his own favor. Therefore, when one occupant who is present expressly objects to a police search, the consent of another occupant actually provides no additional authority to the police to enter absent a warrant or exigent circumstances. Here, the police sought entry into the home to look for evidence and they did not claim exigent circumstances to preserve evidence or protect Randolph’s wife. Randolph was physically present when his wife gave consent and he flatly refused to give permission for the search. Therefore, the police search was unreasonable. The judgment of the state supreme court is affirmed.

**Concurrence (Stevens, J.)**

Under an “original understanding” interpretation of the Fourth Amendment, the search of Randolph’s home would be deemed unconstitutional because at the time the amendment was drafted, Randolph, as a man, would have had a greater property interest in the house than his wife and therefore the authority to overrule her wishes. Today however, husbands and wives have an identical interest in their shared dwelling for Fourth Amendment purposes.

**Concurrence (Breyer, J.)**

The Court’s ruling here is very fact specific and the totality of the circumstances support the position that the search was unreasonable. However, the reasonableness of a warrantless search in subsequent cases should be similarly evaluated by weighing the totality of the circumstances to determine whether an exigency exists that would warrant immediate entry.

**Dissent (Roberts, C.J.)**

A warrantless search is reasonable provided the police gain the consent of someone authorized to give it. While the Court claims its opinion is grounded in Fourth Amendment privacy jurisprudence, this is not the case. Just as people assume the risk that someone may fail to keep a secret, under *Matlock*, when people share a home they assume the risk of living with others. The right to privacy of things or places shared is no longer absolute, but is limited by the person with whom one lives who maintains the authority to consent to searches of the shared living quarters. Also, the Court is creating Fourth Amendment law based solely on assumptions about people’s behavior, assumptions that could easily go the other way. The Court’s holding is arbitrary, drawing lines between an occupant asleep on the couch and one present at the door when another occupant is consenting to a police search, and obscure, forbidding a search that may incriminate the occupant present and objecting but permitting a search that may incriminate someone else in the home but not present. Fourth Amendment rights should not be subject to such randomness. Finally, the Court’s holding risks inhibiting the police from protecting victims of domestic violence when the abused occupant consents to entry but the abuser refuses and further risks immediate destruction of evidence or retribution on the consenting occupant when the police leave.

**Dissent (Scalia, J.)**

Even if Justice Stevens’ critique of originalism is true and women would not have had the authority to consent to police searches when the Fourth Amendment was drafted, the Fourth Amendment remains constant while the laws it interacts with change. Therefore, under originalism, who may consent to a warrantless search of a home may change while the protections of the Fourth Amendment remain constant. Such an approach to constitutional interpretation should not be so easily dismissed.

***Georgia v. Randolph*** – Police officers may not rely on one co-tenant’s consent to search a residence when the other co-tenant objects.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Georgia v. Randolph** 547 U.S., 126 S. Ct. 1515 page 326

Justice Souter delivered the Opinion of the Court (Justice Alito took no part in the consideration or decision in this case, Justices Stevens and Breyer concurred.)

Dissent: Justice Roberts with Justice Scalia joining

**Facts**: Police responded to a domestic dispute where Janet Randolph complained about her husband’s drug use and also volunteered there were “items of drug evidence” in the house. Sgt. Murray asked Scott Randolph for permission to search the house. He refused.

The Sgt. then asked Ms. Randolph for consent to search. She said yes. She led the officer to an upstairs bedroom that she said was Mr. Randolph’s room where the officer saw a section of a drinking straw with white powder on it. He then left the house to get an evidence bag from his car and to call the DA’s office which told him to stop the search and apply for a warrant. When Sgt Murray returned to the house, Ms, Randolph withdrew her consent. The police took the straw and the Randolphs to the police station. After getting a search warrant, they returned to the house and seized further evidence of drug use. Mr. Randolph was indicted for possession of concaine. He moved to suppress the evidence based on a warrantless search of his house and his wife’s consent over his express refusal.

The trial court denied the motion, ruling Ms. Randolph had common authority to consent to the search.

The Court of Appeals of Georgia reversed. It held that an individual who chooses to live with another assumes a risk no greater than “an ability 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.

**Rule of Law**

The police may not enter a home without a warrant to search for evidence where they obtain consent from an occupant but a co-occupant is present and objects to the search.

**Issue:** Under the Fourth Amendment, may police conduct a warrantless search of a home when one occupant gives consent to search the premises while another occupant is present and is expressly refusing to consent to the search?

**Justice Souter**: No, To the 4th Amendment rule ordinarily prohibiting the warrantless entry of a person’s house as unreasonable *per se,*  one “jealously and carefully drawn” exception recognizes the validity of searches with voluntary consent of an individual possessing authority. That person might be the householder against whom evidence is sought, or a fellow occupant who shares common authority over property, when the suspect is absent. (United States v. Matlock) 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 (Illinois v. Rodriquez). None of our co-occupant cases, however, has presented the further act of a second occupant physically present and refusing permission to search, and later moving to suppress evidence so obtained. The significance of such refusal turns on the underpinnings of the co-occupant consent rule, as recognized since Matlock.

Analysis: In Matlock, the defendant was arrested in the yard of house shared by Mrs. Graff and her relatives. She allowed the police and agreed to the search. We explained that a “common authority” is not synonymous with a technical property interest.

…It is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection on his own right and that *others have assumed the risk that one of their number might permit the common area to be searched.”*

Matlock’s example of common understanding is readily apparent. Matlock relied on what was usual and placed no burden on the police to eliminate the possibility of atypical arrangements.

It is fair to say that called standing at the door of shared premises would have no confidence that one occupants invitation was a sufficiently good reason to enter when a fellow tenant stood there saying “stay out.” No sensible person would go inside under those conditions. There is no common understanding that one co-tenant as a right or authority over the express wishes of another, whether the issue is the color of the curtains or invitations to outsiders.

Disputed permission is no match for this central value of the 4th Amendment, and the States other countervailing claims do not add up to outweigh it. Yes, we recognize the consenting tenants interest as a citizen in bringing criminal activity to light. And we understand a co-tenants legitimate self-interest in siding with the police to deflect suspicion raised by sharing quarters with a criminal. The reliance on a co-tenants information instead of disputed consent accords with the laws general partiality toward “police action taken under a warrant [as against] searched and seizures without one.

Nor should his established policy of 4th Amendment law be undermined by the principal dissents claim that it shields spousal abusers and other violent co-tenants who will refuse to allow the police to enter a dwelling when their victims ask the police for help [as]this case has no bearing on the capacity of the police to protect domestic victims. (“When the defendant has victimized the third-party…the emergency nature of the situation is such that the third-party consent should validate a warrantless search despite defendants objections.”)

The dissents argument rests on the failure to distinguish 2 different issues:

1. when the police may enter without committing a trespass
2. and when the police may enter to search for evidence

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 to him on the basis of consent given to the police by another resident.

Justice Souter goes on to say there are 2 loose ends (page 330).

1. The first is in Matlock – “giving permission “*in his own right”* how can his

“own right”be eliminated by another tenants objection? The question is whether customary social understanding accords the consenting tenant authority powerful enough to prevail over the co-tenants objection. *Matlock* did not purport to answer this question.

1. the significance of *Matlock* and *Rodriguez* after todays decision. We have to admit 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-tenants permission does not suffice for a reasonable search, whereas the potential objector, nearby but not invited to take part in the threshold colloquy, loses out.

The pragmatic decision to accept the simplicity of this line is 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.

**DISSENT** Justice Roberts and Justice Scalia pages 333-335

Invitees may react one way if the feuding roommates share one room, differently if there are common areas from which the objecting roommates could readily ne expected to absent himself. The possible scenarios are limitless. That the rule is so random in its application confirms that it bears no real relation to the privacy protected by the 1st Amendment. The question presented often arises when innocent cotenants seek to disassociate or protect themselves from ongoing criminal activity. Under the majoritys rule, there will be many cases in which a consenting co-occupants wish to have the police enter is overridden by an objection from another present occupant. What does the majority imagine will happen in a case in which the consenting co-occupant is concerned about the others criminal activity, once the door clicks shut?

The majority acknowledges these concerns, but dismisses them on the grounds that its rule can be expected to give rise to exigent situations, and police can then rely on an exigent circumstances exception to justify entry. See *United States v. Davis* – finding no exigent circumstances justifying entry when police responded to a report of domestic abuse, officers heard no noise upon arrival, defendant told officers that his wife was out of town, and then wife appeared at the door seemingly unharmed but resisted husbands efforts to close the door.

**Dissent** Justice Thomas

The Court held in *Coolidge v. New Hampshire* that no 4th Amendment search occurs where, as here, the spouse of an accused voluntarily leads the police to potential evidence of wrongdoing by the accused. Because *Coolidge* squarely controls this case, the Court need not address whether the police could permissibly have conducted a general search of the Randolph home, based on Mrs. Randolphs consent. I respectfully dissent.

***Georgia v. Randolph* (2006)**

**Randolphs were husband and wife who lived in a residence together. Police came to their house in response to a domestic dispute, and Ms. Randolph told police about Mr. Randolph’s drug use. Police asked for permission to search, Mr. Randolph denied. Ms. Randolph then granted permission. Ms. Randolph led police to a room identified as her husbands. There police discovered a straw with suspected cocaine residue on it. Police called the District Attorney, who told them to halt the search and apply for a search warrant. Ms. Randolph then revoked consent, police went and got a warrant and found more evidence which was used to convict him of cocaine possession.**

**He moved to suppress the evidence and was denied. Georgia Court of Appeals reversed and State Supreme Court affirmed the reversal. State appeals here.**

**Issue: Was the consent valid?**

**Affirmed. Consent is valid when given with apparent authority or by one possessing common authority provided it is reasonable. Where a physically present cotenant objects, the consenting tenant’s consent is not powerful enough to overcome the objecting tenant’s denial.**

**United States v. Matlock**

United States Supreme Court  
415 U.S. 164 (1974)

**Rule of Law**

**The voluntary consent of any joint occupant of a residence to search jointly occupied premises is valid against the co-occupant.**

**Facts**

William Matlock (defendant) was indicted for robbing a federally insured bank. Matlock shared a room with Gayle Graff in a home rented by Graff’s parents. Law enforcement knew that Matlock lived in the home but did not know in which room. Law enforcement arrived at the home and arrested Matlock in the front yard. The officers proceeded to the home, and Graff consented to a search of the home, including the bedroom that Graff told the officers she shared with Matlock. The officers found incriminating evidence against Matlock. Matlock filed a motion to suppress the evidence. During the suppression hearing, the district court excluded as hearsay Graff’s statement about sharing a bedroom with Matlock and testimony stating that Graff and Matlock held themselves out to be husband and wife to various people. The district court found that the prosecution had failed to prove that Graff’s consent to the search was binding on Matlock. The court of appeals affirmed. The United States Supreme Court granted certiorari.

**Issue**

Is the voluntary consent of any joint occupant of a residence to search jointly occupied premises valid against the co-occupant?

**Holding and Reasoning (White, J.)**

Yes. The voluntary consent of any joint occupant of a residence to search jointly occupied premises is valid against the co-occupant. Generally, consent to search can be binding on another person if the consenter has common authority over the person or the premises to be searched. In this case, the district court erred in its reasoning that led to the conclusion that Graff’s consent was not binding on Matlock. The district court should not have excluded Graff’s statement about sharing a bedroom with Matlock or the testimony stating that Graff and Matlock held themselves out to be husband and wife. Considering this evidence, it appears that as a co-occupant of the bedroom, Graff’s consent was binding on Matlock, rendering the search reasonable. However, this is an issue to be determined by the district court on remand. The judgment of the court of appeals is reversed, and the case is remanded.

**Dissent (Brennan, J.)**

Remand in this case should also include the question of whether Graff knew that she was free to deny consent.

**Dissent (Douglas, J.)**

Law enforcement could have and should have obtained a search warrant in this case. The officers used Graff’s permission to search the entire home, including those spaces occupied by Matlock and Graff’s parents. This search was akin to a search authorized by a general warrant, which is unconstitutional. Purported consent should not permit law enforcement to conduct a search more widely than it could with a warrant.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Search** - The official examination of a person or property in order to find evidence of crime.

**General Warrant** - An unconstitutional warrant authorizing a search or seizure without naming and describing the items or individuals to be searched and seized, in violation of the Fourth Amendment.

**Illinois v. Rodriguez**

United States Supreme Court  
497 U.S. 177 (1990)

**Rule of Law**

**Under the Fourth Amendment, the police may enter a home without a warrant if they reasonably believe the person who consents to their presence has the authority to do so.**

**Facts**

A woman called the police because she had been beaten by Rodriguez (defendant). The woman agreed to accompany the police to Rodriguez’s home and unlock the door with her key so the police could arrest him. The woman had lived in the apartment with Rodriguez but had moved out a few weeks prior to this incident. She had kept the key without Rodriguez’s knowledge. Upon entering Rodriguez’s apartment, the police found drugs and drug paraphernalia lying in plain view. Rodriquez was arrested and charged with drug possession and intent to deliver. The trial court granted Rodriguez’s motion and suppressed the drug evidence, holding that the woman who let the police into the apartment had no authority to do so. The trial court held further that the Fourth Amendment was violated even if the police reasonably believed the woman had the authority to let them into the apartment.

**Issue**

Is the warrantless entry into a home and subsequent search constitutional where the police reasonably believe that the person consenting to their presence has the authority to do so but the person in fact does not possess such authority?

**Holding and Reasoning (Scalia, J.)**

Yes. A warrantless entry and the subsequent search are valid under the Fourth Amendment provided the police reasonably believe that the person giving consent has the authority to do so, even though they may later learn no such authority exists. The Fourth Amendment only guarantees that evidence obtained from searches conducted unreasonably will be excluded at trial. Nowhere throughout constitutional jurisprudence has it been held that to be reasonable, the government’s beliefs must be proven correct. Instead, the facts that the government agent relies on must be such that a reasonable person would not demand further inquiry. In this case, the appellate court did not rule on whether the police reasonably believed that the woman had the authority to consent to their entry and subsequent search. As such, the case is remanded to decide this issue.

**Dissent (Marshall, J.)**

The police intrusion into Rodriguez’s home was a violation of the Fourth Amendment. Third party consent cases are grounded in the belief that a person limits his expectation of privacy when he shares a dwelling with someone else and reasonableness plays no role in third party consent cases. Here, Rodriguez no longer shared a home and he therefore had no diminished privacy expectation that would warrant third party consent. Furthermore, the cases cited by the Court, where it holds that for a search to be reasonable the police need not be correct, are misleading. Those cases are grounded in the general reasonableness of police action. However, in this case the police action was unreasonable because they entered a home without a warrant and without exigency, where there was no diminished privacy expectation.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Warden v. Hayden**

United States Supreme Court  
387 U.S. 294 (1967)

#### Rule of Law

**(1) The Fourth Amendment permits officers in hot pursuit of a fleeing felon to enter a home, into which the suspect had fled, and search the home without a warrant.**

**(2) The Fourth Amendment permits officers to seize mere evidence of a crime that is not either a fruit or instrumentality of crime or contraband.**

#### Facts

Police received a call that an armed robbery had just occurred. The caller gave a description of the suspect and informed the police that the robber had just entered a private residence. When the police arrived at the home, they knocked at the door, and Bennie Hayden’s (defendant’s) wife answered. She let the police in to search the house. The police found Hayden upstairs and arrested him. During the course of their search, the police also found a gun and ammunition. They also found clothing in a washing machine that was consistent with the description given of the robber. All of this evidence was introduced at trial, and Hayden was convicted. Unable to secure relief from state courts, Hayden petitioned the federal district court for habeas corpus, which was denied. The court of appeals reversed, holding that the search was lawful, but that the clothing should not have been admitted because it had “evidential value only” and could not be validly seized. The United States Supreme Court granted certiorari.

#### Issue

(1) Does the Fourth Amendment permit officers in hot pursuit of a fleeing felon to enter a home, into which the suspect had fled, and search the home without a warrant?

(2) Does the Fourth Amendment permit officers to seize mere evidence of a crime that is not either a fruit or instrumentality of crime or contraband?

#### Holding and Reasoning (Brennan, J.)

(1) Yes. The Fourth Amendment permits officers in hot pursuit of a fleeing felon to enter a home, into which the suspect had fled, and search the home without a warrant. Under the exigent-circumstances exception to the Fourth Amendment’s warrant requirement, officers may conduct a warrantless search if delaying the search would be inappropriate under the circumstances. For example, officers may enter a house and conduct a warrantless search if speed is necessary to avoid grave danger to the officers or others. Here, there is no doubt that the entry into the home and the search for weapons were lawful in light of the exigencies of the situation. The police acted reasonably when they entered the home and searched it for suspects and weapons, because they were acting to protect their lives and the lives of others.

(2) Yes. The Fourth Amendment permits officers to seize mere evidence of a crime that is not either a fruit or instrumentality of crime or contraband. Fourth Amendment cases have traditionally differentiated between seized items with only evidential value, which could not be admitted in a criminal trial, and contraband, instrumentalities, or fruits of crime, which were admissible. This distinction is not mentioned in the Fourth Amendment, but was read in, based largely on the notion that police officers could not enter a person’s home, even with a warrant, for no reason other than searching for evidence. Evidence could thus only be admitted if it was obtained during a search based on some government interest other than looking for evidence of crime or the accused had no lawful right to have it. The historical underpinnings of the right to be free from unreasonable searches and seizures were based on protection of property rights. Times have changed, and the Fourth Amendment is now understood primarily to protect privacy rights, not property rights. Moreover, society now recognizes a legitimate government interest in investigating and punishing crime. In light of these changes, the distinction between seized items with purely evidential value and seized items that are contraband, instrumentalities, or fruits of crime is abolished. Here, the officer who saw the suspected robber’s clothes in the washing machine did not violate Hayden’s privacy rights. Further, the clothing is not “testimonial” or “communicative,” so there is no danger that introducing it will compel Hayden to be a witness against himself in violation of the Fifth Amendment. Accordingly, the seizure of the clothing was constitutional. The judgment is reversed.

#### Concurrence (Fortas, J.)

The Court correctly concludes that the Fourth Amendment does not require the exclusion of the guns, ammunition, and clothing. However, the seizure of clothing worn during the commission of the crime is justified under the hot-pursuit exception, as it is relevant to identifying the suspect being hotly pursued. It was unnecessary for the Court to strike down the mere-evidence rule to justify the seizure.

#### Dissent (Douglas, J.)

The mere-evidence rule is necessary to protect unreasonable invasions of privacy, and it is supported by history and longstanding precedent that the Court should not overrule.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Chimel v. California**

United States Supreme Court  
395 U.S. 752 (1969)

**Rule of Law**

**Incident to a lawful arrest, a warrantless search of the area in possession and control of the person under arrest is permissible under the Fourth Amendment.**

In ***Chimel***, the Supreme Court clarified the permissible scope of a search incident to arrest.

**Michigan v. Tyler**

**Rule of Law**

98 S.Ct. 1942

Supreme Court of the United States

**State of MICHIGAN, Petitioner,**

**v.**

**Loren TYLER and Robert Tompkins.**

No. 76–1608.

Argued Jan. 10, 1978.Decided May 31, 1978.

**Synopsis**

A judgment of the [Michigan Supreme Court, 399 Mich. 564, 250 N.W.2d 467,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977196411&pubNum=595&originatingDoc=Id4c0577f9c1d11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) granted a new trial to defendants convicted of conspiring to burn real property, one defendant having been also convicted of burning real property and of burning insured property with intent to defraud. The State of Michigan sought review by way of certiorari. The Supreme Court, Mr. Justice Stewart, held that: (1) an entry to fight a fire requires no warrant, and, once in the building, officials may remain there for a reasonable time to investigate the cause of the blaze; (2) thereafter, additional inquiries to investigate cause of the fire must be made pursuant to the warrant procedures governing administrative searches, and (3) evidence of arson discovered in course of such investigations is admissible, but if investigating officials find probable cause to believe that arson has occurred and require further access to gather evidence for possible prosecution, they may obtain warrant only upon traditional showing of probable cause applicable to searches for evidence of crime.

Judgment ordering new trial affirmed.

Mr. Justice Blackmun joined in the judgment of the court and in portions of its opinion.

Mr. Justice White filed an opinion concurring in part and dissenting in part, in which Mr. Justice Marshall joined.

Mr. Justice Stevens filed an opinion concurring in part and concurring in the judgment.

Mr. Justice Rehnquist dissented and filed opinion.

# Johnson v. United States

#### United States Supreme Court 333 U.S. 10 (1948)

#### Rule of Law

**The Fourth Amendment requires that law enforcement officers present a warrant, received from a neutral magistrate, before they can search an individual’s premises.**

# Fernandez v. California

#### United States Supreme Court 134 S. Ct. 1126 (2014)

#### Rule of Law

**One occupant’s consent to search a premises is effective under the Fourth Amendment as long as no other occupant who objects to the search is physically present.**

#### Facts

Police officers were investigating an assault and robbery involving gang activity. The officers were directed to a nearby building, where they observed a man run inside. The officers heard screams and the sounds of a fight coming from inside. The officers knocked on the door of the apartment, and Roxanne Rojas answered. She was clearly hurt and stated that she had been in a fight. When the officers asked Rojas to step outside so they could conduct a sweep of the apartment, Walter Fernandez (defendant) appeared at the door and told the officers they did not have a right to enter the apartment. Rojas identified Fernandez as her attacker, and the police arrested him. Approximately an hour later, officers returned to the apartment and told Rojas that they had arrested Fernandez and that he was in jail. The officers asked for consent to search the apartment, and Rojas agreed. The police discovered gang paraphernalia, a butterfly knife, clothing worn by the robbery suspect, and a sawed-off shotgun. The State of California (plaintiff) charged Fernandez with several crimes, including robbery. Fernandez moved to suppress the evidence discovered in the apartment, arguing that his earlier objection to the search meant Rojas’s consent was not effective.

#### Issue

Is one occupant’s consent to search a premises effective under the Fourth Amendment as long as no other occupant who objects to the search is physically present?

#### Holding and Reasoning (Alito, J.)

Yes. One occupant’s consent to search a premises is effective under the Fourth Amendment as long as no other occupant who objects to the search is physically present. Under the Fourth Amendment, a warrant is generally required to search a home. However, there are certain categories of warrantless searches that have been recognized as constitutional. One such category is search pursuant to consent. The Fourth Amendment permits a search when the sole owner or occupant of a home voluntarily consents to the search. This is a legitimate law-enforcement tool and is helpful to individuals who want the police to be able to search quickly without having to obtain a warrant. Requiring a warrant under these circumstances would needlessly inconvenience everyone involved. The same rule applies when a home has more than one owner or occupant. A single occupant has the authority to invite guests into the home and, therefore, has the authority to consent to a search by law enforcement. However, there is an exception to this rule. If another occupant is physically present and unequivocally objects to the search, the other occupant cannot effectively consent to a search. *Georgia v. Randolph,*547 U.S. 103 (2006). This exception is limited to situations where the objecting occupant is physically present. Fernandez argues that the exception should apply in this case because he objected to the search while he was physically present and because the police removed him. These reasons fail to justify an extension of the exception. Additionally, permitting a single objection to continue effectively presents serious practical issues, including impeding the other occupants’ rights. Obtaining a warrant still imposes a burden on police, magistrates, and the occupant who wishes to consent. These issues all become moot when the exception is limited to the circumstance of a physically present and objecting occupant. Therefore, an occupant may give effective consent to a search under the Fourth Amendment as long as no other occupant is physically present who objects.

#### Concurrence (Thomas, J.)

*Georgia v. Randolph*was wrongly decided because the facts of that case did not implicate a Fourth Amendment search. However, the majority decision is a faithful application of that decision.

#### Concurrence (Scalia, J.)

*Georgia v. Randolph*was wrongly decided, but the majority decision is a faithful application of the rule recognized in that case. This case would be more difficult if general property rights supported the argument that a cotenant does not have the right to admit visitors over an absent cotenant’s objection. In fact, the limited authority on this issue points to the opposite conclusion.

#### Dissent (Ginsburg, J.)

The police should have obtained a warrant to search the premises. The facts of this case are very similar to those in *Georgia v. Randolph*. The warrant requirement is critical to the Fourth Amendment, and exceptions to the warrant requirement should be as narrow as possible. Fernandez’s objection should have rendered Rojas’s consent ineffective just as much as if he had remained on the premises. There is no reason that the police could not have obtained a warrant during the hour before they returned to the home. All of the practical problems the majority identified would have been addressed by simply obtaining a warrant.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Warrant** - An order issued by a court directing an officer to undertake a certain act (e.g., arrest or search).

**United States v. Davis**

#### Rule of Law

**Searches and Seizures**

**The existence of exigent circumstances, as would justify warrantless entry and search of a home, is a mixed question of law and fact.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=Ib5005e1879d711d99c4dbb2f0352441d&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Criminal Law**

**Although Court of Appeals accepts underlying fact findings unless they are clearly erroneous, the determination of whether those facts satisfy the legal test of exigency, in context of entry into and search of a home, is subject to de novo review.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=Ib5005e1879d711d99c4dbb2f0352441d&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Arrest**

**Searches and Seizures**

**A principal protection against unnecessary intrusions into private dwellings is the warrant requirement imposed by the Fourth Amendment on agents of the government who seek to enter the home for purposes of search or arrest.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=Ib5005e1879d711d99c4dbb2f0352441d&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Searches and Seizures**

**Probable cause for a search, accompanied by exigent circumstances, will excuse the absence of a warrant.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=Ib5005e1879d711d99c4dbb2f0352441d&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Searches and Seizures**

**When a government agent enters a home without a warrant, burden is on the government to demonstrate exigent circumstances that overcome the presumption of unreasonableness that attaches to all warrantless home entries.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=Ib5005e1879d711d99c4dbb2f0352441d&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Searches and Seizures**

**Determination whether exigent circumstances exist as would justify entry and search of a home ultimately depends on the unique facts of the controversy.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=Ib5005e1879d711d99c4dbb2f0352441d&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Searches and Seizures**

**An officer's warrantless entry of a residence during a domestic call is not exempt from the requirement of demonstrating exigent circumstances.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=Ib5005e1879d711d99c4dbb2f0352441d&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Searches and Seizures**

**Officers' warrantless entry into defendant's home during domestic disturbance call was not justified by any exigent circumstances, even though defendant had lied about whereabouts of his girlfriend; officers had no reasonable grounds to believe that there was immediate danger to their safety, in that defendant was not threatening or aggressive and had no reputation for violence, and officers could have checked girlfriend's condition without entering the home.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=Ib5005e1879d711d99c4dbb2f0352441d&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

290 F.3d 1239

**United** **States** Court of Appeals,

**Tenth** Circuit.

**UNITED STATES of America, Plaintiff–Appellant,**

**v.**

**Jason Maltino DAVIS, Defendant–Appellee.**

No. 01–3291.

May 16, 2002.

**Synopsis**

Following his arrest, defendant moved to suppress cocaine and firearms seized from his home. The **United** **States**District Court for the District of Kansas, [Richard D. Rogers](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0235076701&originatingDoc=Ib5005e1879d711d99c4dbb2f0352441d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ib5005e1879d711d99c4dbb2f0352441d), J., [2001 WL 1013313,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001763191&pubNum=999&originatingDoc=Ib5005e1879d711d99c4dbb2f0352441d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) granted the motion. Government appealed. The Court of Appeals, [Porfilio](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0132084601&originatingDoc=Ib5005e1879d711d99c4dbb2f0352441d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ib5005e1879d711d99c4dbb2f0352441d), Circuit Judge, held that no exigent circumstances justified officers' entry into home.

Affirmed.

**Coolidge v. New Hampshire**

United States Supreme Court  
403 U.S. 443 (1971)

**Rule of Law**

**Under the plain-view doctrine, police may not conduct a warrantless search of an automobile if they expected in advance to find evidence and failed to secure a warrant.**

**Facts**

Pamela Mason was murdered. Police questioned Edward Coolidge (defendant). Coolidge was cooperative. While Coolidge was taking a lie-detector test, police arrived at his home, questioned his wife, and obtained evidence from her. Police presented the evidence to the state attorney general, who was in charge of the prosecution. Police applied to the attorney general for arrest and search warrants, including a warrant to search Coolidge’s Pontiac. The attorney general, in his capacity as a justice of the peace, granted the warrant. Police arrested Coolidge. Police told Coolidge’s wife to leave, placed the house under guard, and had the Coolidges’ cars towed to the station. Microscopic evidence gathered from the Pontiac was presented against Coolidge at trial, over his motions to suppress, and a jury convicted him. The state supreme court affirmed, and Coolidge petitioned the United States Supreme Court for certiorari, contending the warrantless search of the Pontiac was unconstitutional.

**Issue**

Under the plain-view doctrine, may police conduct a warrantless search of an automobile if they expected in advance to find evidence and failed to secure a warrant?

**Holding and Reasoning (Stewart, J.)**

No. Under the Fourth Amendment, a warrant must be issued by a “neutral and detached magistrate.” A warrant issued by a government enforcement agent is per se invalid. Any search or seizure made under such a warrant is unconstitutional, unless it falls within one of the recognized exceptions to the warrant requirement. First, police may search the area in the possession or under the control of a person arrested incident to that lawful arrest. The search must be contemporaneous with the arrest and limited to the “immediate vicinity.” Next, a police officer may search an automobile if he stopped the car on the highway and had probable cause to believe the car had contraband concealed inside. Lastly, the plain-view doctrine allows police who are somewhere they are lawfully permitted to be to legitimately seize inadvertently found evidence of another crime, which comes within plain view. This is true whether the officer is in “hot pursuit” of a suspect, conducting a search incident to arrest, or otherwise in a lawful vantage. The invasion of privacy must have been authorized on other grounds. The doctrine only applies to evidence found inadvertently and will not justify seizure of evidence police expected to be found in advance. The plain-view doctrine may not be used to circumvent the prohibition of general searches. The Warrant Clause requires probable cause and specificity about the persons or property to be searched or seized to protect against unnecessary government intrusions. If the plain-view doctrine applies, the intrusion has already occurred. The accidental discovery of evidence does not turn a legitimate search into a general one. The substantial benefit to law enforcement outweighs the relatively small threat to privacy. Requiring police to obtain a warrant for accidentally found evidence would be unduly burdensome. Here, the official prosecuting Coolidge issued the warrant. Thus, it was invalid. The car was not in the vicinity of Coolidge’s arrest, and the search did not occur until later. Therefore, this was not a search incident to arrest. Next, the car was not on the highway. The automobile exception does not authorize the search. Lastly, the plain-view doctrine does not apply, because the police knew in advance they needed to search the car. The search was invalid.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Warrant Clause** - A portion of the Fourth Amendment to the United States Constitution, incorporated in the Bill of Rights, that prohibits the search of private property in the absence of a warrant supported by sworn statements and a finding of probable cause.

**Plain-view Doctrine** - An exception to the warrant requirement allowing the warrantless seizure of items if (1) it is immediately apparent that there is probable cause to believe an item is evidence of a crime, without the need for touching or further investigation, and (2) law enforcement officers are lawfully in a position to see and obtain the item.

# State v. Berrios, 235 S.W.3d 99 (Tenn. 2007)

# State v. Berrios

**Rule of Law**

**Criminal Law**

**When a trial court makes findings of fact at the conclusion of a suppression hearing, the findings are binding upon the Supreme Court unless the evidence in the record preponderates against them.**

**Criminal Law**

**With respect to suppression issues, questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact at the suppression hearing.**

**Criminal Law**

**When reviewing a trial court's ruling on a motion to suppress, the party prevailing in the trial court is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from that evidence.**

**Criminal Law**

**When reviewing a trial court's ruling on a motion to suppress, the Supreme Court's review of the trial court's application of law to the facts is de novo, with no presumption of correctness.**

**Criminal Law**

**When a trial court's findings of fact with respect to suppression issues are based entirely on evidence that does not involve issues of witness credibility, appellate courts are as capable as trial courts of reviewing the evidence and drawing conclusions, and the trial court's findings of fact are subject to de novo review.**

**Arrest**

**While arrests and investigatory stops are seizures implicating constitutional protections, consensual encounters are not.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=I31b24f424cf511dca1e6fa81e64372bf&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**;**[**West's T.C.A. Const. Art. 1, § 7**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S7&originatingDoc=I31b24f424cf511dca1e6fa81e64372bf&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Arrest**

**A seizure does not occur simply because a police officer approaches an individual and asks a few questions.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=I31b24f424cf511dca1e6fa81e64372bf&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**;**[**West's T.C.A. Const. Art. 1, § 7**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S7&originatingDoc=I31b24f424cf511dca1e6fa81e64372bf&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Arrest**

**Searches and Seizures**

**Exceptions to the warrant requirement include searches incident to arrest, plain view, hot pursuit, exigent circumstances, and others, such as the consent to search.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=I31b24f424cf511dca1e6fa81e64372bf&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**;**[**West's T.C.A. Const. Art. 1, § 7**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S7&originatingDoc=I31b24f424cf511dca1e6fa81e64372bf&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

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**Arrest**

**Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=I31b24f424cf511dca1e6fa81e64372bf&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Searches and Seizures**

**Reasonableness is the touchstone of the Fourth Amendment.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=I31b24f424cf511dca1e6fa81e64372bf&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Searches and Seizures**

**Constitutional protections against unreasonable searches and seizures are designed to safeguard the privacy and security of individuals against arbitrary invasions of government officials.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=I31b24f424cf511dca1e6fa81e64372bf&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**;**[**West's T.C.A. Const. Art. 1, § 7**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S7&originatingDoc=I31b24f424cf511dca1e6fa81e64372bf&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Criminal Law**

**Evidence obtained as a result of a warrantless search or seizure is subject to suppression unless the state demonstrates that the search or seizure was conducted pursuant to one of the narrowly defined exceptions to the warrant requirement.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=I31b24f424cf511dca1e6fa81e64372bf&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**;**[**West's T.C.A. Const. Art. 1, § 7**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S7&originatingDoc=I31b24f424cf511dca1e6fa81e64372bf&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Arrest**

**An automobile stop constitutes a “seizure” within the meaning of both the Fourth Amendment and the search-and-seizure provision of the state constitution.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=I31b24f424cf511dca1e6fa81e64372bf&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**;**[**West's T.C.A. Const. Art. 1, § 7**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S7&originatingDoc=I31b24f424cf511dca1e6fa81e64372bf&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Automobiles**

**As a general rule, if police officers have probable cause to believe a traffic violation has occurred, an automobile stop is constitutionally reasonable.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=I31b24f424cf511dca1e6fa81e64372bf&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**;**[**West's T.C.A. Const. Art. 1, § 7**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S7&originatingDoc=I31b24f424cf511dca1e6fa81e64372bf&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Automobiles**

**Law enforcement officer had probable cause to initiate a traffic stop and, consequently, was statutorily authorized to issue a traffic citation, where defendant was driving eight miles per hour over posted limit.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=I31b24f424cf511dca1e6fa81e64372bf&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**;**[**West's T.C.A. Const. Art. 1, § 7**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S7&originatingDoc=I31b24f424cf511dca1e6fa81e64372bf&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Automobiles**

**Although there is no federal constitutional prohibition against an arrest for a minor traffic offense, state statute precludes full custodial arrest for misdemeanor traffic violation unless statutory exception applies.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=I31b24f424cf511dca1e6fa81e64372bf&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**;**[**West's T.C.A. §§ 40–7–118**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS40-7-118&originatingDoc=I31b24f424cf511dca1e6fa81e64372bf&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**,**[**55–10–207(a)(1)**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS55-10-207&originatingDoc=I31b24f424cf511dca1e6fa81e64372bf&refType=SP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_7b9b000044381)**,**[**(f)**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS55-10-207&originatingDoc=I31b24f424cf511dca1e6fa81e64372bf&refType=SP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_ae0d0000c5150)**.**

**Automobiles**

**Law enforcement officer did not have a reasonable basis during a traffic stop to place defendant, who had been driving, in secured area of officer's patrol car, even though the state argued that officer placed defendant in patrol car to shield him from rain and cold; officer did not write a citation and intended from outset to ask for consent to search, officer had no suspicion that defendant was armed or dangerous when officer frisked defendant and placed him in patrol car, and record established that officer placed defendant in patrol car primarily to determine whether he became more nervous.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=I31b24f424cf511dca1e6fa81e64372bf&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**;**[**West's T.C.A. Const. Art. 1, § 7**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S7&originatingDoc=I31b24f424cf511dca1e6fa81e64372bf&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Searches and Seizures**

**Consent given to a law enforcement officer by defendant to search his vehicle was not sufficiently attenuated from unlawful detention that occurred when officer, during traffic stop, placed defendant in secured area of officer's patrol car; consent was given while defendant was unlawfully detained in patrol car, no temporal separation existed between unlawful detention and consent, no intervening circumstances separated unlawful detention and consent, and consideration of purpose and flagrancy of officer's misconduct weighed marginally in favor of defendant, given that detection of illegal drugs rather than enforcement of traffic laws was apparent purpose of detention.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=I31b24f424cf511dca1e6fa81e64372bf&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**;**[**West's T.C.A. Const. Art. 1, § 7**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S7&originatingDoc=I31b24f424cf511dca1e6fa81e64372bf&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Searches and Seizures**

**Whether an individual voluntarily consents to a search is a question of fact to be determined from the totality of the circumstances.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=I31b24f424cf511dca1e6fa81e64372bf&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**;**[**West's T.C.A. Const. Art. 1, § 7**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S7&originatingDoc=I31b24f424cf511dca1e6fa81e64372bf&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Searches and Seizures**

**A consent to a search must be unequivocal, specific, intelligently given, and uncontaminated by duress or coercion.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=I31b24f424cf511dca1e6fa81e64372bf&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**;**[**West's T.C.A. Const. Art. 1, § 7**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S7&originatingDoc=I31b24f424cf511dca1e6fa81e64372bf&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Searches and Seizures**

**When determining whether an individual's consent to a search is voluntary, the pertinent question is whether the individual's act of consenting is the product of an essentially free and unconstrained choice; if the individual's will was overborne and his or her capacity for self-determination critically impaired, due process is offended.**[**U.S.C.A. Const.Amends. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=I31b24f424cf511dca1e6fa81e64372bf&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**,**[**14**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDXIV&originatingDoc=I31b24f424cf511dca1e6fa81e64372bf&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**;**[**West's T.C.A. Const. Art. 1, § 7**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S7&originatingDoc=I31b24f424cf511dca1e6fa81e64372bf&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

235 S.W.3d 99

Supreme Court of Tennessee,

at Jackson.

**STATE of Tennessee**

**v.**

**Eric BERRIOS.**

No. W2005–01179–SC–R11–CD.

April 3, 2007 Session.Aug. 17, 2007.

**Synopsis**

**Background:** Defendant moved to suppress evidence of cocaine seized during a traffic stop. The Criminal Court, Shelby County, [Paula Skahan](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0209130701&originatingDoc=I31b24f424cf511dca1e6fa81e64372bf&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I31b24f424cf511dca1e6fa81e64372bf), J., granted the motion. The state was granted an interlocutory appeal, and the Court of Criminal Appeals affirmed. The state applied for permission to appeal, which was granted.

**Holdings:** The Supreme Court, [Gary R. Wade](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0184606901&originatingDoc=I31b24f424cf511dca1e6fa81e64372bf&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I31b24f424cf511dca1e6fa81e64372bf), J., held that:

[1](https://1.next.westlaw.com/Document/I31b24f424cf511dca1e6fa81e64372bf/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)#co_anchor_F152012931062) law enforcement officer had probable cause to initiate a traffic stop and, consequently, was statutorily authorized to issue a traffic citation;

[2](https://1.next.westlaw.com/Document/I31b24f424cf511dca1e6fa81e64372bf/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)#co_anchor_F172012931062) officer did not have a reasonable basis to place defendant in secured area of officer's patrol car; and

[3](https://1.next.westlaw.com/Document/I31b24f424cf511dca1e6fa81e64372bf/View/FullText.html?transitionType=SearchItem&contextData=(sc.Search)#co_anchor_F182012931062) consent given to officer by defendant to search his vehicle was not sufficiently attenuated from officer's unlawful detention of defendant in patrol car.

Affirmed.

The defendant, Eric Berrios, was charged with one count of possession with intent to sell or  deliver more than three hundred grams of cocaine. After the trial court granted the defendant’s motion to suppress the cocaine seized during the traffic stop, the State was granted an interlocutory appeal pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure. The Court of Criminal Appeals affirmed the suppression of the evidence. We granted the State’s application for permission to appeal to determine whether the officer’s actions amounted to an unconstitutional seizure and, if so, whether the defendant’s consent to search the vehicle was sufficiently attenuated from that illegal act. Because the seizure violated constitutional safeguards and because the consent to search was not sufficiently attenuated from the violation, we affirm the suppression of the evidence. The judgment of the Court of Criminal Appeals is, therefore, affirmed.

Interlocutory appeal – an interim appeal on a ruling in part of a case while other parts of a case are still proceeding.

**State v. Berrios, 235 S.W.3d 99**

Supreme Court of Tennessee, At Jackson

April 3, 2007, Session; August 17, 2007, Filed

No. W2005-01179-SC-R11-CD

**Facts:** On Feb 25, 2004, a Police Officer (Nichols) stopped Berrios for speeding. Officer frisked the defendant and placed him in the back of his patrol car for the “defendant’s safety.” While in the back of the car, the officer called Customs to “validate defendant’s driver’s license and registration and to determine whether the vehicle had recently crossed the border from Mexico..

The officer searched defendant’s vehicle. He noticed the bolts to the fender had been taken off and replaced. He called Sgt. McCord (and his narcotics dog). After the dog alerted to the fender, the officer discovered 300 grams of cocaine hidden in the fender.

**Issue:** Did the warrantless search violate state and federal right to protection from unreasonable search and seizure guaranteed under the US Const. Amend. IV and Tenn. Const. Art. I § 7?

**Rule:** Both the state and federal constitutions offer protection from unreasonable searches and seizures; the general rule is that a warrantless search or seizure is presumed unreasonable and any evidence discovered subject to suppression. See U.S. Const. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."); Tenn. Const. art. I, § 7 ("That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures . . . .").

**CONCLUSION:** In these specific circumstances, the arresting officer violated the state and federal constitutions by frisking the Defendant and placing him in the secured area of his patrol car. Because the consent to search was not adequately attenuated from the unlawful detention, the judgments of the trial court and Court of Criminal Appeals suppressing the evidence seized  [\*\*28] during the search of the Defendant's vehicle are affirmed.

This Court has recognized three categories of police interventions with private citizens: a full scale arrest, which requires probable cause; a brief investigatory detention, requiring reasonable suspicion of wrong-doing; and a brief police-citizen encounter, requiring no objective justification. Exceptions to the warrant requirement include searches incident to arrest, plain view, hot pursuit, exigent circumstances, and others, such as the consent to search

**Reporter**  
235 S.W.3d 99 \* | 2007   
  
STATE OF TENNESSEE v. ERIC BERRIOS  
  
Tenn. R. App. P. 11; Judgment of the Court of Criminal Appeals Affirmed. Appeal by permission from the Court of Criminal Appeals Criminal Court for Shelby County. No. 04-03042. Paula Skahan, Judge.

State v. Berrios, 2006 Tenn. Crim. App. LEXIS 193 (Tenn. Crim. App., Mar. 3, 2006)  
  
**Disposition:**

Judgment of the Court of Criminal Appeals Affirmed.

**Core Terms**

patrol car, driver, traffic stop, seizure, detention, consent to search, arrest, suppression, frisk, trial court, attenuated, questions, intrusive, license, traffic, circumstances, registration, speeding, weapons, sit, routine traffic stop, probable cause, pat-down, fender, reasonable suspicion, unlawful seizure, placement, initiate, cocaine, factors

**Case Summary**

**Procedural Posture**  
A trial court granted defendant's motion to suppress cocaine seized during a traffic stop, and the Court of Criminal Appeals of Tennessee affirmed. The State appealed.

**Overview**  
A police officer stopped defendant's vehicle for speeding, frisked him and placed him in the back of his patrol car, and after defendant consented, searched his vehicle and discovered 300 grams of cocaine hidden in the fender. On appeal of the trial court's decision granting defendant's motion to suppress, the court held that even though the initial stop of defendant's vehicle was constitutionally permissible, as he was speeding, the officer's frisking defendant and placing him in the patrol car was not, and therefore the motion was properly granted. The officer had no suspicion that defendant was armed or dangerous, and he did not check the validity of defendant's driver's license or vehicle registration before frisking him or placing him in the patrol car. The record established that the officer placed defendant in the patrol car primarily to determine whether he became more nervous, and the officer's record showed that he conducted "frisks and sits" in other instances regardless of the weather or the time of day. Defendant's consent to the search of his vehicle was not sufficiently attenuated from the violation of his constitutional rights.

**Outcome**  
The judgment granting defendant's motion to suppress was affirmed.

**Judges:** GARY R. WADE, J., delivered the opinion of the court, in which WILLIAM M. BARKER, C.J., and JANICE M. HOLDER and CORNELIA A. CLARK, JJ., joined.  
  
**Opinion by:** GARY R. WADE

**Opinion**

 [\*101]  The defendant, Eric Berrios, was charged with one count of possession with intent to sell or deliver more than three hundred grams of cocaine. After the trial court granted the defendant's motion to suppress the cocaine seized during the traffic stop, the State was granted an interlocutory appeal pursuant to Rule 9 of the Tennessee Rules of Appellate Procedure. The Court of Criminal Appeals affirmed the suppression of the evidence.  [\*\*2] We granted the State's application for permission to appeal to determine whether the officer's actions amounted to an unconstitutional seizure and, if so, whether the defendant's consent to search the vehicle was sufficiently attenuated from that illegal act. Because the seizure violated constitutional safeguards and because the consent to search was not sufficiently attenuated from the violation, we affirm the suppression of the evidence. The judgment  [\*102]  of the Court of Criminal Appeals is, therefore, affirmed.

**OPINION**

On February 25, 2004, Officer Kelly Nichols of the West Tennessee Drug Task Force observed Eric Berrios ("the Defendant") driving fifty-three miles per hour in a construction zone on Interstate 40 in Shelby County. The posted speed limit for the area was forty-five miles per hour. When Officer Nichols activated his emergency equipment, the Defendant stopped his vehicle on the shoulder of the highway. The officer then approached the vehicle on the driver's side, asked the Defendant for his license and vehicle registration, and directed him out of the vehicle. After glancing at the license and registration, Officer Nichols frisked the Defendant and led him to the backseat  [\*\*3] of the patrol car. The Defendant was questioned and ultimately agreed to the officer's request for consent to search the vehicle. A large amount of cocaine was hidden in the fender area of the vehicle.

**Factual and Procedural Background**

At the hearing on the motion to suppress, Officer Nichols, testifying for the State, stated that he directed the Defendant outside of the vehicle for safety reasons. He explained that "police officers working on highways happen to be more likely to be run over by vehicles than shot and killed by a suspect." Later in his direct testimony, he added that the cold and rainy weather was another reason to place the Defendant in the patrol car. Officer Nichols performed a pat-down search for weapons before putting the Defendant in the patrol car but found none. At the hearing, he pointed out that it was his practice to frisk every person he placed in the back of his vehicle.

While inside the patrol car, the Defendant was asked a number of questions about his automobile, his travel plans, and his business. Officer Nichols also telephoned the United States Customs Service to verify the validity of the Defendant's driver's license and registration and to determine  [\*\*4] whether the vehicle had recently crossed the border from Mexico. While awaiting the results of his inquiry, the officer asked for and received consent to search the vehicle.

As he looked under the hood of the vehicle, Officer Nichols discovered that the bolts holding the fender in place had been removed and replaced. After unsuccessfully attempting to remove the fender, he called for Sergeant Mike McCord to assist in the search, explaining that Sergeant McCord "had a narcotics detecting canine and also . . . had experience in searching vehicles." The dog alerted to the front fender area, and the two officers drilled into the fender, discovering more than three hundred grams of cocaine hidden in the firewall of the fender.

During cross-examination, Officer Nichols conceded that the Defendant was cooperative during the stop. He also acknowledged that he had seen nothing in the interior of the car that caused him to fear for his safety or led him to suspect any criminal activity other than speeding. The officer admitted that he did not believe that the Defendant was either armed or dangerous. Upon further questioning, Officer Nichols explained that because the Defendant appeared nervous  [\*\*5] during the initial encounter, his purpose in placing the Defendant in the back of the patrol car was to determine whether the anxiety level of the Defendant would increase.

At the conclusion of the hearing, the trial court took the motion under advisement and later issued a written memorandum and order granting the motion to suppress. The trial court concluded that because the Defendant was driving in excess of the speed limit, the initial stop "was  [\*103]  not unreasonable" but also ruled that detaining the Defendant in the police vehicle and asking questions "unrelated to speeding" or "officer safety" violated constitutional limits. Further findings by the trial court as summarized by the Court of Criminal Appeals, were as follows:

[The officer] did not initiate the computer check on the [D]efendant's license and registration until approximately two minutes after placing the [D]efendant in the back of the squad car and four minutes after initiating the traffic stop. After the call to U.S. Customs, [the officer] continued for four minutes to ask questions unrelated to the speeding offense.

[The officer's] questions exceeded both the *duration* and *subject matter*of the stop.

Contrary to the state's  [\*\*6] argument, the [D]efendant's responses to the officer's questions were an insufficient basis for extending the detention.

The only possible indicator of criminal activity . . . was the [D]efendant's nervousness. Nervousness alone is seldom sufficient for finding reasonable suspicion, and although it could suffice under certain circumstances, those circumstances are not present in this case.

From numerous viewings of the video tape of the traffic stop, the court cannot [ac]credit [the officer's] testimony that the [D]efendant appeared nervous at the beginning of the stop and that the nervousness escalated. Nothing about the [D]efendant's appearance on camera suggested that he was nervous enough to raise a reasonable suspicion of criminal activity . . . .

Any nervousness that the [D]efendant did exhibit was likely a result of being locked in the backseat of a police car while Nichols retained his driver's license. The [D]efendant not only did not feel free to leave, but he was physically unable to do so . . . .

In a supplemental order, the trial court also ruled that even though the Defendant voluntarily consented to the vehicle search, the consent was not sufficiently attenuated from the  [\*\*7] unlawful detention so as to allow the admission of the illegal drugs. The Court of Criminal Appeals affirmed the order of suppression, concluding that the officer's conduct, patting down the Defendant and placing him in the back of the patrol car, amounted to an illegal "frisk and sit." The intermediate court also ruled that the consent to search was not sufficiently attenuated from the illegal conduct.

In this appeal, the State contends that both the trial court and the Court of Criminal Appeals erred by suppressing the cocaine discovered in the vehicle. In the alternative, the State asserts that the consent to search was voluntary and so unrelated to the unlawful seizure as to permit the admission of the evidence.

**Standard of Review**

***HN1*** The standard of review applicable to suppression issues is well established. When the trial court makes findings of fact at the conclusion of a suppression hearing, the findings are binding upon this Court unless the evidence in the record preponderates against them. State v. Odom, 928 S.W.2d 18, 23 (Tenn. 1996). "Questions of credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted  [\*\*8] to the trial judge as the trier of fact." Id. "The party prevailing in the trial court is entitled to the strongest legitimate view of the evidence adduced at the suppression hearing as well as all reasonable and legitimate inferences that may be drawn from  [\*104]  that evidence." Id. Our review of a trial court's application of law to the facts is de novo, with no presumption of correctness. See State v. Walton, 41 S.W.3d 75, 81 (Tenn. 2001) (citing State v. Crutcher, 989 S.W.2d 295, 299 (Tenn. 1999); State v. Yeargan, 958 S.W.2d 626, 629 (Tenn. 1997)). When the trial court's findings of fact are based entirely on evidence that does not involve issues of witness credibility, however, appellate courts are as capable as trial courts of reviewing the evidence and drawing conclusions and the trial court's findings of fact are subject to de novo review. State v. Binette, 33 S.W.3d 215, 217 (Tenn. 2000).

**Analysis**

***HN2*** Both the state and federal constitutions offer protection from unreasonable searches and seizures; the general rule is that a warrantless search or seizure is presumed unreasonable and any evidence discovered subject to suppression. See U.S. Const. amend. IV ("The right of the people to  [\*\*9] be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."); Tenn. Const. art. I, § 7 ("That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures . . . ."). "[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.'" Coolidge v. New Hampshire, 403 U.S. 443, 454-55, 91 S. Ct. 2022, 29 L. Ed. 2d 564 (1971) (quoting Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967)); see also State v. Bridges, 963 S.W.2d 487, 490 (Tenn. 1997). ***HN3*** This Court has recognized three categories of police interventions with private citizens: a full scale arrest, which requires probable cause; a brief investigatory detention, requiring reasonable suspicion of wrong-doing; and a brief police-citizen encounter, requiring no objective justification. State v. Daniel, 12 S.W.3d 420, 424 (Tenn. 2000). "While arrests and investigatory stops are seizures implicating constitutional protections, consensual  [\*\*10] encounters are not." State v. Nicholson, 188 S.W.3d 649, 656 (Tenn. 2006). "[A] seizure does not occur simply because a police officer approaches an individual and asks a few questions." Florida v. Bostick, 501 U.S. 429, 434, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991). Exceptions to the warrant requirement include searches incident to arrest, plain view, hot pursuit, exigent circumstances, and others, such as the consent to search. See State v. Cox, 171 S.W.3d 174, 179 (Tenn. 2005). "The Fourth Amendment applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest." United States v. Brignoni-Ponce, 422 U.S. 873, 878, 95 S. Ct. 2574, 45 L. Ed. 2d 607 (1975) (citing Davis v. Mississippi, 394 U.S. 721, 89 S. Ct. 1394, 22 L. Ed. 2d 676 (1969); Terry v. Ohio, 392 U.S. 1, 16-19, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968)). Reasonableness is the "touchstone of the Fourth Amendment." Florida v. Jimeno, 500 U.S. 248, 250, 111 S. Ct. 1801, 114 L. Ed. 2d 297 (1991) (citing Katz, 389 U.S. at 360); see also Skinner v. Ry. Labor Executives' Assn., 489 U.S. 602, 619, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989); State v. Scarborough, 201 S.W.3d 607, 616 (Tenn. 2006). These constitutional protections are designed to "'safeguard the privacy and security of individuals against arbitrary invasions of government officials.'" State v. Keith, 978 S.W.2d 861, 865 (Tenn. 1998)  [\*\*11] (quoting Camara  [\*105]  v. Mun. Court, 387 U.S. 523, 528, 87 S. Ct. 1727, 18 L. Ed. 2d 930 (1967)).

***HN4*** This Court has previously held that our state constitution offers more protection than the corresponding provisions of the Fourth Amendment. See, e.g., State v. Jacumin, 778 S.W.2d 430, 436 (Tenn. 1989); State v. Lakin, 588 S.W.2d 544, 549 (Tenn. 1979). As under the federal constitution, evidence obtained as a result of a warrantless search or seizure "is subject to suppression unless the State demonstrates that the search or seizure was conducted pursuant to one of the narrowly defined exceptions to the warrant requirement." Yeargan, 958 S.W.2d at 629. The State bears the burden of proof when a search or seizure is conducted without a warrant. Id.

*I. The Initial Stop*

***HN5*** An automobile stop constitutes a "seizure" within the meaning of both the Fourth Amendment to the United States Constitution, see Mich. Dep't of State Police v. Sitz, 496 U.S. 444, 450, 110 S. Ct. 2481, 110 L. Ed. 2d 412 (1990); Delaware v. Prouse, 440 U.S. 648, 653, 99 S. Ct. 1391, 59 L. Ed. 2d 660 (1979), and article I, section 7 of the Tennessee Constitution, see State v. Pulley, 863 S.W.2d 29, 30 (Tenn. 1993). As a general rule, if the police have probable cause to believe a traffic violation has occurred, the stop is constitutionally  [\*\*12] reasonable. Whren v. United States, 517 U.S. 806, 810, 116 S. Ct. 1769, 135 L. Ed. 2d 89 (1996). In this case, the State concedes that the Defendant was seized when the officer initiated the traffic stop. Similarly, the Defendant concedes that the officer had probable cause based upon his excessive speed to conduct the traffic stop.

Because the Defendant was driving eight miles per hour over the posted limit, Officer Nichols had probable cause to initiate a traffic stop. In consequence, he was authorized pursuant to Tennessee Code Annotated section 55-10-207 to issue a traffic citation. See Tenn. Code Ann. § 55-10-207(a)(1) (2004) (***HN6*** "Whenever a person is arrested for a violation of any provision of . . . chapter 8 . . . of this title . . ., punishable as a misdemeanor, . . . the arresting officer shall issue a traffic citation to such person in lieu of arrest, continued custody and the taking of the arrested person before a magistrate."). Although there is no federal constitutional prohibition against an arrest for a minor traffic offense, see Atwater v. City of Lago Vista, 532 U.S. 318, 354, 121 S. Ct. 1536, 149 L. Ed. 2d 549 (2001)  [\*\*13] (holding that the Fourth Amendment permits custodial arrest on the basis of probable cause that an individual has committed even a minor traffic violation), our statute precluded the officer from doing so in this case, see Tenn. Code Ann. § 55-10-207(a)(1) (2004). ***HN7*** In State v. Walker, 12 S.W.3d 460 (Tenn. 2000), this Court concluded that Tennessee's "cite and release" statute, Tennessee Code Annotated section 40-7-118, created a "a presumptive right to be cited and released for the commission of a misdemeanor." Id. at 464. Full custodial arrest is permitted only when one of the statutory exceptions is met. Tennessee Code Annotated section 55-10-207 makes reference to the "cite and release" statute and provides that the same exceptions apply. See Tenn. Code Ann. § 55-10-207(f) (2004). None of the statutory exceptions, however, are present in this instance.

As indicated, the initial stop of the Defendant's vehicle was constitutionally permissible. ***HN8*** The United States Supreme  [\*106]  Court has held, however, that "[i]t is nevertheless clear that a seizure that is lawful at its inception can violate the Fourth Amendment if its  [\*\*14] manner of execution unreasonably infringes interests protected by the Constitution." Illinois v. Caballes, 543 U.S. 405, 407, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005) (citing United States v. Jacobsen, 466 U.S. 109, 124, 104 S. Ct. 1652, 80 L. Ed. 2d 85 (1984)). Moreover, a well-recognized authority on the Fourth Amendment has addressed the "routine traffic stop" as follows:

Given that police can easily come by a factual basis for a traffic stop, that such stops are often motivated by drug-enforcement purposes, and that there exists virtually no basis for questioning the initiation of such a stop because of its pretextual or arbitrary nature, it is apparent that the permissible dimensions of a lawful traffic stop are matters of some importance.

Wayne R. LaFave, The "Routine Traffic Stop" From Start to Finish: Too Much "Routine," Not Enough Fourth Amendment, 102 Mich. L. Rev. 1843, 1862 (2004).

*II. Pat-down of the Defendant and Placement in the Patrol Car*

After the Defendant gave the officer his driver's license and registration, the officer asked the Defendant to step out of his vehicle. The officer explained that he did so for his own safety, a constitutionally justifiable purpose. See Pennsylvania v. Mimms, 434 U.S. 106, 109-11, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977) (holding that an  [\*\*15] officer may, as a matter of course, ask that a driver step out of the vehicle during a traffic stop). As he complied with the request, the Defendant asked permission to remove his jacket from the car. The officer responded by saying, "I'm going to let you have a seat back here." He then patted down the Defendant and placed him in the secured area of the patrol car. At that point, the Defendant was no longer free to leave, a fact the officer acknowledged during the suppression hearing. Further, the Defendant could not have opened the back door from the inside.

The officer, who did not ask for a computer check on the license and registration before placing the Defendant in the back of the patrol car, provided a variety of explanations for placing the Defendant there. Initially, he contended that he had done so for safety reasons. Later, he added, "[P]lus it was also raining." He ultimately admitted, however, that he used the detention as an investigatory tool. He explained that he wanted to determine whether the Defendant's anxiety level increased when he was placed in the police vehicle.

***HN9*** The United States Supreme Court has observed that "[t]he permissibility of a particular law enforcement  [\*\*16] practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." Prouse, 440 U.S. at 654. The Court has also held that "an investigative detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop. Similarly, the investigative methods employed should be the least intrusive means reasonably available to verify or dispel the officer's suspicion in a short period of time." Florida v. Royer, 460 U.S. at 500, 103 S. Ct. 1319, 75 L. Ed. 2d 229. In State v. Cox, 171 S.W.3d 174 (2005), this Court adopted the rationale of the U.S. Supreme Court in Royer, making the following observations:

The duration of [a traffic] stop, however, must be "temporary and last no longer than necessary to effectuate the purpose of the stop." "The proper inquiry is whether during the detention the police  [\*107]  diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly." A traffic stop may be deemed "unreasonable," if the "'time, manner or scope of the investigation exceeds the proper parameters.'"

Id. at 179-80 (citations omitted).

***HN10*** The United States Supreme Court has ruled that  [\*\*17] an officer may order the occupants out of the vehicle during a traffic stop:

Against this important interest [of officer safety] we are asked to weigh the intrusion into the driver's personal liberty occasioned not by the initial stop of the vehicle, which was admittedly justified, but by the order to get out of the car. We think this additional intrusion can only be described as de minimis. The driver is being asked to expose to view very little more of his person than is already exposed. The police have already lawfully decided that the driver shall be briefly detained; the only question is whether he shall spend that period sitting in the driver's seat of his car or standing alongside it. Not only is the insistence of the police on the latter choice not a "serious intrusion upon the sanctity of the person," but it hardly rises to the level of a "'petty indignity.'" What is at most a mere inconvenience cannot prevail when balanced against legitimate concerns for the officer's safety.

Mimms, 434 U.S. at 111 (citation omitted). On the other hand, ***HN11*** the placement of a driver into the backseat of a patrol car cannot be described as "de minimis" or a "mere inconvenience." A process involving  [\*\*18] a frisk and placement into the back of a locked patrol car is more akin to a full-scale arrest than the brief detention generally incident to an ordinary traffic stop. After a traffic violation, a driver can generally expect "to spend a short period of time answering questions and waiting while the officer checks his license and registration, that he may then be given a citation, but that in the end he most likely will be allowed to continue on his way." Berkemer v. McCarty, 468 U.S. 420, 437, 104 S. Ct. 3138, 82 L. Ed. 2d 317 (1984). "The government's general interest in criminal investigation, without more, is generally insufficient to outweigh the individual interest in ending the detention." United States v. Holt, 264 F.3d 1215, 1221 (10th Cir. 2001).

***HN12*** Other jurisdictions considering the issue have permitted the "frisk and sit" for officer convenience if placement in the patrol car is the least intrusive means of avoiding a dangerous condition outside the vehicle. For example, in State v. Lozada, 92 Ohio St. 3d 74, 2001 Ohio 149, 748 N.E.2d 520 (Ohio 2001), the Ohio Supreme Court held as follows:

[D]uring a routine traffic stop, it is reasonable for an officer to search the driver for weapons before placing the driver in a patrol car, if placing the  [\*\*19] driver in the patrol car during the investigation prevents officers or the driver from being subjected to a dangerous condition and placing the driver in the patrol car is the least intrusive means to avoid the dangerous condition.

748 N.E.2d at 526. In Wilson v. State, 745 N.E.2d 789 (Ind. 2001), the Indiana Supreme Court observed that it could "envision various particularized circumstances (including, for example and without limitation, inclement weather, the lack of available lighting for paperwork, the need to access equipment with the detained motorist, etc.) that may make it reasonably necessary for police to require a stopped motorist to enter a police vehicle," but nevertheless concluded that ***HN13*** "[a]n officer is not using the least intrusive means to investigate a traffic stop if, without a particularized justification making it reasonably  [\*108]  necessary, he places a person into his patrol vehicle and thereby subjects the person to a pat-down search." Id. at 793. Similarly, the Minnesota Supreme Court has ruled that "a reasonable basis must exist" for an officer to ask a driver to wait in the patrol car during a routine traffic stop. See State v. Varnado, 582 N.W.2d 886, 891 n.4 (Minn. 1998).

***HN14*** As  [\*\*20] to the frisk, the United States Supreme Court has granted "narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." Terry, 392 U.S. at 27. The Court has ruled that there is no justification for an exception to the warrant requirement for a search incident to a traffic stop, observing that "[t]he threat to officer safety from issuing a traffic citation, however, is a good deal less than in the case of a custodial arrest." Knowles v. Iowa, 525 U.S. 113, 117, 119 S. Ct. 484, 142 L. Ed. 2d 492 (1998). The Court concluded that the interest of officer safety was sufficiently protected in a traffic stop setting through the search power permitted under Terry. See id. at 117-18; see also LaFave, 102 Mich. L. Rev. at 1869 (for a discussion of this doctrine). That is to say, an officer may conduct a pat-down for weapons if he has reasonable suspicion that the driver may be armed. Knowles, 525 U.S. at 117-18.

As stated, Officer Nichols had probable cause to stop the Defendant's vehicle and issue a citation for  [\*\*21] speeding. He did not, however, write a citation and admittedly intended from the outset to ask for consent to search the vehicle. Without any suspicion that the Defendant was armed or dangerous, the officer frisked the Defendant and placed him in the back of the patrol car before checking the validity of his driver's license or vehicle registration. Despite the State's insistence that the officer placed the Defendant in the patrol car to shield him from the rain and cold, the record establishes that the officer placed the Defendant in the patrol car primarily to determine whether he became more nervous. Moreover, the videotape of the traffic stop, which also includes several other traffic stops conducted by Officer Nichols over the course of the three-day period, refutes the explanation offered by the State. In six of those detentions, all of which occurred at roughly the same location on Interstate 40, the driver was asked to step outside the vehicle. Of those six, four were frisked and placed into the backseat of the patrol car. Only the Defendant's stop involved inclement weather. That the officer conducted a "frisk and sit" in those instances regardless of the weather or the time  [\*\*22] of day supports our conclusion that the extended detention in this case lacked a reasonable basis.

While in this case Officer Nichols' intuition and persistence frustrated the illegal activities of the Defendant, a fact that would otherwise merit praise, our approval of this particular "frisk and sit" would deviate from generations of law in this area. The Supreme Court has warned that *"illegitimate and unconstitutional practices get their first footing . . . by silent approaches and slight deviations from legal modes of procedure."* Boyd v. United States, 116 U.S. 616, 635, 6 S. Ct. 524, 29 L. Ed. 746 (1886).

Moreover, those jurisdictions  [\*109]  that permit a detention like this during a routine traffic stop do not allow a pat-down for weapons in the absence of reasonable suspicion. See, e.g., Lozada, 748 N.E.2d at 524 ("[D]uring a routine traffic stop, it is unreasonable for an officer to search the driver for weapons before placing him or her in a patrol car, if the sole reason for placing the driver in the patrol car during the investigation is for the convenience of the officer."). Other jurisdictions have concluded that a pat-down for weapons is permissible before placing a person into a patrol car so long as there  [\*\*23] was a reasonable basis for the placement. As stated by one New York court, "Although a police officer may reasonably pat down a person before he places him in the back of a police vehicle, the legitimacy of that procedure depends on the legitimacy of placing him in the police car in the first place." People v. Kinsella, 139 A.D.2d 909, 527 N.Y.S.2d 899, 899 (N.Y. App. Div. 1988).

Officer Nichols lacked a reasonable basis for placing the Defendant into the secured area of his patrol car and also lacked an independent basis for the frisk. The Court of Criminal Appeals so held, regardless of whether the duration and scope of the subsequent interrogation exceeded constitutional limits. In our view, that is the proper analysis.

*III. Consent to Search*

In the alternative, the State argues that even if the  [\*\*24] "frisk and sit" was improper, the Court of Criminal Appeals erred by concluding that the Defendant's consent to search his vehicle was not sufficiently attenuated from the constitutional impropriety. The State also argues that our decision in State v. Garcia, 123 S.W.3d 335 (Tenn. 2003), should be overruled because it conflicts with the landmark decision of the United States Supreme Court in Schneckloth v. Bustamonte, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973).

***HN15*** Whether an individual voluntarily consents to a search is a question of fact to be determined from the totality of the circumstances. See Schneckloth, 412 U.S. at 227; Cox, 171 S.W.3d at 184. The consent must be "'unequivocal, specific, intelligently given, and uncontaminated by duress or coercion.'" State v. Simpson, 968 S.W.2d 776, 784 (Tenn.1998) (quoting State v. Brown, 836 S.W.2d 530, 547 (Tenn.1992)). "The pertinent question is this: whether the [individual's] act of consenting is the product of an essentially free and unconstrained choice. If the [individual's] will was overborne and his or her capacity for self-determination critically impaired, due process is offended." Cox, 171 S.W.3d at 185 (citing Schneckloth, 412 U.S. at 225-26).

In Garcia,  [\*\*25] this Court observed that ***HN16*** "'a consent to search that is preceded by an illegal seizure is not 'fruit of the poisonous tree' if the consent is both: 1) voluntary, and 2) not an exploitation of the prior illegality.'" Garcia, 123 S.W.3d at 346 (citing Wayne LaFave, 3 Search and Seizure § 8.2(d) at 656 (3d ed. 1996)). We utilized the factors established in Brown v. Illinois, 422 U.S. 590, 603-04, 95 S. Ct. 2254, 45 L. Ed. 2d 416 (1975), for determining whether a voluntary confession was sufficiently attenuated from an unlawful seizure. Those factors are "1) the temporal proximity of the illegal seizure and consent; 2) the presence of intervening circumstances; and 3) the purpose and flagrancy of the official misconduct." Garcia, 123 S.W.3d at 346. This Court acknowledged that "'[a] brief time lapse between a Fourth Amendment violation and  [\*110]  consent often indicates exploitation [of the prior illegal police action] because the effects of the misconduct have not had time to dissipate.'" Id. (quoting State v. Hansen, 2002 UT 125, 63 P.3d 650, 666 (Utah 2002)). By the application of these factors to the illegal "frisk and sit" procedure, the Court of Criminal Appeals ruled that the Defendant's consent to search was not sufficiently attenuated  [\*\*26] from the intrusive act. We agree.

In Schneckloth, the Court stated that ***HN17*** "the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force." 412 U.S. at 228. While in Garcia this Court acknowledged that "the Brown factors were designed to aid courts in determining whether a confession was obtained by exploitation of an illegal arrest," we concluded that "these factors may also be used by courts to evaluate whether the causal connection between an unlawful seizure and a subsequent consent has been broken, i.e. whether the primary taint of an unlawful seizure has been sufficiently attenuated from the voluntary consent." Garcia, 123 S.W.3d at 346. Our ruling in Garcia upholds the principle that when consent to search is not sufficiently attenuated from an unlawful seizure, it is presumptively the product of coercion.

In this case, the Defendant consented to the search of his vehicle while he was unlawfully detained in the secured area of the officer's patrol car. The trial judge, who saw and heard the witnesses firsthand, determined that the consent was the direct result of the unconstitutional detention. There was  [\*\*27] no temporal separation between the illegal act and the consent. Further, there were no intervening circumstances separating the two events. Finally, in this instance, "the purpose and flagrancy of the official misconduct" weighs marginally in favor of the Defendant. As in Garcia, a drug interdiction officer rather than a traffic officer conducted the stop. The detection of illegal drugs rather than the enforcement of the traffic laws was the apparent purpose of the detention. See Garcia, 123 S.W.3d at 347-48 ("Kohl's status as a member of the drug task force adds to the likelihood that her prolonged and unreasonable detention of the defendant was for the sole purpose of obtaining consent to search his vehicle."). In our view, the Defendant's consent to the vehicle search was the end product of his unlawful detention.

**CONCLUSION**

In these specific circumstances, the arresting officer violated the state and federal constitutions by frisking the Defendant and placing him in the secured area of his patrol car. Because the consent to search was not adequately attenuated from the unlawful detention, the judgments of the trial court and Court of Criminal Appeals suppressing the evidence seized  [\*\*28] during the search of the Defendant's vehicle are affirmed.

Because the Defendant is indigent, costs of the appeal are taxed to the State.

GARY R. WADE, JUSTICE

**Footnotes**

* "The correct spelling of the defendant's name is 'Pulley'; however, it is cited by West Publishing Company as 'Pully.'" Yeargan, 958 S.W.2d at 636 n.5 (Reid, J., concurring).
* Examples of when it might be reasonable to place a driver in the secured area of a patrol car are: where a dangerous crowd threatens the officer and driver, see Lozada, 748 N.E.2d at 524; during inclement weather, see State v. Mertz, 362 N.W.2d 410, 413 (N.D. 1985); and failure to produce a driver's license during a traffic stop as required by state law, see State v. Evans, 67 Ohio St. 3d 405, 1993 Ohio 186, 618 N.E.2d 162, 167 (Ohio 1993).

[State v. Berrios, 235 S.W.3d 99, 2007 Tenn. LEXIS 745](https://plus.lexis.com/api/document/collection/cases/id/4PJJ-R1B0-TXFW-W2N9-00000-00?cite=235%20S.W.3d%2099&context=1530671)

# *State v. Berrios* (2007)

# Police stopped Berrios for speeding, frisked him, and led him to the back seat of a patrol car. While Berrios was in the car, Police Officer looked under the hood of the car and noticed new bolts holding the fender in place. He called another Officer to bring a dog to the car. The dog alerted to the front fender area. Police drilled into the fender and found over 300 grams of cocaine. Defendant moved to suppress, trial court granted. CCA affirmed. State appeals here.

# Issue: Was the search and seizure reasonable?

# Not really. Affirmed: Initial stop was a seizure, but reasonable given the speeding. Placement in the patrol car was unreasonable and more akin to a full scale arrest, and police had no reason for the pat down. The consent was thus given while Berrios was illegally detained, and was not “sufficiently attenuated” from the illegality.

# January 21, 2021

# Chapter 4 – Scope of the Exclusionary Rule

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Crim Con Case (Group) for 1-21-21

Brown v. Illinois pages 340-344

Proximate Cause: Attenuation Doctrine

**Attenuate** - to reduce the force or severity, to lessen a relationship or connection between two objects

**Inculpatory** - evidence that tends to show a person’s involvement in an act, or evidence that can establish guilt. In criminal law, the prosecution has a duty to provide all evidence to the defense, whether it favors the prosecution or the defendant’s case.

**Exclusionary Rule** - prevents the government from using most evidence gathered in violation of the US Constitution. The decision in *Mapp v. Ohio* established that the exclusionary rule applies in evidence gained from an unreasonable search or seizure in violation of the 4th Amendment.

**Attenuation in Criminal Procedure** - the relationship between an illegal search and a confession may be sufficiently attenuated as to remove the confession from the protection afforded by the Fruit of the Poisonous Tree doctrine, thereby making it admissible as evidence in a criminal prosecution depending on the facts of the case.

# Nardone v. United States

**Rule of Law**

**Criminal Law**

**In determining whether the statute prohibiting the unauthorized publication or use of interstate or foreign communications by wire or radio merely interdicts the introduction into evidence in a federal trial of intercepted telephone conversations, and leaves the prosecution free to make every other derivative use of the proscribed evidence, the stern enforcement of the criminal law and protection of that realm of privacy left free by the Constitution and laws but capable of infringement must be harmonized, and, in harmonizing those concerns, meaning must be given to what Congress has written, even if not in explicit language, so as to effectuate the policy which Congress has formulated. Communications Act**[**§ 605**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=47USCAS605&originatingDoc=I5beb75919cbd11d9bdd1cfdd544ca3a4&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**,**[**47 U.S.C.A. § 605**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=47USCAS605&originatingDoc=I5beb75919cbd11d9bdd1cfdd544ca3a4&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Criminal Law**

**The essence of a statutory provision forbidding the acquisition of evidence in a certain way is not merely that evidence so acquired shall not be used before the court in a criminal case, but that it shall not be used at all.**

**Criminal Law**

**Facts improperly obtained by the government do not become sacred and inaccessible, and, if knowledge of them is gained from an independent source, they may be proved like any others in a criminal case, but the knowledge gained by the government's own wrong cannot be used by it simply because it is used derivatively.**

**Criminal Law**

**The accused has the burden in the first instance of proving to the trial court's satisfaction that wire tapping was unlawfully employed in procuring evidence, and, once that is established, the trial court must give opportunity to the accused to prove that a substantial portion of the case against him was thus unlawfully procured. Communications Act**[**§ 605**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=47USCAS605&originatingDoc=I5beb75919cbd11d9bdd1cfdd544ca3a4&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**,**[**47 U.S.C.A. § 605**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=47USCAS605&originatingDoc=I5beb75919cbd11d9bdd1cfdd544ca3a4&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Criminal Law**

**Timely steps must be taken to secure judicial determination of claims of illegality on the part of agents of the government in obtaining testimony.**

**Criminal Law**

**Claims of illegality on the part of agents of the government in obtaining testimony must not be merely a means of eliciting what is in the government's possession before its submission to the jury, and, if such a claim is made after the trial is under way, the trial judge must be satisfied that the accused could not at an earlier stage have had adequate knowledge to make his claim.**

**Criminal Law**

**The civilized conduct of criminal trials necessarily demands the authority of limited direction intrusted to the judge presiding in federal trials, including a well-established range of judicial discretion, subject to appropriate review on appeal in ruling on preliminary questions of fact.**

**Criminal Law**

**The statute prohibiting the unauthorized publication or use of interstate or foreign communications by wire or radio does not merely interdict the introduction into evidence in a federal trial of intercepted telephone conversations and leave the prosecution free to make every other derivative use of the proscribed evidence. Communications Act**[**§ 605**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=47USCAS605&originatingDoc=I5beb75919cbd11d9bdd1cfdd544ca3a4&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**,**[**47 U.S.C.A. § 605**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=47USCAS605&originatingDoc=I5beb75919cbd11d9bdd1cfdd544ca3a4&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

60 S.Ct. 266

Supreme Court of the **United** **States**.

**NARDONE et al.**

**v.**

**UNITED STATES.**

No. 240.

Argued Nov. 14, **1939**.Decided Dec. 11, **1939**.

**Synopsis**

Mr. Justice McREYNOLDS, dissenting.

On Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit.

Frank Carmine **Nardone** and others were convicted of smuggling and concealing alcohol and of conspiracy to do so, and they bring certiorari to review a judgment of the Circuit Court of Appeals affirming the conviction, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Icf7b0927548911d997e0acd5cbb90d3f&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=88566b8f13c94d6489ea0880f95e8372&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[106 F.2d 41](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1939124638&pubNum=350&originatingDoc=I5beb75919cbd11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

Judgment reversed and cause remanded to the District Court for further proceedings.

# \*\*WONG SUN v. UNITED STATES\*\*

#### United States Supreme Court 371 U.S. 471 (1963)

#### Rule of Law

**Although evidence obtained through illegal police conduct must be excluded at trial as it is “fruit of the poisonous tree,” the connection between the illegal police conduct and a relevant piece of evidence can become so attenuated as to dissipate the taint, and such evidence may then be admissible.**

#### Facts

Federal narcotics agents arrested Hom Way for drug possession. Hom Way told the police he got the drugs from “Blackie Toy” who owned a laundry business. The agents went to Toy's business, and James Wah Toy answered the door. When he realized it was the police, he ran back into the building. The police chased and arrested him. No drugs were found, but when the agents told him why they were there he said he never sold drugs but that “Johnny” sells drugs. The agents then had Toy take them to Johnny Yee’s home where they found Yee in the bedroom. Yee surrendered his drugs and drug paraphernalia. Yee and Toy were then taken to the Office of the Bureau of Narcotics where Yee told the agents he received the drugs from “Sea Dog,” whose real name, Toy said, was Wong Sun (defendant). Toy then took the agents to Wong Sun’s house where Wong Sun’s wife let them into the home. Wong Sun was arrested. No drugs were found. Toy, Yee and Wong Sun were all arraigned and released on their own recognizance. The men returned to the office several days later. The agents interrogated all three men separately and drafted statements for them to sign. Toy refused to sign his statement. Wong Sun would not sign his but admitted that it was accurate. The court of appeals found that there was no probable cause or reasonable grounds for Toy’s or Wong Sun’s arrest.

#### Issue

Is evidence obtained through illegal police conduct admissible if the evidence is far removed from the illegal police conduct?

#### Holding and Reasoning (Brennan, J.)

Yes. Evidence that has been acquired through illegal police conduct is admissible if it has been so far removed from the illegal action so as to dissipate the taint of illegality. In this case, the police violated Wong Sun’s constitutional rights when they arrested him. However, his subsequent unsigned confession is admissible because after his unlawful arrest, Wong Sun was released and returned voluntarily a few days later when he was interrogated by the agents. Therefore, the connection between his unlawful arrest and his statement had become so attenuated as to dissipate the taint of illegality. In addition, the drugs taken from Yee cannot be admitted into evidence against Toy. Toy’s statement to the police regarding Yee is inadmissible because the statement is a fruit of illegal police action; the police had no authority to chase Toy into his home. Therefore, the police only knew about Yee because of Toy’s statement, which derived from illegal police conduct. Therefore, the statement is still tainted by the illegality and must be excluded at trial.

#### Concurrence (Douglas, J.)

The Court correctly concluded that the agents lacked probable cause to arrest the defendants. However, the arrests were also unconstitutional because the agents did not obtain arrest warrants even though there was time to do so.

#### Dissent (Clark, J.)

There was probable cause supporting the arrests in this case, and there was sufficient evidence corroborating the confessions.

***Wong Sun*** was the first case which the Court **applied the exclusionary rule to a confession**, in addition to physical evidence, tainted by an unconstitutional arrest. The Court also recognized that a **confession given after sufficient attenuation from unconstitutional arrest is admissible.**

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

***Wong Sun v. United States***

**A confession attained as the result of an illegal arrest may not be suppressed if the connection between the statement had been so attenuated as to “dissipate the taint.”** Basically, the statement is admissible if the accused has a reasonable ability to independently come forward, and confession was not coerced. (Suspects made confessions days after the initial illegal arrest.)

# Silverthorne Lumber Company v. United States

#### United States Supreme Court 251 U.S. 385 (1920)

**Rule of Law**

**Physical evidence obtained in violation of the Fourth Amendment, and information derived from such evidence, may not be presented at court or used by the government to help develop its case.**

**Facts**

The two owners of Silverthorne Lumber Company (Silverthorne) (defendant) were arrested. While detained, federal officers went to Silverthorne’s office and, without a warrant or any authority, collected books, papers and documents. The district court held that all the materials had been seized in violation of Silverthorne’s constitutional rights. While recognizing the illegality of its actions, the government seeks to copy the materials so it may avail itself of all the information.

**Issue**

Can information obtained from evidence acquired in violation of the Fourth Amendment be used by the government to help build its case against the individual whose rights had been violated?

**Holding and Reasoning (Holmes, J.)**

No. Evidence obtained in violation of the Fourth Amendment cannot be used to build the government’s case against an individual and this protection extends to copies the government may make and knowledge the government obtains from such documents. While the exclusionary rule prohibits the admission of illegally obtained evidence at trial, it is broader than that, prohibiting the government from using in any way information it obtains illegally. However, if, after violating the constitution, the government can acquire the information through another, independent and legal method, it becomes admissible.

# \*\*BROWN v. ILLIONOIS\*\*

#### United States Supreme Court 422 U.S. 590 (1975)

#### Rule of Law

**Incriminating statements made following an unlawful arrest are only admissible if the statements, in light of all relevant facts and circumstances, are “sufficiently an act of free will to purge the primary taint.”**

#### Facts

Police investigating the murder of Roger Corpus arrested Richard Brown (defendant) at gunpoint after breaking into and searching his apartment. The police did not have a warrant or probable cause. Brown was taken to the police station, given the warnings set forth under *Miranda v. Arizona*, 384 U.S. 436 (1966), and interrogated. Brown made incriminating statements during the interrogation. Brown and Jimmy Clagett (defendant) were indicted by a grand jury for murder. Brown moved to suppress the incriminating statements on the grounds that the arrest was unlawful. The trial court denied the motion. The jury convicted Brown and sentenced him to 15 to 30 years imprisonment. The Supreme Court of Illinois affirmed. The United States Supreme Court granted certiorari.

**Facts (in other words)**

Roger Corpus was murdered and Corpus’ brother told police that Richard Brown was one of Corpus’ acquaintances. Police then broke into Brown’s apartment and searched it without a warrant. When Brown arrived during their search, they arrested him at gunpoint. They later testified that they made the arrest for the purpose of questioning Brown about the Corpus murder. The police did not have a warrant or probable cause.Detectives took Brown to the police station, placed him in an interrogation room and read him his Miranda rights. They informed him they knew of an incident in a poolroom when Brown had become angry at being cheated at dice and he fired a shot from a revolver into the ceiling. Brown answered, “Oh, you know about that.” Police told him a bullet had been taken from the ceiling of the poolroom and to the crime lab to be compared with bullets taken from Corpus’ body. Brown replied, “Oh, you know that too.” About 8:45pm, the police asked him if he wanted to talk about the murder. He said yes. For 20-25 minutes Brown answered questions which implicated himself in the murder. He signed a 2-page inculpatory statement. About 2:00am, the Asst State’s Attorney arrived, read Brown his Miranda rights and obtained *another* incriminating statement from him. Brown and Jimmy Clagett (defendant) were indicted by a grand jury for murder. Brown was charged with murder and unsuccessfully moved to suppress both statements. He was convicted and sentenced to prison for not less than 15 and not more than 30 years.

#### Issue

Are incriminating statements made following an unlawful arrest admissible in court if the suspect was given the *Miranda*warnings?

**Another way to say this**: Should the statements be excluded as the fruit of the illegal arrest or were they admissible because the giving of the Miranda warnings sufficiently attenuated the taint of the arrest?

#### Holding and Reasoning (Blackmun, J.)

No. *Miranda* warnings alone do not guarantee admissibility for statements made following an unlawful arrest. The exclusionary rule protects Fourth Amendment rights by barring admission of all evidence derived from police error or misconduct as “fruit of the poisonous tree.” Under *Wong Sun v. United States*, 371 U.S. 471 (1963), statements made following an illegal arrest may be admissible if those statements are “sufficiently…act[s] of free will to purge the primary taint.” *Miranda*warnings are aimed at safeguarding Fifth Amendment rights against self-incrimination. The warnings are not designed to deter police misconduct and violations of Fourth Amendment rights. Therefore, a statement made after a *Miranda*warning would not violate the Fifth Amendment, but might still violate the Fourth Amendment. A blanket rule treating the *Miranda* warning as a universal cure for all constitutional violations would nullify the deterrent effect of the exclusionary rule. Thus, determinations of admissibility for statements made after an illegal arrest must be made on a case-by-case basis after assessing all relevant facts and circumstances including: *Miranda* warnings, the time elapsed between the arrest and the statement, and the egregiousness of the misconduct. The prosecution bears the burden of proving such statements were based on free will. In this case, Brown’s statements were made a short time after his arrest, and the officers’ constitutional violations were purposeful. The prosecution did not meet its burden, and Brown’s statements are inadmissible. The ruling of the lower court is reversed.

#### Concurrence (Powell, J.)

Any violation of the Fourth Amendment is unreasonable, and any admission of illegally obtained evidence in court must not defeat the deterrent effect of the exclusionary rule. Evidence obtained after a flagrantly abusive violation of the amendment should only be admitted if there was a break in the sequence of events sufficient to cure the taint, such as a meeting with an attorney or a hearing before a judge. In cases where there has only been a technical violation of the Fourth Amendment, however, the *Miranda* warnings are enough to cure the taint. These are factual questions to be evaluated on a case-by-case basis. The record in this case does not resolve these factual questions, and the case should be remanded to allow the lower court to make the factual determinations required.

**Concurrence (Justice White)**

(1) despite *Miranda* warnings, the 4th and 14 Amendments require the exclusion from evidence of statements obtained as the fruit of an arrest which the arresting officers knew or should have known was without probable cause and unconstitutional, and (2) that the statements obtained in this case were in this category, I am in agreement and therefore concur with the judgment.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Miranda Warnings** - The notices of constitutional rights set forth in the opinion of the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436(1966) that law enforcement authorities must provide to a suspect in a criminal investigation prior to initiation of a custodial interrogation. The suspect must be advised that the suspect has the right to remain silent, anything the suspect says may be used against the suspect, and the suspect has the right to an attorney.

**Fruit of the Poisonous Tree Doctrine** - Rule barring admission of any evidence found on the basis of illegally obtained evidence.

***Brown v. Illinois***

**In order for the causal chain to be broken, *Wong Sun* requires an act of free will to “purge the primary taint.” The reading of *Miranda* rights does not automatically break the chain.** (Murder suspect Brown is given his Miranda rights and station at 8:45pm and confesses. Then again at 2:00am. He confesses again. Both confessions are suppressed. No act of free will in between confessions.)

***Brown v. Illinois***

Justice Blackmun delivered the opinion for the Court

Justices White, Powell and Rehnquist concurred.

No dissent.

(Quimbee and textbook combined)

THE SUPREME COURT OF THE U.S. HOLDS 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. THE COURT HAS IDENTIFIED SEVERAL FACTORS THAT SHOULD BE CONSIDERED IN DETERMINING WHETHER A CONFESSION HAS BEEN PURGED OF THE TAINT OF THE ILLEGAL ARREST: THE TEMPORAL PROXIIMITY OF THE ARREST AND THE CONFESSION, THE PRESENCE OF INTERVENING CIRCUMSTANCES, AND, PARTICULARLY, THE PURPOSE AND FLAGRANCY OF THE OFFICIAL MISCONDUCT. THE STATE BEARS THE BURDEN IN PROVING THAT A CONFESSION IS ADMISSIBLE.

On appeal, the Supreme Court of Illinois affirmed the judgment, believing that the *Miranda* warnings had purged the taint of any earlier 4th Amendment violation. The United States Supreme Court granted certiorari.

***Miranda v. Arizona*:** Rule of Law: Without certain hallmark warnings regarding the right to remain silent and the right to counsel, statements made during custodial interrogation are inadmissible at trial.

***Wong Sun v. United States***: Rule of Law:Although evidence obtained through illegal police conduct must be excluded at trial as it is “fruit of the poisonous tree,” the connection between the illegal police conduct and a relevant piece of evidence can become so attenuated as to dissipate the taint, and such evidence may then be admissible.

#### Footnotes:

#### *Dunaway v. New York*:

#### Rule of Law: Except in the case of temporary stops on the street where the police need only have reasonable suspicion of criminal activity, the police may only seize a citizen based upon probable cause.

#### *Kaupp v. Texas* – a confession “obtained by exploitation of an illegal arrest” may not be used against a criminal defendant.

#### *Taylor v. Alabama* –The facts that the police did not physically abuse Taylor, that the confession may have been voluntary for purposes of the 5th Amendment, and that Taylor had been given the *Miranda* warnings three times, did not cure the illegality of the initial arrest.

**Wong Sun v. United States**

United States Supreme Court  
371 U.S. 471 (1963)

**Rule of Law**

**Although evidence obtained through illegal police conduct must be excluded at trial as it is “fruit of the poisonous tree,” the connection between the illegal police conduct and a relevant piece of evidence can become so attenuated as to dissipate the taint, and such evidence may then be admissible.**

***Wong Sun*** was the first case which the Court **applied the exclusionary rule to a confession**, in addition to physical evidence, tainted by an unconstitutional arrest. The Court also recognized that a **confession given after sufficient attenuation from unconstitutional arrest is admissible.**

# Kaupp v. Texas

**Rule of Law**

**Arrest**

**Seizure of person within meaning of the Fourth and Fourteenth Amendments occurs when taking into account all of circumstances surrounding encounter, police conduct would have communicated to reasonable person that he was not at liberty to ignore police presence and go about his business.**[**U.S.C.A. Const.Amends. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=I1d1524e79c9711d993e6d35cc61aab4a&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**,**[**14**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDXIV&originatingDoc=I1d1524e79c9711d993e6d35cc61aab4a&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Arrest**

**Seizure of seventeen-year old defendant was an “arrest” within meaning of the Fourth Amendment, where defendant was awakened in his bedroom at three in the morning by three police officers, one of whom stated, “we need to go and talk,” and taken from his home in handcuffs, without shoes, in his underwear in January for questioning, and in such situation, defendant's response of “okay” to officer's statement and his failure to struggle with officers did not constitute consent sufficient to overcome probable cause requirement for arrest.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=I1d1524e79c9711d993e6d35cc61aab4a&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Arrest**

**Involuntary transport of individual to police station for questioning, without probable cause or judicial authorization, is sufficiently like arrest to invoke traditional rule that arrests may constitutionally be made only on probable cause.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=I1d1524e79c9711d993e6d35cc61aab4a&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Arrest**

**Initially consensual encounter with law enforcement officers can be transformed into seizure or detention within meaning of the Fourth Amendment.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=I1d1524e79c9711d993e6d35cc61aab4a&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Criminal Law**

**Defendant's confession to murder, which was made after he was arrested without probable cause in violation of the Fourth Amendment, had to be suppressed, absent showing that confession was act of free will sufficient to purge primary taint of unlawful invasion.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=I1d1524e79c9711d993e6d35cc61aab4a&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Criminal Law**

**State had burden to establish through circumstantial evidence that defendant's confession taken after he was illegally arrested should not be suppressed because it was act of free will sufficient to purge primary taint of unlawful invasion, and relevant considerations included observance of**[**Miranda**](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&originatingDoc=I1d1524e79c9711d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**, temporal proximity of arrest and confession, presence of intervening circumstances, and, particularly, purpose and flagrancy of official misconduct.**[**U.S.C.A. Const.Amends. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=I1d1524e79c9711d993e6d35cc61aab4a&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**,**[**5**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDV&originatingDoc=I1d1524e79c9711d993e6d35cc61aab4a&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Criminal Law**

[**Miranda**](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&originatingDoc=I1d1524e79c9711d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**warnings, alone and per se, cannot always break, for Fourth Amendment purposes, the causal connection between illegality of arrest and confession.**[**U.S.C.A. Const.Amends. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=I1d1524e79c9711d993e6d35cc61aab4a&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**,**[**5**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDV&originatingDoc=I1d1524e79c9711d993e6d35cc61aab4a&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

123 S.Ct. 1843

Supreme Court of the United States

**Robert KAUPP**

**v.**

**TEXAS.**

No. 02–5636.

Decided May 5, 2003.

**Synopsis**

Defendant was convicted in the Texas 262nd District Court, Harris County, of murder, and he appealed. The Texas Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I6a85c957ea7b11d983e7e9deff98dc6f&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[2001 WL 619119,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001487076&pubNum=999&originatingDoc=I1d1524e79c9711d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed, and the Court of Criminal Appeals of Texas denied discretionary review. On petition for writ of certiorari, the Supreme Court held that: (1) defendant was arrested within meaning of the Fourth Amendment, and his conduct at the time did not constitute consent sufficient to overcome probable cause requirement for arrest, and (2) defendant's confession to murder, which occurred after he was arrested, had to be suppressed, absent showing that confession was act of free will sufficient to purge primary taint of unlawful invasion.

Petition granted, and judgment vacated.

***Kaupp v. Texas***

**A confession should be suppressed when there is an illegal arrest and there are no intervening circumstances.** (17 yr old kid is dragged out of bed in his underwear and told by police to answer questions. He says “ok.” They handcuff him and take him to station. They say this is not an arrest because he agreed by saying “ok.” Court said this was an illegal arrest.)

**Taylor v. Alabama**

#### Rule of Law

**Criminal Law**

**Confession obtained through custodial interrogation after illegal arrest should be excluded unless intervening events break causal connection between arrest and confession so that confession is sufficiently an act of free will to purge primary taint.**[**U.S.C.A.Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=Ic1db0aa89c1e11d991d0cc6b54f12d4d&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Criminal Law**

**In determining whether confession has been purged of taint of illegal arrest, factors to be considered include temporal proximity of arrest and confession, presence of intervening circumstances and, particularly, purpose and flagrancy of official misconduct; state bears burden of proving that confession is admissible.**[**U.S.C.A.Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=Ic1db0aa89c1e11d991d0cc6b54f12d4d&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Criminal Law**

**Illegality of petitioner's arrest was not cured by fact that six hours elapsed between arrest and confession, and, therefore, confession should have been suppressed as fruit of illegal arrest.**[**U.S.C.A.Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=Ic1db0aa89c1e11d991d0cc6b54f12d4d&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Criminal Law**

**Illegality of initial arrest was not cured by fact that confession may have been “voluntary” for Fifth Amendment purposes because Miranda warnings were given before confession was made.**[**U.S.C.A.Const.Amends. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=Ic1db0aa89c1e11d991d0cc6b54f12d4d&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**,**[**5**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDV&originatingDoc=Ic1db0aa89c1e11d991d0cc6b54f12d4d&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Criminal Law**

**Illegality of petitioner's initial arrest was not cured by fact that petitioner was permitted short visit with his girlfriend and a male companion before he confessed, as those two visitors were outside interrogation room where petitioner was being questioned and, after petitioner signed waiver-of-rights form, he was allowed to meet with his visitors.**[**U.S.C.A.Const.Amends. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=Ic1db0aa89c1e11d991d0cc6b54f12d4d&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**,**[**5**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDV&originatingDoc=Ic1db0aa89c1e11d991d0cc6b54f12d4d&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Criminal Law**

**Fact that arrest warrant, based on comparison of fingerprints, was filed after petitioner had been arrested and while he was being interrogated was not “significant intervening event” so as to dissipate taint of illegal arrest, as warrant was irrelevant to whether confession was fruit of illegal arrest.**[**U.S.C.A.Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=Ic1db0aa89c1e11d991d0cc6b54f12d4d&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Criminal Law**

**Fingerprints, which were themselves fruit of petitioner's illegal arrest and which were used to extract confession from petitioner, could not be deemed sufficient “attenuation” to break connection between illegal arrest and confession merely because they also formed basis for arrest warrant that was being filed while petitioner was being interrogated.**[**U.S.C.A.Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=Ic1db0aa89c1e11d991d0cc6b54f12d4d&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Criminal Law**

**Fact that police conduct was not flagrant or purposeful did not cure illegality of initial arrest, and, therefore, confession obtained as result of illegal arrest should have been suppressed.**[**U.S.C.A.Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=Ic1db0aa89c1e11d991d0cc6b54f12d4d&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

102 S.Ct. 2664

Supreme Court of the United States

**Omar TAYLOR, Petitioner**

**v.**

**ALABAMA.**

No. 81–5152.

Argued March 23, 1982.Decided June 23, 1982.

## Synopsis

Petitioner was convicted in the Alabama Circuit Court, Montgomery County, Joseph D. Phelps, J., of robbery, and he appealed. The Alabama Court of Criminal Appeals, [399 So.2d 875,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&pubNum=735&cite=399SO2D875&originatingDoc=Ic1db0aa89c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) reversed and remanded, and certiorari was granted. The [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Id30533860c0a11d98220e6fa99ecd085&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[Alabama Supreme Court, 399 So.2d 881,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981110406&pubNum=735&originatingDoc=Ic1db0aa89c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) again reversed and remanded, holding that the taint of the petitioner's illegal arrest was purged, rendering his confession admissible. After certiorari was granted by the United States Supreme Court, the Court of Criminal Appeals, [399 So.2d 894,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981119518&pubNum=735&originatingDoc=Ic1db0aa89c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed. The Supreme Court, Justice Marshall, held that a confession obtained through the custodial interrogation of the petitioner after he had been illegally arrested without a warrant or probable cause should have been suppressed, as the intervening events did not break the causal connection between the arrest and the confession, and the illegality of the initial arrest was not cured by the fact that six hours elapsed between the arrest and the confession, that the confession may have been “voluntary” for Fifth Amendment purposes because Miranda warnings were given, that the petitioner was permitted a short visit with girlfriend or that the police did not physically abuse the petitioner; moreover, the fact that an arrest warrant, based on a comparison of fingerprints, was filed, did not dissipate the taint, as the initial fingerprints, which were themselves the fruit of the illegal arrest and were used to extract confession, could not be deemed sufficient “attenuation.”

Reversed and remanded.

Justice O'Connor filed a dissenting opinion in which Chief Justice Burger, Justice Powell and Justice Rehnquist joined.

***Taylor v. Alabama***

**Confession is “fruit of poisonous illegal arrest” even with:**

* **Six hours elapsed between arrest and confession.**
* **Advised of rights 3 times.**
* **Allowed to visit girlfriend and neighbor before confession.**

**Westlaw: Taylor v. Alabama** (1982)

Petitioner was arrested on a grocery-store robbery charge without a warrant or probable cause, based on an uncorroborated informant's tip, and was taken to the police station, where he was given Miranda warnings, fingerprinted, questioned, and placed in a lineup. After being told that his fingerprints matched those on grocery items handled by one of the participants in the robbery and after a short visit with his girlfriend, petitioner signed a written confession. Over petitioner's objection, the confession was admitted into evidence at his trial in an Alabama state court, and he was convicted. The Alabama Court of Criminal Appeals reversed, holding that the confession should not have been admitted, but was in turn reversed by the Alabama Supreme Court.

**Held** : Petitioner's confession should have been suppressed as the fruit of an illegal arrest. Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416; Dunaway v. New York, 442 U.S. 200, 99 S.Ct. 2248, 60 L.Ed.2d 824. Pp. 2667–2669.

(a) A confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the arrest and the confession so that the confession is sufficiently an act of free will to purge the primary taint. Pp. 2667–2668.

(b) Here, there was no meaningful intervening event. The illegality of the initial arrest was not cured by the facts that six hours elapsed between the arrest and confession; that the confession may have been “voluntary” for Fifth Amendment purposes because Miranda warnings were given; that petitioner was permitted a short visit with his girlfriend; or that the police did not physically abuse petitioner. Nor was the fact that an arrest warrant, based on a comparison of fingerprints, was filed after petitioner had been arrested and while he was being interrogated a significant intervening event, such warrant being \*\*2666 irrelevant to whether the confession was the fruit of an illegal arrest.

# The initial fingerprints, which were themselves the fruit of the illegal arrest and were used to extract the confession, cannot be deemed sufficient “attenuation” to break the connection between the illegal arrest and the confession merely because they formed the basis for the arrest warrant. Pp. 2667–2669

# Dunaway v. New York

#### United States Supreme Court 442 U.S. 200 (1979)

#### Rule of Law

**Except in the case of temporary stops on the street where the police need only have reasonable suspicion of criminal activity, the police may only seize a citizen based upon probable cause.**

***Dunaway v. New York***

**You must have probable cause to arrest.** (Detectives get a tip about Dunaway possibly being the killer in a pizza parlor robbery/murder. Not enough information in the tip to get a warrant. Police go to Dunaway’s house and ask him to come to police headquarters to answer questions. He agrees. They put him in patrol car, go to station, and read him his *Miranda* rights. He waives his right to an attorney and implicates himself in the murder. He is convicted of murder and robbery. He loses in trial court, intermediate appeals court, and NY Ct of Appeals. The issue was whether the Fourth Amendment allows for the seizure of a person for reasonable suspicion of a crime. The answer is that you must have probable cause.)

# \*\*NEW YORK v. HARRIS\*\*

#### United States Supreme Court 495 U.S. 14 (1990)

#### Rule of Law

**An unlawful arrest made without a warrant but with probable cause in a suspect’s home does not require exclusion of statements the suspect subsequently made outside the home.**

#### Facts

Five days after discovering the victim’s body, police had probable cause to believe Bernard Harris (defendant) committed the murder. Officers then went to Harris’s home and arrested him without a warrant. Harris let the officers in and reportedly admitted to the murder after *Miranda* warnings. The officers transported him to the station house, repeated the *Miranda*warnings, and Harris signed a written confession. Police repeated *Miranda*warnings a third time then videotaped a district attorney questioning Harris, even though he said he wanted to end the interrogation. The trial court excluded the admission Harris made in his home and the videotaped interrogation but allowed the written confession into evidence. Harris appealed his subsequent conviction on the ground that the warrantless and nonconsensual entry into his home rendered the written confession inadmissible. The appellate court affirmed, but New York’s highest court reversed. The United States Supreme Court granted review.

#### Facts (Restated)

#### On January 11, 1984 New York police found Thelma Staton murdered in her apartment. Police had probable cause to believe Bernard Harris had killed Staton. Five days later (January 16, 1984), police officers went to Harris’s apartment without a warrant and took him into custody. Police knocked on the door, displayed their guns and badges, and Harris let them in. Once inside officers, read him his Miranda rights. Harris acknowledged that he understood the warnings and agreed to answer the officers’ questions. Next, he reportedly admitted that he killed Staton. He was taken to the station house where he was again given his Miranda rights and he signed a written inculpatory statement (incriminating statement). Police read Harris his Miranda warnings a third time and video taped an interview between Harris and a district attorney, even though he indicated he wanted to end the interrogation. The trial court suppressed the first and third statements. Harris appealed his conviction stating the warrantless and non-consensual entry into his home rendered the written confession inadmissible. The appellate court affirmed, New York’s highest court reversed.

#### Issue

Does an unlawful arrest made without a warrant but with probable cause in a suspect’s home require exclusion of statements the suspect subsequently made outside the home?

#### Holding and Reasoning (White, J.)

No. Police entering a suspect’s home without consent or a warrant to make a routine felony arrest violates the Fourth Amendment under *Payton v. New York*, 445 U.S. 573 (1980). The main evil the Fourth Amendment was designed to prevent is physical entry into the sanctity of a person’s home. A warrant confirms that a judge has found probable cause to make an arrest. The Fourth Amendment was not intended to grant criminal suspects immunity from prosecution based on statements made outside the home when police have probable cause. *Payton* does not prevent admission of all evidence obtained after an illegal arrest, only that produced as a direct result. Nothing in the case law suggests that a warrantless arrest somehow renders keeping the suspect in custody after removal from the home unlawful. This Court refused to suppress an in-court identification following an illegal arrest in *United States v. Crews*, 445 U.S. 463 (1980), reasoning that the identification did not result from violation of the defendant’s Fourth Amendment rights. Evidence that was not obtained as a product of an illegal arrest is not tainted by violation of the Fourth Amendment, and courts need not perform attenuation analysis to admit it. Police lack incentive to make warrantless arrests in the home because they know courts will suppress all evidence obtained there. Here, for purposes of this decision, the Court accepts the trial court’s findings that the police had probable cause to arrest Harris and that Harris did not consent to entry into his home. Therefore, the warrantless entry clearly violated the Fourth Amendment under the *Payton* rule. But *Payton* did not require the police to release Harris after removing him from his home, and they could have momentarily released then rearrested him. The illegal entry did not deprive the police of probable cause or mean Harris was not in lawful custody when taken to the station. That fact distinguishes this case from other cases that suppressed evidence obtained without probable cause. Harris’s written confession was not a product of unlawful custody or the arrest at his home instead of somewhere else. Therefore, attenuation analysis was unnecessary. The trial court properly suppressed all evidence obtained in Harris’s home, as well as the videotape made after Harris said he wanted to end the interrogation. The Court accordingly affirms Harris’s conviction.

#### Dissent (Marshall, J.)

Attenuation analysis requires consideration of factors including (1) the time between arrest and the suspect’s subsequent statement, (2) any intervening circumstances, and (3) the purpose and flagrancy of the unlawful arrest. This Court upheld the exclusion of a statement made two hours after an illegal arrest in *Brown v. Illinois*, 422 U.S. 590 (1975). Here, Harris’s statement at the station occurred just one hour after his arrest. The only intervening event was the police reiterating *Miranda* warnings, which do not alone sufficiently attenuate the violation to remove its taint. As for the flagrancy of the violation, the officers knew they did not have a warrant when they arrested Harris in his home, even though they had developed probable cause and could have gotten a warrant during the five days that had elapsed since the murder. One of the officers testified that the department had a policy of not getting warrants to make arrests in the home. Police do have incentive to enter homes illegally to make warrantless arrests, because it allows them to strengthen their case by obtaining a confession without restrictions on questioning. Invading a person’s home and forcibly removing that person for questioning is a frightening event likely to cause the person to say something incriminating. Not suppressing subsequent statements made at the station house creates incentive for the police to do exactly that.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Exclusionary Rule** - A rule that excludes or suppresses evidence in a criminal proceeding where that evidence was obtained in violation of an individual’s constitutional rights.

**Attenuation** - An exception to the exclusionary rule that admits evidence seized in violation of the Fourth Amendment if the chain between the police misconduct and the seizure was attenuated by the lack of flagrant impropriety or temporal proximity, or was interrupted by some intervening circumstance.

***New York v. Harris***

**An unlawful arrest made without a warrant but with probable cause in a suspect’s home does not require exclusion of statements the suspect subsequently made outside the home.**

***New York v. Harris***

**Issue:** Whether Harris’ 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 consent, violated *Payton vs. New York*.

**Rule:** The court did not 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. Harris made the second statement outside the home (at the police station).

Where police have probable cause to arrest a suspect, the exclusionary rule does not bar the 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*.

**Analysis:** The difference in this case is that Harris’ statement was made outside the home and the police had probable cause to arrest. Harris’ statement at the police station was not a product of being in unlawful custody. Police had a justification to question Harris prior to his arrest, his subsequent statement was not an exploitation of the illegal entry into Harris’ home. Because the officers had probable cause to arrest Harris for a crime, he was not unlawfully in custody when he was taken to the station house, given his Miranda warnings, and allowed to talk.

There is no valid claim that Harris was immune from prosecution because his person was the fruit of an illegal arrest.

Differs from *Brown, Dunaway*, and *Taylor* because in these cases police lacked probable cause for an arrest.

**Westlaw: New York v. Harris**

Police officers, having probable cause to believe that respondent Harris committed murder, entered his home without first obtaining a warrant, read him his rights under Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, and reportedly secured an admission of guilt. After he was arrested, taken to the police station, and again given his Miranda rights, he signed a written inculpatory statement. The New York trial court suppressed the first statement under Payton v. New York, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639, 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. However, the court admitted the second statement, and Harris was convicted of second-degree murder. The Appellate Division affirmed, but the State Court of Appeals reversed. Applying the rule of Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416, and its progeny that the indirect fruits of an illegal search or arrest should be suppressed when they bear a sufficiently close relationship to the underlying illegality, the court deemed the second statement inadmissible because its connection with the arrest was not sufficiently attenuated.

**Held: 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 penalties imposed on the government where its officers have violated the law must bear some relation to the purposes which the law serves. United States v. Ceccolini, 435 U.S. 268, 279, 98 S.Ct. 1054, 1061, 55 L.Ed.2d 268.

The rule in Payton was designed to protect the physical integrity of the home, not to grant criminal suspects protection for statements made outside their premises where the police have probable cause to make an arrest. Brown v. Illinois, supra, and its progeny are distinguishable, since attenuation analysis is only appropriate where, as a threshold matter, courts determine that the challenged evidence is in some sense the product of illegal governmental activity. Here, the police had a justification to question Harris prior to his arrest; therefore, his subsequent statement was not an exploitation of the illegal entry into his home. Cf. United States v. Crews, 445 U.S. 463, 100 S.Ct. 1244, 63 L.Ed.2d 537. Suppressing that statement would not serve the purpose of the Payton rule, since anything incriminating gathered from Harris' in-home arrest has already been excluded. The principal incentive to obey \*15 Payton still obtains: the police know that a warrantless entry will lead to the suppression of evidence found or statements taken inside the home. Moreover, the incremental deterrent value of suppressing statements like Harris' would be minimal, since it is doubtful that the desire to secure a statement from a suspect whom the police have probable cause to arrest would motivate them to violate Payton. Pp. 1642–1645.

72 N.Y.2d 614, 536 N.Y.S.2d 1, 532 N.E.2d 1229 (1988), reversed.

WHITE, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and O'CONNOR, SCALIA, and KENNEDY, JJ., joined. MARSHALL, J., filed a dissenting opinion, in which BRENNAN, BLACKMUN, and STEVENS, JJ., joined, post, p. 1645.

# Miranda v. Arizona

#### United States Supreme Court 384 U.S. 436 (1966)

#### Rule of Law

**Without certain hallmark warnings regarding the right to remain silent and the right to counsel, statements made during custodial interrogation are inadmissible at trial.**

# Payton v. New York

#### United States Supreme Court 445 U.S. 573 (1980)

**Rule of Law**

**Absent exigent circumstances, the police may not enter a person’s home to make an arrest without a warrant.**

# United States v. Watson

#### United States Supreme Court 423 U.S. 411 (1976)

#### Rule of Law

**A warrantless arrest is permitted if there is probable cause to believe the person has committed a felony.**

# United States v. Crews

100 S.Ct. 1244

Supreme Court of the United States

**UNITED STATES, Petitioner,**

**v.**

**Keith CREWS.**

No. 78–777.

Argued Oct. 31, 1979.Decided March 25, 1980.

**Synopsis**

Defendant was convicted before the Superior Court, District of Columbia, Robert H. Campbell, J., of armed robbery, and he appealed. The District of Columbia Court of Appeals, [369 A.2d 1063,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977101466&pubNum=162&originatingDoc=I6b46def09c2511d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed. On rehearing en banc, the District of Columbia Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic8e77822344911d9abe5ec754599669c&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Search))[389 A.2d 277,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1978115869&pubNum=162&originatingDoc=I6b46def09c2511d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) reversed, and certiorari was granted. The Supreme Court, Mr. Justice Brennan, held that in-court identification of defendant by victim did not have to be suppressed as fruit of defendant's unlawful arrest where robbery victim's presence in courtroom was not product of any police misconduct and where illegal arrest did not infect her ability to give accurate identification testimony.

Judgment of District of Columbia Court of Appeals reversed.

Mr. Justice Powell filed an opinion concurring in part in which Mr. Justice Blackmun joined.

Mr. Justice White filed an opinion concurring in the result in which Mr. Chief Justice Burger and Mr. Justice Rehnquist joined.

Immediately after being assaulted and robbed at gunpoint, the victim notified the police and gave them a full description of her assailant. Several days later, respondent, who matched the suspect's description, was seen by the police around the scene of the crime. After an attempt to photograph him proved unsuccessful, respondent was taken into custody, ostensibly as a suspected truant from school, and was detained at police headquarters, where he was briefly questioned, photographed, and then released. Thereafter, the victim identified respondent's photograph as that of her assailant. Respondent was again taken into custody and at a court-ordered lineup was identified by the victim. Respondent was then indicted for armed robbery and other offenses. On respondent's pretrial motion to suppress all identification testimony, the trial court found that respondent's initial detention at the police station constituted an arrest without probable cause, and accordingly ruled that the products of that arrest -- the photographic and lineup identifications -- could not be introduced at trial, but further held that the victim's ability to identify respondent in court was based upon independent recollection untainted by the intervening identifications, and that therefore such testimony was admissible. At trial, the victim once more identified respondent as her assailant, and respondent was convicted of armed robbery. The District of Columbia Court of Appeals reversed, holding that the in court identification testimony should have been excluded as a product of the violation of respondent's Fourth Amendment rights.

**Held** : The judgment is reversed. Pp. 1249–1253; 1253; 1253–1254.

D.C.App., 389 A.2d 277, reversed.

**Mr. Justice BRENNAN delivered the opinion of the Court with respect to Parts I, II–A, II–B, and II–C, concluding that:**

The in-court identification need not be suppressed as the fruit of respondent's concededly unlawful arrest but is admissible because the police's knowledge of respondent's identity and the victim's independent recollections of him both antedated the unlawful arrest and were thus untainted by the constitutional violation. Pp. 1249–1251, 1253.

\*464 (a) The victim's presence in the courtroom at respondent's trial was not the product of any police misconduct. Her identity was known long before there was any official misconduct, and her presence in court was thus not traceable to any Fourth Amendment violation. P. 1250.

(b) Nor did the illegal arrest infect the victim's ability to give accurate identification testimony. At trial, she merely retrieved her mnemonic representation of the assailant formed at the time of the crime, compared it to the figure of respondent in the courtroom, and positively identified him as the robber. Pp. 1250–1251.

(c) Insofar as respondent challenges his own presence at trial, he cannot claim immunity from prosecution simply because his appearance in court was precipitated by an unlawful arrest. Respondent is not himself a suppressible “fruit,” and the illegality of his detention cannot deprive the Government of the opportunity to prove his guilt through the introduction of evidence wholly untainted by the police misconduct. P. 1251.

**Mr. Justice BRENNAN, joined by Mr. Justice STEWART and Mr. Justice STEVENS, concluded in Part II–D** that the Court need not decide whether respondent's person should be considered evidence and therefore a possible “fruit” of police misconduct, since the Fourth Amendment violation in question yielded nothing of evidentiary value that the police did not already have. Respondent's unlawful arrest served merely to link together two extant ingredients in his identification. While the exclusionary rule enjoins the Government from benefiting from evidence it has unlawfully obtained, it does not reach backward to taint information that was in official hands prior to any illegality. Davis v. Mississippi, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676, distinguished. Pp. 1252–1253.

***Crews***- The court held that a defendant is not a “suppressible fruit”. The attenuation analysis is only appropriate where courts determine that the challenged evidence is in some sense the product of illegal government activity.

# \*\*UTAH v. STRIEFF\*\*

#### United States Supreme Court 136 S.Ct. 2056 (2016)

#### Rule of Law

**Unconstitutionally seized evidence is admissible if lack of flagrant impropriety, lack of temporal proximity, or an intervening circumstance attenuates the chain between police misconduct and the seizure.**

#### Facts

Police had a house under surveillance for suspected illegal drug activity. When Edward Strieff (defendant) visited and then left the house, police officer Douglas Fackrell stopped and questioned Strieff. Fackrell did so not because he had reasonable cause to suspect Strieff of criminal behavior, but solely because Fackrell wanted to question visitors about activities inside the house. Fackrell made a routine check of police records, found that Strieff had an outstanding warrant for a minor traffic offense, and arrested Strieff on that warrant. Fackrell then conducted a routine search and seized illegal drugs he found in Strieff's possession. The State of Utah (plaintiff) charged Strieff on drug charges. At trial, Strieff argued that the seized drugs came to light only as the result of Fackrell's unconstitutional search and seizure and that therefore the drugs should be excluded from evidence. The state argued that Fackrell's misconduct arose solely from an inadvertent procedural error. The judge admitted the seized drugs into evidence, and a jury convicted Strieff. On appeal, the Utah Court of Appeals affirmed Strieff's conviction, but the Utah Supreme Court reversed. The state appealed to the United States Supreme Court.

#### Issue

Is unconstitutionally seized evidence admissible if lack of flagrant impropriety, lack of temporal proximity, or an intervening circumstance attenuates the chain between police misconduct and the seizure?

Was the evidence seized properly admitted by the trial court?

#### Holding and Reasoning (Thomas, J.)

Yes. The attenuation exception to the exclusionary rule admits evidence seized in violation of the Fourth Amendment if lack of flagrant impropriety, lack of temporal proximity, or an intervening circumstance attenuated the chain between police misconduct and the seizure. Attenuation is one of several exceptions when the exclusionary rule's beneficial effect in deterring police misconduct is outweighed by the social cost of suppressing critical evidence pointing to a defendant's guilt. In this case, Fackrell unconstitutionally stopped and questioned Strieff without reasonable cause for suspicion. The fact that Fackrell seized the evidence soon after he wrongfully stopped and questioned Strieff argues in favor of suppressing the evidence. However, Fackrell's misconduct resulted from an inadvertent procedural error and was neither improperly motivated nor flagrant. Moreover, Fackrell's discovery of an outstanding warrant against Strieff was an important intervening factor. Therefore, the trial judge properly applied the attenuation exception and admitted the seized drugs as evidence of Strieff's guilt. The judgment of the Utah Supreme Court is reversed.

#### Dissent (Kagan, J.)

Intervening circumstances must be unforeseeable. However, given the millions of outstanding warrants for minor offenses, it was hardly unforeseeable that a search of police records would turn up an outstanding warrant and furnish a pretext for arresting and searching Strieff. Fackrell's unconstitutional search and seizure was improperly motivated by a desire to question visitors about drug activities inside the house. The Court should discourage Fackrell's misconduct by excluding the seized drugs. Instead, the majority encourages the spread of such misconduct by admitting the drugs under the attenuation doctrine.

#### Dissent (Sotomayor, J.)

Many individuals may find themselves in Strieff's situation, especially if they belong to minority communities that traditionally have been the targets of police misconduct. These individuals can be unreasonably stopped and then arrested on one of the millions of unprocessed warrants that are outstanding for minor offenses. Only the exclusionary rule, undiluted by the attenuation doctrine, can deter police officers who might be tempted to exploit the backlog in outstanding warrants to excuse their unconstitutional conduct.

**Key Terms:**

**Attenuation** - An exception to the exclusionary rule that admits evidence seized in violation of the Fourth Amendment if the chain between the police misconduct and the seizure was attenuated by the lack of flagrant impropriety or temporal proximity, or was interrupted by some intervening circumstance.

**Exclusionary Rule** - A rule that excludes or suppresses evidence in a criminal proceeding where that evidence was obtained in violation of an individual’s constitutional rights.

“To trigger the **exclusionary rule**, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system,” which will generally mean that an officer’s conduct must involve “deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence” to trigger suppression. ***Herring v. United States*** - 555 U.S. 135, 129 S. Ct. 695 (2009)

Three factors articulated in ***Brown v. Illinois***, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed.2d 416, lead to this conclusion. The first factor is “temporal proximity” between the initially unlawful stop and the search, favors suppressing the evidence. Officer Fackrell discovered drug contraband on Strieff only minutes after the illegal stop. In contrast, the second factor, “the presence of intervening circumstances,” strongly favors the State. The existence of a valid warrant, predating the investigation and entirely unconnected with the stop, favors finding sufficient attenuation between the unlawful conduct and the discovery of evidence. That warrant authorized Officer Fackrell to arrest Strieff, and once the arrest was authorized, his **search of Strieff incident to that arrest was undisputedly lawful.** The third factor, “the purpose and flagrancy of the official misconduct,” also strongly favors the State. Officer Fackrell was at most negligent, but his errors in judgment hardly rise to a purposeful or flagrant violation of Strieff's Fourth Amendment rights.

# Brown v. Illinois

#### United States Supreme Court 422 U.S. 590 (1975)

#### Rule of Law

**Incriminating statements made following an unlawful arrest are only admissible if the statements, in light of all relevant facts and circumstances, are “sufficiently an act of free will to purge the primary taint.”**

# Segura v. United States

#### United States Supreme Court 468 U.S. 796 (1984)

#### Rule of Law

**Criminal evidence will not be suppressed pursuant to the exclusionary rule if law enforcement officers had an independent source of information justifying a valid search and seizure of the evidence.**

# Kaupp v. Texas

**Rule of Law**

**Arrest**

**Seizure of person within meaning of the Fourth and Fourteenth Amendments occurs when taking into account all of circumstances surrounding encounter, police conduct would have communicated to reasonable person that he was not at liberty to ignore police presence and go about his business.**[**U.S.C.A. Const.Amends. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=I1d1524e79c9711d993e6d35cc61aab4a&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**,**[**14**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDXIV&originatingDoc=I1d1524e79c9711d993e6d35cc61aab4a&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Arrest**

**Seizure of seventeen-year old defendant was an “arrest” within meaning of the Fourth Amendment, where defendant was awakened in his bedroom at three in the morning by three police officers, one of whom stated, “we need to go and talk,” and taken from his home in handcuffs, without shoes, in his underwear in January for questioning, and in such situation, defendant's response of “okay” to officer's statement and his failure to struggle with officers did not constitute consent sufficient to overcome probable cause requirement for arrest.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=I1d1524e79c9711d993e6d35cc61aab4a&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Arrest**

**Involuntary transport of individual to police station for questioning, without probable cause or judicial authorization, is sufficiently like arrest to invoke traditional rule that arrests may constitutionally be made only on probable cause.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=I1d1524e79c9711d993e6d35cc61aab4a&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Arrest**

**Initially consensual encounter with law enforcement officers can be transformed into seizure or detention within meaning of the Fourth Amendment.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=I1d1524e79c9711d993e6d35cc61aab4a&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Criminal Law**

**Defendant's confession to murder, which was made after he was arrested without probable cause in violation of the Fourth Amendment, had to be suppressed, absent showing that confession was act of free will sufficient to purge primary taint of unlawful invasion.**[**U.S.C.A. Const.Amend. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=I1d1524e79c9711d993e6d35cc61aab4a&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Criminal Law**

**State had burden to establish through circumstantial evidence that defendant's confession taken after he was illegally arrested should not be suppressed because it was act of free will sufficient to purge primary taint of unlawful invasion, and relevant considerations included observance of**[**Miranda**](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&originatingDoc=I1d1524e79c9711d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**, temporal proximity of arrest and confession, presence of intervening circumstances, and, particularly, purpose and flagrancy of official misconduct.**[**U.S.C.A. Const.Amends. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=I1d1524e79c9711d993e6d35cc61aab4a&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**,**[**5**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDV&originatingDoc=I1d1524e79c9711d993e6d35cc61aab4a&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Criminal Law**

[**Miranda**](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&originatingDoc=I1d1524e79c9711d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**warnings, alone and per se, cannot always break, for Fourth Amendment purposes, the causal connection between illegality of arrest and confession.**[**U.S.C.A. Const.Amends. 4**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDIV&originatingDoc=I1d1524e79c9711d993e6d35cc61aab4a&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**,**[**5**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDV&originatingDoc=I1d1524e79c9711d993e6d35cc61aab4a&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

123 S.Ct. 1843

Supreme Court of the United States

**Robert KAUPP**

**v.**

**TEXAS.**

No. 02–5636.

Decided May 5, 2003.

**Synopsis**

Defendant was convicted in the Texas 262nd District Court, Harris County, of murder, and he appealed. The Texas Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I6a85c957ea7b11d983e7e9deff98dc6f&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[2001 WL 619119,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001487076&pubNum=999&originatingDoc=I1d1524e79c9711d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed, and the Court of Criminal Appeals of Texas denied discretionary review. On petition for writ of certiorari, the Supreme Court held that: (1) defendant was arrested within meaning of the Fourth Amendment, and his conduct at the time did not constitute consent sufficient to overcome probable cause requirement for arrest, and (2) defendant's confession to murder, which occurred after he was arrested, had to be suppressed, absent showing that confession was act of free will sufficient to purge primary taint of unlawful invasion.

# Petition granted, and judgment vacated

**Whren v. United States**

United States Supreme Court  
517 U.S. 806 (1996)

#### Rule of Law

**Except with inventory searches and administrative inspections, when probable cause of illegal conduct exists, an officer’s true motive for searching or detaining a person does not negate the constitutionality of the search or seizure.**

# United States v. Brignoni-Ponce

95 S.Ct. 2590

Supreme Court of the United States

**UNITED STATES, Petitioner,**

**v.**

**Felix Humberto BRIGNONI-PONCE.**

**UNITED STATES, Petitioner,**

**v.**

**Luis Antonio ORTIZ.**

Nos. 74—114, 73—2050.

June 30, 1975

## Synopsis

For opinions of the Court, see [95 S.Ct. 2574, 2585](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1975129841&pubNum=708&originatingDoc=Id4c64ae29c1d11d991d0cc6b54f12d4d&refType=RP&fi=co_pp_sp_708_2585&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_2585).

**\*\*2590** Mr. Chief Justice BURGER, with whom Mr. Justice BLACKMUN joins, concurring in the judgment.

Like Mr. Justice WHITE I can, at most, do no more than concur in the judgment. As the Fourth Amendment now has been interpreted by the Court it seems that the Immigration and Naturalization Service is powerless to stop the tide of illegal aliens—and dangerous drugs—that daily and freely crosses our 2,000-mile southern boundary.[1](https://1.next.westlaw.com/Document/Id4c64ae29c1d11d991d0cc6b54f12d4d/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_footnote_B00111975243270) Perhaps these decisions will be seen in perspective as but another example of a society seemingly impotent to deal with massive lawlessness. In that sense history may view us as prisoners of our own traditional and appropriate concern for individual rights, unable—or unwilling—to apply the concept of reasonableness explicit in the Fourth Amendment in order to develop a rational accommodation between those rights and the literal safety of the country.

**\*900** Given today's decisions it would appear that, absent legislative action, nothing less than a massive force of guards could adequately protect our southern border.[2](https://1.next.westlaw.com/Document/Id4c64ae29c1d11d991d0cc6b54f12d4d/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_footnote_B00221975243270) To establish hundreds of checkpoints with enlarged border forces so as to stop literally every car and pedestrian at every border checkpoint, however, would doubtless impede the flow of commerce and travel between this country and Mexico. Moreover, it is uncertain whether stringent penalties for employment of illegal aliens, and rigid requirements for proof of legal entry before employment, would help solve the problems, but those remedies have not been tried.

I would hope that when we next deal with this problem we give greater weight to the reality that the Fourth Amendment prohibits only ‘unreasonable searches and seizures' and to the frequent admonition that reasonableness must take into account all the circumstances and balance the rights of the individual with the needs of society. See, e.g., **\*\*2591** [Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1968131212&pubNum=708&originatingDoc=Id4c64ae29c1d11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)); [Elkins v. United States, 364 U.S. 206, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1960122558&pubNum=708&originatingDoc=Id4c64ae29c1d11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)); [United States v. Biswell, 406 U.S. 311, 92 S.Ct. 1593, 32 L.Ed.2d 87 (1972)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127119&pubNum=708&originatingDoc=Id4c64ae29c1d11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

# Adams v. Williams

92 S.Ct. 1921

Supreme Court of the United States

**Frederick E. ADAMS, Warden, Petitioner,**

**v.**

**Robert WILLIAMS.**

No. 70—283.

Argued April 10, 1972.Decided June 12, 1972.

**Synopsis**

Habeas corpus proceeding was brought by a state prisoner. The United States District Court for the District of Connecticut denied the writ and prisoner appealed. The Court of Appeals, [436 F.2d 30,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1970145301&pubNum=350&originatingDoc=Idf14e4f19c9c11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed, but on rehearing en banc the Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I6f7a293c8fc011d98e8fb00d6c6a02dd&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[441 F.2d 394,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971109915&pubNum=350&originatingDoc=Idf14e4f19c9c11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) reversed, and certiorari was granted. The Supreme Court, Mr. Justice [Rehnquist](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0238463201&originatingDoc=Idf14e4f19c9c11d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Idf14e4f19c9c11d993e6d35cc61aab4a), held that where informant, who had previously given information to officer, advised officer that individual seated in nearby vehicle was carrying narcotics and had gun at his waist, officer acted justifiably in going to vehicle to investigate and in reaching in and removing loaded gun from occupant's waistband after occupant rolled down window rather than complying with officer's request to open door.

Reversed.

Mr. Justice Douglas dissented and filed opinion in which Mr. Justice [Marshall](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0336250901&originatingDoc=Idf14e4f19c9c11d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Idf14e4f19c9c11d993e6d35cc61aab4a) joined.

Mr. Justice Brennan dissented and filed opinion.

Mr. Justice [Marshall](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0336250901&originatingDoc=Idf14e4f19c9c11d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Idf14e4f19c9c11d993e6d35cc61aab4a) filed dissenting opinion in which Mr. Justice Douglas joined.

**Procedural Posture(s):** On Appeal.

# United States v. Sokolow

#### United States Supreme Court 490 U.S. 1 (1989)

#### Rule of Law

The fact that an individual fits the profile of a drug courier does give rise to reasonable suspicion justifying a *Terry*stop.

#### Facts

Andrew Sokolow (defendant) fit the profile of a drug smuggler. Sokolow purchased expensive airline tickets from Honolulu to Miami in cash, used his mother’s last name, gave the ticket agent a phone number listed under the name of another man (Sokolow’s roommate), did not check any luggage, and spent 20 hours travelling and only 48 hours in Miami. Sokolow was young, dressed in a black jumpsuit and gold jewelry, and appeared nervous. Drug Enforcement Agency (DEA) Agents stopped Sokolow in front of the airport on his return to Honolulu. A drug dog hit on one of Sokolow’s bags, and agents secured a search warrant for the bag. Agents found suspicious documents but no drugs. The drug dog tested the bags again and hit on another bag. The next day, agents secured a warrant for the second bag and found over 1,000 grams of cocaine. Sokolow was indicted for possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1). Sokolow moved to suppress the evidence found in the bags. The United States District Court for Hawaii found reasonable cause existed and denied the motion. The United States Court of Appeals for the Ninth Circuit reversed.

#### Issue

Does the fact that an individual fits the profile of a drug courier give rise to reasonable suspicion justifying a *Terry*stop?

#### Holding and Reasoning (Rehnquist, C.J.)

Yes. Under *Terry v. Ohio*, 392 U.S. 1 (1968), a police officer may briefly detain a person to investigate if there is reasonable suspicion to believe that person was engaged in criminal activity. The Fourth Amendment typically requires probable cause, meaning there must be “a fair probability that contraband or evidence of a crime will be found.” Reasonable suspicion is a less stringent standard than probable cause, but still requires particularized suspicion based upon articulable facts. There is no specific test for reasonable suspicion, but all of the relevant facts and circumstances must be considered. Further, the existence of a profile does not negate the officer’s reasonable conclusion. In this case, Sokolow purchased expensive tickets in cash, did not check luggage, travelled under an alias, and spent 20 hours traveling only to spend 48 hours in Miami. Although none of these facts would individually give rise to reasonable suspicion, when all are viewed together reasonable suspicion is created. Finally, the agents were not required to use the least intrusive method to investigate their suspicion. Thus, the stop was reasonable. The Court of Appeals for the Ninth Circuit is reversed.

#### Dissent (Marshall, J.)

The rules applied to guilty people will also be applied to innocent people. The use of profiles impairs police officers’ ability to draw thoughtful conclusions from difficult situations and threatens liberty. None of the factors used to justify Sokolow’s stop give rise to an inference that he may be involved in criminal activity. Innocent travelers often visit resort cities, travel light for short trips, register phone numbers in the names of roommates, dress in an apparently suspicious fashion, or pay with cash. None of these things suggests criminal behavior. Furthermore, there was no pressing law enforcement need to stop Sokolow at the airport. The Court’s decision demonstrates its willingness to erode constitutional protections for drug offenses.

# Key Terms:

**Reasonable Suspicion** - Generally, a quantum of proof sufficient to justify an objectively reasonable person in suspecting, but not necessarily believing, that someone has committed, is committing, or is about to commit a crime. Reasonable suspicion is usually the lowest quantum of proof that the law will recognize for any purpose. It is sufficient to justify brief investigatory detentions, but not full-blown arrests, by the police.

# Illinois v. Wardlow

#### United States Supreme Court 528 U.S. 119 (2000)

#### Rule of Law

A police officer may stop and frisk a citizen on the street when he has reasonable suspicion that the person is armed and may pose a threat to the officer.

#### Facts

Riding in four separate cars, police officers entered a high drug area of the city to investigate drug transactions. The officers in the last car of the caravan witnessed Wardlow (defendant) standing by a building holding an opaque bag. When Wardlow looked at the car he began running away, and the officers in the last car gave chase and caught him. One of the officers immediately conducted a pat-down to search for weapons. The officer felt something that appeared to be a weapon and when he removed it he discovered it was a handgun. Wardlow was arrested for unlawful use of a weapon by a felon. The trial court held that the stop and frisk was lawful and allowed the gun to be introduced as evidence at trial. The court of appeals reversed Wardlow’s conviction, holding that the police had no reasonable suspicion to search Wardlow and the gun should have been suppressed. The state supreme court affirmed the court of appeals’ ruling and held that flight, even in a high crime area, does not amount to reasonable suspicion because it may be interpreted as an exercise of a citizen’s right to refuse to answer police questions when stopped on the street. The United States Supreme Court granted certiorari.

#### Issue

Does a subject’s unprovoked flight from a police officer, while in a high crime area, amount to reasonable suspicion to justify a stop and frisk?

#### Holding and Reasoning (Rehnquist, C.J.)

Yes. The flight of a suspect in a high crime area can amount to reasonable suspicion and justify a lawful stop and frisk by the police. In *Florida v. Royer*, 460 U.S. 491 (1983), the Court held that a person who is stopped by an officer without reasonable suspicion or probable cause may ignore the officer and continue on his way. However, running from the police is not an exercise of this right but instead amounts to evasive and suspicious behavior that properly leads law enforcement officers to reasonably believe unlawful activity is occurring. Furthermore, while being in a high crime area is not by itself sufficient, previous cases have considered it as a relevant factor when determining the reasonableness of police conduct. Finally, it is important to remember that, even in *Terry v. Ohio*, 392 U.S.1 (1968), the conduct justifying the stop could have been justified with innocent explanations. The Fourth Amendment does not require that the police exhaust all lawful explanations before they may develop reasonable suspicion, and the *Terry* opinion acknowledges that police may stop innocent people from time-to-time. In this case, Wardlow was in a high crime area and fled as soon as he saw the police. Together, these two factors gave the police reasonable suspicion and the police lawfully conducted a *Terry* stop. The judgment of the state supreme court is reversed.

#### Concurrence/Dissent (Stevens, J.)

Because there are a number of reasons why an innocent person might flee the police, the Court in this case correctly rejects a per se rule governing whether or not flight amounts to reasonable suspicion. However, the Court is wrong when it holds that in this case the officers had reasonable suspicion to stop Wardlow. The record is not detailed enough to justify this conclusion. For example, the officer who conducted the search could not remember whether he had been in a marked or unmarked car. Also, the evidence presented was too vague to assume that Wardlow ran because of the police presence. It is possible he did not realize the men in the car were the police since, presumably, he did not recognize the first three cars as the police.

# Key Terms:

**Per Se Rule/Exception** - A rule that is applied uniformly without consideration of the specific situation or circumstance.

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

# Devenpeck v. Alford

#### United States Supreme Court 543 U.S. 146 (2004)

#### Rule of Law

The offense establishing probable cause does not have to be closely related to, and based on the same conduct as, the offense identified by the arresting officer at the time of arrest.

#### Facts

On November 22, 1997, Alford (defendant) pulled his car off to the side of the road to help some stranded motorists. As he did so, he activated his “wig-wag” headlights, which flash the left and right alternately. Officer Haner noticed the stranded motorist and stopped to help. As he did so, Alford drove away. The motorists asked if Alford was a “cop,” because he had given them that impression. Concerned that Alford was trying to impersonate a police officer, Haner radioed Devenpeck and set off in pursuit. Haner pulled Alford over and noticed that Alford was listening to a police radio station and had handcuffs and a hand-held police scanner. Devenpeck arrived shortly thereafter, and while asking Alford questions, noticed that Alford was recording the conversations with the officers. At this point, Devenpeck arrested Alford for violating the Washington Privacy Act. Alford protested that his recording the conversations was legal under a state court-of-appeals decision. Having read the language of the Privacy Act, but unable to confirm with a prosecutor that the arrest was lawful, Devenpeck had Haner take Alford to jail. A subsequent conversation with a prosecutor confirmed for Devenpeck that many possible criminal charges were possible and that there was “clearly probable cause” to arrest Alford. At booking Haner charged Alford with violating the Privacy Act (and for using the headlights). The state trial court dismissed both charges. In federal district court Alford asserted a federal cause of action against petitioners and a state cause of action for unlawful arrest and imprisonment, both charges being based on the fact that his recording of the petitioners’ conversations was not a crime because of the state court-of-appeals decision. The jury returned a verdict for Haney and Devenpeck. The United States Court of Appeals for the Ninth Circuit reversed, rejecting petitioners’ claim that probable cause existed to arrest Alford for the offenses of impersonating and obstructing an officer, because those offenses were not “closely related” to the offense for which Devenpeck arrested Alford (i.e., recording the conversations). The United States Supreme Court granted certiorari.

#### Issue

Does the offense establishing probable cause have to be closely related to, and based on the same conduct as, the offense identified by the arresting officer at the time of arrest?

#### Holding and Reasoning (Scalia, J.)

No. The offense establishing probable cause does not have to be closely related to, and based on the same conduct as, the offense identified by the arresting officer at the time of arrest. Our previous decisions have ruled that an officer’s subjective intent or motivation is irrelevant to the existence of probable cause. To insist that the offenses be closely related would contradict these previous rulings and require that the lawfulness of an arrest depend on the arresting officer’s motivation alone, thereby discounting any factors that played no overt role in the express, or stated, subjective decision. Any and all subjective factors should be allowed, as validating probable cause, whether they are expressly stated or not. Here, Devenpeck’s stated reason for taking Alford into custody was his supposed violation of the Privacy Act, but we do not have to ignore other subjective motivations, which could also provide the necessary probable cause. If we should require that the offenses be closely related, the constitutionality of an arrest would vary from time to time and place to place, depending on whether the arresting officer states the reason for the detention and other factors. In some cases, then, an arrest by a veteran officer would be valid, while that of a rookie officer would not, even though the arrests might take place in exactly the same circumstances. This would lead to ambiguity in the protection afforded by the Fourth Amendment. Moreover, there is no constitutional requirement for a suspect to be informed of the reason for his arrest, even though it is good police practice to do so. If we adopt the “closely-related rule” endorsed by the Ninth Circuit, however, officers might stop providing any reasons when they arrest a suspect, and this would be a bad development in law enforcement. Since the Ninth Circuit held that the charge of impersonating an officer and obstructing a law enforcement officer were legally irrelevant, we decline to answer whether probable cause existed to arrest him for these charges. We reverse and remand.

# Key Terms:

**Probable Cause** - A reasonable basis, amounting to more than mere suspicion, to believe that a person has committed a crime or is about to commit a crime, or that evidence relevant to a crime exists in a particular location.

# Heien v. North Carolina

#### United States Supreme Court 574 U.S. 54 (2014)

**Rule of Law**

**A mistake of law can give rise to the reasonable suspicion necessary to uphold a warrantless seizure under the Fourth Amendment.**

# Florida v. Bostick

#### United States Supreme Court 501 U.S. 429 (1991)

#### Rule of Law

**A police request for identification and consent to search private belongings does not amount to a seizure when the police inform the subject of the right to refuse consent to questioning and search.**

# Terry v. Ohio

#### United States Supreme Court 392 U.S. 1 (1968)

#### Rule of Law

**When an officer observes unusual conduct that reasonably leads him to assume that criminal activity is afoot and that the people he is interacting with are armed, the police officer may conduct a limited search for weapons.**

# Atwater v. City of Lago Vista

#### United States Supreme Court 532 U.S. 318 (2001)

#### Rule of Law

**The Fourth Amendment does not prohibit a warrantless arrest for a minor offense.**

# Florence v. Board of Chosen Freeholders of the County of Burlington

#### United States Supreme Court 566 U.S. 318 (2012)

#### Rule of Law

**A strip search in jail for those who commit minor offenses does not require reasonable suspicion.**

# Maryland v. King

#### United States Supreme Court 569 U.S. \_\_\_ (2013)

#### Rule of Law

**When officers make an arrest for a serious offense that is supported by probable cause and bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is a legitimate police-booking procedure that is reasonable under the Fourth Amendment.**

# Murray v. United States

#### United States Supreme Court 487 U.S. 533 (1988)

#### Rule of Law

**The independent-source doctrine does not apply if police officers were subjectively motivated to obtain a search warrant by what they learned during an original warrantless search of the premises, even if the warrant application does not rely on information gained during the original search.**

#### Facts

Federal agents had Michael Murray (defendant) and some of his co-conspirators under surveillance. The agents observed two large vehicles enter into a warehouse and exit about 20 minutes later. When the vehicles exited the warehouse, police observed inside the warehouse two people and a tractor-trailer rig carrying a long, dark container. The police subsequently followed the two vehicles, and when the drivers were stopped, the police found the vehicles full of marijuana. After hearing about the marijuana in the vehicles, the agents remaining at the warehouse went inside, where they saw numerous burlap-wrapped bales. Without touching anything, the agents left the warehouse, keeping it under surveillance while a warrant was obtained. The warrant application did not mention the prior entry and contained no information that was gathered upon that first entry into the warehouse. Upon obtaining a warrant, the agents reentered the warehouse and seized the bales, which were found to contain marijuana. Murray moved to have the evidence in the warehouse suppressed, arguing that the warrant was invalid because the warrant application did not mention the prior entry. The district court denied the motion, and the appellate court affirmed. The United States Supreme Court granted certiorari.

#### Issue

Does the independent-source doctrine apply if police officers were subjectively motivated to obtain a search warrant by what they learned during an original warrantless search of the premises, even if the warrant application does not rely on information gained during the original search?

#### Holding and Reasoning (Scalia, J.)

No. Under the independent-source doctrine, the Fourth Amendment exclusionary rule does not generally require suppression of evidence seized from premises pursuant to a search warrant, despite an earlier unconstitutional search of the same premises, if the warrant application was based entirely on an independent source of probable cause. The exclusionary rule should not place police officers in a worse position than they would have been before an unconstitutional search occurred, and excluding evidence seized pursuant to a valid warrant based on an independent source of probable cause generally would do so. However, the search and seizure pursuant to the subsequent warrant cannot be deemed independent of the earlier, unconstitutional search if officers were subjectively motivated to obtain a warrant by what they learned during the earlier search. In this case, the officers likely learned that the warehouse contained drugs when they initially entered illegally. However, they also acquired this information, and the tangible evidence, when they entered legally the second time. As long as the subsequent entry into the warehouse pursuant to the warrant was not the result of the earlier entry, the independent-source doctrine applies, and the evidence need not be suppressed. Although the appellate court held definitively that the original warrantless entry into the warehouse did not influence the subsequent issuance of the warrant or the discovery of the evidence, it is the job of the district court to ascertain these facts, and the district court did not do so here. Specifically, the district court never found that the police would have sought a warrant if they had not previously entered the warehouse. Therefore, the judgment is vacated, and the case is remanded to the appellate court with instructions to remand to the district court to determine whether the second search pursuant to the warrant was a genuinely independent source of uncovering the information and the tangible evidence. If so, the information and the tangible evidence are admissible under the independent-source doctrine.

#### Dissent (Marshall, J.)

The evidence uncovered during the second, lawful search must be suppressed. Under the facts of this case, the Court’s holding undermines the deterrence incentive of the exclusionary rule and allows police to invade an individual’s privacy before a neutral and detached magistrate determines that there is probable cause to do so. In addition, in cases like this one, there is no evidence, except the testimony of the agents, that the second entry pursuant to the search warrant is independent from the initial illegal entry, further widening the opportunity for police misconduct.

**Key Terms:**

**Independent Source Doctrine** - Evidence can be admitted at trial when it was initially obtained illegally but later obtained lawfully and independently. Evidence that is discovered legally, pursuant to a valid warrant, can be admitted at trial even when the police initially entered the premises unlawfully.

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

# Silverthorne Lumber Company v. United States

#### United States Supreme Court 251 U.S. 385 (1920)

#### Rule of Law

**Physical evidence obtained in violation of the Fourth Amendment, and information derived from such evidence, may not be presented at court or used by the government to help develop its case.**

# Nix v. Williams

#### United States Supreme Court 467 U.S. 431 (1984)

#### Rule of Law

**Evidence obtained in violation of the Sixth Amendment may be admitted if police would have inevitably discovered it.**

# Segura v. United States

#### United States Supreme Court 468 U.S. 796 (1984)

#### Rule of Law

**Criminal evidence will not be suppressed pursuant to the exclusionary rule if law enforcement officers had an independent source of information justifying a valid search and seizure of the evidence.**

# \*\*NIX v. WILLIAMS\*\*

#### United States Supreme Court 467 U.S. 431 (1984)

#### Rule of Law

**Evidence obtained in violation of the Sixth Amendment may be admitted if police would have inevitably discovered it.**

#### Facts

In 1968, a 10-year-old girl was abducted from an Iowa YMCA by Robert Williams (defendant). Two hundred people divided into search teams to search the area where police believed the girl could be; the searchers were instructed to search all roads, ditches, and abandoned buildings where the girl's body could possibly be hidden. Williams hired an attorney and surrendered to police. After his arraignment, Williams was transported to Des Moines. Police told Williams’s attorney that he would not be questioned. During transport, one of the officers urged Williams to lead them to the body. Specifically, the officer told Williams to think about how the girl's parents deserved the right to give their daughter a "Christian burial." Williams then agreed to lead officers to the body, and they found the girl's body in a ditch within the search area, just over two miles from the nearest search team. Williams was charged with first-degree murder. At his first trial, Williams moved to suppress the evidence of the body as fruit of an unlawful interrogation. The trial court denied the motion, and a jury convicted Williams. The Iowa Supreme Court affirmed. Williams petitioned the United States District Court for the Southern District of Iowa for a writ of habeas corpus. The court held that the evidence should have been suppressed, and the United States Court of Appeals for the Eighth Circuit affirmed. The United States Supreme Court granted certiorari and affirmed. During Williams’s second trial, the prosecution did not offer evidence of the interrogation but did present evidence of the condition of the body. The trial court admitted the evidence, finding that the prosecution had shown by a preponderance of the evidence that the body would have been discovered without Williams’s help. Williams was convicted by a jury and sentenced to life in prison. The Iowa Supreme Court affirmed. Williams again sought a writ of habeas corpus in federal district court. The district court denied Williams's petition, but the Eighth Circuit reversed. The United States Supreme Court granted certiorari.

#### Issue

May evidence obtained in violation of the Sixth Amendment be admitted if police would have inevitably discovered it?

#### Holding and Reasoning (Burger, C.J.)

Yes. Evidence may properly be admitted at trial, even if discovered in violation of the Sixth Amendment, if police would have inevitably discovered it. Under *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), the exclusionary rule prohibits admission of illegally discovered evidence and any evidenced derived from it. This harsh rule discourages police from engaging in misconduct by ensuring that the prosecution does not benefit from constitutional violations. Society must bear the burden that probative evidence will not be heard and guilty people will go free in order to safeguard the Constitution. The goal of the exclusionary rule is to leave the prosecution in the position it would have been had the constitutional violation not occurred. Thus, the independent-source exception allows illegally obtained evidence to be admitted if the evidence has been found legally unconnected to any misconduct. In this case, Williams argues that the evidence of the body should be suppressed because it is the fruit of an illegal interrogation, *i.e.*, the officer's request that Williams think about allowing the girl's parents the opportunity to give their daughter a Christian burial. Although the independent-source doctrine is inapplicable here, its underlying principles warrant the adoption of the inevitable-discovery doctrine. The prosecution must show discovery would have inevitably occurred by a preponderance of the evidence. Requiring the prosecution to prove an absence of bad faith as part of the exception would do little to deter police misconduct and would be overly punitive. Three courts have already determined that the body in this case would have inevitably been discovered by the searchers, and these courts' conclusions are supported by the evidence of the search teams' location and the thoroughness of their search. Accordingly, the evidence was properly admitted. The appellate court's judgment is reversed.

#### Concurrence (Stevens, J.)

The constitutional violations by police in this case were particularly egregious. Thus, the proper question is whether Williams received a fair trial through the adversarial process, as guaranteed by the Sixth Amendment. If the body would have been inevitably discovered, then the Sixth Amendment is satisfied. The majority is properly concerned with ensuring that the deterrent effect of the exclusionary rule is not eroded. Therefore, the risk of a mistake in the decision to admit illegally obtained evidence must be borne by the prosecution. In this case, the prosecution met its burden and proved that the search would inevitably have recovered the body. Consequently, the rule in this case does not place law enforcement in a better position than it would have been without the constitutional violation.

#### Dissent (Brennan, J.)

The inevitable-discovery exception is constitutional. Unlike the independent-source exception, this exception involves evidence that has not been legally obtained by means unrelated to the constitutional violation. Accordingly, the prosecution should have to prove inevitable discovery by clear and convincing evidence.

**Key Terms:**

**Exclusionary Rule** - A rule that excludes or suppresses evidence in a criminal proceeding where that evidence was obtained in violation of an individual’s constitutional rights.

**Independent Source Doctrine** - Evidence can be admitted at trial when it was initially obtained illegally but later obtained lawfully and independently. Evidence that is discovered legally, pursuant to a valid warrant, can be admitted at trial even when the police initially entered the premises unlawfully.

**Inevitable Discovery Doctrine** - Exception to the exclusionary rule allowing illegally obtained evidence to be admitted at trial if the evidence would certainly have been found without any constitutional or statutory violation.

***Nix v. Williams***

pages 358-360

**CAUSE IN FACT: INEVITABLE DISCOVERY**

Much more facts detail in Quimbee regarding this case. Have included it.

*Nix v. Williams* 1984 Chief Justice Burger delivered the opinion for the Court,

Justices Stevens and White Concurred

Justice Marshall dissented as did Justice Brennan

In the dissent, Justice Brennan agreed with the majority that evidence that would have been inevitably discovered despite the constitutional violation should be admissible at a later trial date, but he would have required the government to satisfy a heightened burden of proof—clear and convincing evidence—before it would be allowed to use such evidence. Because the lower courts did not impose such a requirement, he would have remanded the case.

From Quimbee:

**Rule of Law:** Evidence obtained in violation of the Sixth Amendment may be admitted if police would have inevitably discovered it.

**Facts:** In 1968, a 10-year-old girl was abducted from an Iowa YMCA. Police suspected Mr. Williams was involved in the kidnapping and murder. The police questioned him in violation of his 6th Amendment right to counsel. In response to the questioning, Williams led the police to the girl’s body.

At his second murder trial, the police did not offer William’s statements into evidence nor did it seek to show that Mr. Williams had directed the police to the child’s body. (Williams first conviction was vacated because the statements he made had been admitted into evidence in violation of his 6th Amendment rights. (See Brewer v. Williams) The only evidence admitted was the condition of the victim’s body as it was found, articles of the victim’s clothing, and the results of post mortem medical and chemical tests on the body. (Brewer v. Williams: A defendant has not effectively waived his right to counsel if, at the advice of counsel, he continues to invoke his right to remain silent until he has the opportunity to confer with his attorney but then makes a statement after being subject to police interrogation.)

The trial court concluded that the State had proved by a preponderance of the evidence that, even if the search had not been suspended and Williams had not let police to the victim, the searching party would still have discovered the body 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 have been taken up again where it had left off, given the extreme circumstances of this case, and the body would have been found in *short order*.”

Thus the trial court determined that the evidence about the condition of the body was admissible.

The U.S. Court of Appeals for the 8th Circuit, addressing the case on federal habeas review, disagreed maintaining that an “inevitable discovery” exception requires proof that the police did not act in “bad faith” and noting that the state trial record could not support such a finding. The Eighth Circuit reversed. The United States Supreme Court granted certiorari.

# Segura v. United States

#### United States Supreme Court 468 U.S. 796 (1984)

#### Rule of Law

**Criminal evidence will not be suppressed pursuant to the exclusionary rule if law enforcement officers had an independent source of information justifying a valid search and seizure of the evidence.**

# Brewer v. Williams

#### United States Supreme Court 430 U.S. 387 (1977)

#### Rule of Law

**A defendant has not effectively waived his right to counsel if, at the advice of counsel, he continues to invoke his right to remain silent until he has the opportunity to confer with his attorney but then makes a statement after being subject to police interrogation.**

#### Facts

Williams (defendant) had escaped from a mental institution and was suspected of kidnapping a young girl from a YMCA in Des Moines. The Des Moines police issued a warrant for his arrest. Two days after the abduction, and after consulting with a Des Moines attorney who advised him not to talk to the police, Williams turned himself in to the Davenport police where he was arrested pursuant to the outstanding warrant. Williams’ attorney in Des Moines arranged for two officers to go pick Williams up in Davenport, and they agreed not to question Williams during the 160 mile trip back to Des Moines. Williams was arraigned in Davenport and he was able to consult with a Davenport attorney who advised him not to say anything until he arrived back in Des Moines and could talk with his attorney there. Before putting him in the police car for the ride back to Des Moines, the attorney in Davenport again reiterated to the police that they were not to question Williams during the trip. Once in the car, Williams told the police that he would tell them everything that happened once they got back to Des Moines and he could talk with his lawyer. However, one of the officers then delivered the “Christian burial speech.” The officer told Williams that he was not asking him any questions, but he just wanted Williams to think about something on the ride back to Des Moines. He wanted Williams to think about how bad the weather was outside, that it was going to snow, that the snow would cover the girl’s body, and the police may never be able to recover it and give her the chance at a proper Christian burial. The officer knew that Williams had escaped from a mental institution and also that he was very religious. The officer also testified that his statement was intended to get information from Williams. A few hours into the trip, Williams eventually told the police to stop and showed them where the body was hidden. Williams was indicted for first-degree murder. The trial judge denied Williams’ motion to suppress all evidence resulting from his statements made in the police car, holding that the officer’s “Christian burial speech” amounted to interrogation but that Williams had waived his right to have an attorney present when he began speaking to the police in the car. Applying the totality of the circumstances test to hold that Williams had waived his right to counsel, the state supreme court affirmed. The federal district court granted a petition for a writ of habeas corpus holding that as a matter of law the evidence resulting from Williams’ statements made in the car were wrongly admitted at trial. The court of appeals affirmed, holding that the state failed to establish that Williams intentionally waived his right to have counsel present.

#### Issue

Has a defendant effectively waived his right to counsel if, at the advice of counsel, he continues to invoke his right to remain silent until he has the opportunity to confer with his attorney but then makes a statement after being subject to police interrogation?

#### Holding and Reasoning (Stewart, J.)

No. An effective waiver requires actual relinquishment of a right. If a defendant consistently relies on the advice of counsel in dealing with the police, any suggestion that he waived his right to counsel is refuted. Under the Sixth and Fourteenth Amendments, a person has a right to counsel at or after the time that judicial proceedings have been initiated against him. Furthermore, the police may not interrogate a suspect alone after he has invoked his right to counsel. In this case, judicial proceedings had been initiated against Williams at the time of his car trip back to Des Moines. The officer’s “Christian burial speech” amounted to interrogation because the officer himself testified to the fact that his statements were intended to elicit information from Williams. Williams invoked his right to counsel throughout his ordeal. He contacted his attorney before turning himself in, he continued to employ the advice of counsel by remaining silent, and he even told the police he would tell them everything but only after he consulted with his attorney. Despite this, the officer elicited incriminating statements from Williams without first reading him his *Miranda* rights or ascertaining whether Williams wished to waive his right to counsel. Under such facts, no effective waiver took place. Accordingly, the judgment of the federal court of appeals is affirmed.

#### Concurrence (Stevens, J.)

A lawyer often acts as the middleman between the state and an individual. Therefore, a suspect should be able to rely on his lawyer’s advice. In this case, Williams was not able to because the police broke their word to Williams’ attorney that Williams would not be questioned.

#### Concurrence (Marshall, J.)

The officer intentionally and deliberately denied Williams his constitutional right to an attorney. The dissent condemns the Court’s opinion today and applauds the officer’s conduct as good police work. However, good police work does not involve catching a criminal at any cost but demands strict compliance with the law, no matter how heinous the crime may be.

#### Concurrence (Powell, J.)

The dissent is wrong when it criticizes the majority for holding that a defendant is not able to change his mind and choose to talk to the police. However, in this case, the state produced no affirmative evidence that Williams knowingly and intelligently waived his right to counsel.

#### Dissent (Blackmun, J.)

The Court improperly found that the officer deliberately tried to isolate Williams from his counsel to learn incriminating information from him. Williams was separated from his lawyer as a necessary part of being transported to the county where the crime occurred. Additionally, the officer was not attempting solely to learn incriminating information from Williams. At that point, it was not clear that the girl was dead, and the officer was trying to gain information in hopes of finding her. Moreover, not every attempt to learn information is an interrogation, and the officer's statements and comments during the ride here did not amount to an interrogation. If there is no interrogation, a defendant's truly voluntary statements should be admitted. This matter should be remanded for further consideration of the voluntariness of Williams's statements.

#### Dissent (Burger, C.J.)

The Court’s holding suggests that once a suspect has exercised his right to remain silent and his right to a lawyer, he is not able to later waive these rights. In this case, Williams made a valid waiver of his constitutional rights when he showed the police where the body was. He knew he had the right to counsel and that he could remain silent. The Court never even questions Williams’ mental competence. The only reasonable conclusion is that Williams knew that telling the police where the body was would have further legal consequences for himself but chose to talk to them anyway. The Court’s opinion punishes society instead of punishing the police who actually make the mistake.

#### Dissent (White, J.)

Williams’ statement, and the resulting evidence obtained, should be admissible at trial. Williams knew of his right to remain silent and he intentionally relinquished that right. He had been told a number of times that he did not need to speak and demonstrated his understanding when he told the police in the car that he would tell them what happened once he saw his lawyer. He intentionally relinquished his right because the officer’s “Christian burial speech” was not coercive; the officer even told Williams he did not need to respond. Furthermore, the police’s statement was made hours before Williams actually took them to the body. In addition, the Court applies the holding in *Massiah v. United States*, 377 U.S. 201 (1964). According to the Court’s opinion, *Massiah* offers suspects a slightly different right than that set forth in *Miranda v. Arizona*, 384 U.S. 486 (1966). According to the Court, *Massiah* holds that the right of an individual is the right not to be asked any questions without the presence of counsel, rather than a right not to answer any questions without counsel present. Such a thin distinction should not lead to such disparate results.

**Key Terms:**

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

**Miranda Warnings** - The notices of constitutional rights set forth in the opinion of the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436(1966) that law enforcement authorities must provide to a suspect in a criminal investigation prior to initiation of a custodial interrogation. The suspect must be advised that the suspect has the right to remain silent, anything the suspect says may be used against the suspect, and the suspect has the right to an attorney.

# \*\*HUDSON v. MICHIGAN\*\*

#### United States Supreme Court 547 U.S. 586 (2006)

#### Rule of Law

**The exclusionary rule does not apply to violations of the knock and announce rule.**

#### Facts

The police obtained a warrant to search Hudson’s (defendant) home. The police arrived at Hudson’s home, announced their presence, but only waited three to five seconds before entering the house. Upon searching Hudson’s home, the police found drugs and firearms which Hudson moved to suppress at trial, arguing that the police did not wait long enough before entering his home in violation of his Fourth Amendment rights. The state trial court granted his motion and the court of appeals reversed. The United States Supreme Court granted certiorari.

#### Issue

Does a violation of the knock and announce rule mean that the evidence found pursuant to the subsequent search must be excluded at trial?

#### Holding and Reasoning (Scalia, J.)

No. If the police fail to properly follow the knock and announce rule, the evidence they find may still be admitted at trial. The purpose of the knock and announce rule is to protect lives and prevent injury to people and property. However, once a warrant has been issued, an individual has no more privacy in the evidence described in the warrant. Therefore, the exclusionary rule is not a proper remedy if the police fail to properly knock and announce their presence because the individual’s interests that have been violated have nothing to do with the search and seizure of evidence. In addition, the exclusionary rule only applies where its ability to deter police misconduct outweighs the cost to society of letting criminals go. Excluding evidence found in violation of the knock and announce rule provides little deterrence to police and has a significant detrimental effect on society. Such a policy could lead the police to wait too long before they enter a home, increasing the chance that officers will be harmed; and what constitutes a reasonable time in specific situations would be hard for a trial court to determine. Furthermore, there is little incentive for the police to violate the knock and announce rule since it is designed for everyone’s safety, the suspect and police alike, and the police may lawfully abandon the requirement if exigent circumstances are present making delay more dangerous. Furthermore, as with most rules, the police are deterred from violating the knock and announce rule by the possibility of a civil suit against them sometime in the future and by the possibility of professional reprimands within an officer’s unit that could taint his career. Therefore, the evidence found by the police in Hudson’s home is admissible because the social cost of excluding it outweighs any deterrent effect the knock and announce rule may have. The judgment of the state appeals court is affirmed.

#### Concurrence (Kennedy, J.)

The Court’s holding leaves intact prior precedence concerning the exclusionary rule and it is not intended to minimize the importance of the knock and announce requirement. Instead, the Court’s holding simply stands for the proposition that exclusion of evidence is not the proper remedy when the police fail to properly knock and announce their presence because failure to follow this rule is too attenuated from the subsequent search that eventually leads to the discovery of incriminating evidence.

#### Dissent (Breyer, J.)

The exclusionary rule should apply when the police fail to properly follow the knock and announce rule because the Court’s precedence prohibits the admission of evidence found through illegal search or seizure. Also, violations of the knock and announce rule are widespread. There is no evidence to support the majority’s position that other means of deterrence have become effective and therefore, only by making evidence inadmissible, will the police be properly deterred from violating the rule. In addition, the majority holds that the police held a valid warrant and therefore were entitled to the evidence they found. However, the warrant was valid only so long as its execution complied with the constitution. Furthermore, the Court’s argument that strict compliance with the knock and announce rule may be dangerous for police officers is more an argument against the rule itself than it is against enforcement of the rule. Finally, the majority’s opinion is full of misunderstandings of the Court’s own precedence. For example, the majority misunderstands the doctrine of inevitable discovery and redefines “attenuation” in a way completely inconsistent with precedent.

***Hudson*** showed that sometimes the social costs of excluding evidence outweigh the benefits.

**Key Terms:**

**Exclusionary Rule** - A rule that excludes or suppresses evidence in a criminal proceeding where that evidence was obtained in violation of an individual’s constitutional rights.

**Knock and Announce Rule** - When executing a warrant, and absent exigent circumstances, the police must knock, announce their presence, and wait a reasonable amount of time before they enter a home, giving the occupant of the home the opportunity to let the police enter without the use of force.

***Hudson v. Michigan (2006)***

**Rule:** The exclusionary rule does not apply to knock and announce. If police fail to properly follow the knock and announce rule, the evidence found may still be admitted at trial.

Police obtained a search warrant. They announced their presence but only waited 3-5 seconds before entering. US SC ruled the cost of evidence suppression was outweighed by the benefits. The purpose of the rule is to protect lives and prevent injury to people and property. The exclusionary rule is not the proper remedy if police fail to conduct the knock and announce correctly.

**Hudson v. Michigan (2006)**

Opinion by Scalia

**Facts:** The police had a search warrant for Hudson’s home. They announced their presence but only waited 3 to 5 seconds before entering. After searching the home, the police found drugs and fire arms. Hudson moved to suppress them at trial arguing that the police did not wait long enough before entering his home. The state trial court granted his motion and the court of appeals reversed.

**Issue:** if the knock and announce rule is not executed properly, is the evidence recovered admissible?

**Rule:** Yes, suppressing evidence is not the appropriate remedy if the knock and announce rule is not executed correctly.

**Analysis:** Exclusion may not be premised on the mere fact that a constitutional violation was a “but for” cause of obtaining evidence. The “but for” causality is only a necessary, not a sufficient, condition for suppression. In this case the constitutional violation of an illegal manner of entry was not a “but for” cause of obtaining the evidence. Whether the mishap had occurred or not, the police would have still executed the warrant and would have discovered the drugs and gun inside the house.

*Segura*- the Court held an illegal entry into an apartment did not require suppression of evidence that police later seized when executing a search warrant obtained on the basis of information unconnected to the initial entry. The Court reasoned that “the evidence discovered the day following entry, during the search conducted under a valid warrant- i.e. a warrant obtained independently without use of any information found during illegal entry- and that “it was the product of that search, wholly unrelated to prior (unlawful) entry”.

Attenuation can occur when the casual connection is remote. It also can occur even when there is a direct casual connection, the interest protected by the constitutional guarantee has been violated would not be served by suppression of the evidence.

The interests protected by the knock and announce requirement are the protections of human life, limb, property, and the elements of privacy and dignity that can be destroyed by a sudden entrance. The knock and announce rule gives individuals the opportunity to comply with the law and to avoid the destruction of property by a forcible entry. It assures the opportunity to collect oneself before answering the door. What the knock and announce rule has never protected is one’s interest in preventing the government from seeing or taking evidence described in a warrant. Since the interest that were violated in this case have nothing to do with the seizure of evidence, the exclusionary rule is in applicable

**Dissent- Breyer:** Although police could have entered Hudson’s home lawfully, they did not. Their discovery of evidence in the home was a readily foreseeable consequence of their entry and their unlawful presence within the home.

**Inevitable discovery doctrine**- refers to discovery that did occur or that would have occurred (1) despite the unlawful behavior and (2) independently of that unlawful behavior.

# Segura v. United States

#### United States Supreme Court 468 U.S. 796 (1984)

#### Rule of Law

**Criminal evidence will not be suppressed pursuant to the exclusionary rule if law enforcement officers had an independent source of information justifying a valid search and seizure of the evidence.**

# Wong Sun v. United States

#### United States Supreme Court 371 U.S. 471 (1963)

#### Rule of Law

**Although evidence obtained through illegal police conduct must be excluded at trial as it is “fruit of the poisonous tree,” the connection between the illegal police conduct and a relevant piece of evidence can become so attenuated as to dissipate the taint, and such evidence may then be admissible.**

***Wong Sun*** was the first case which the Court **applied the exclusionary rule to a confession**, in addition to physical evidence, tainted by an unconstitutional arrest. The Court also recognized that a **confession given after sufficient attenuation from unconstitutional arrest is admissible.**

# New York v. Harris

#### United States Supreme Court 495 U.S. 14 (1990)

#### Rule of Law

**An unlawful arrest made without a warrant but with probable cause in a suspect’s home does not require exclusion of statements the suspect subsequently made outside the home.**

# Wilson v. Arkansas

#### United States Supreme Court 514 U.S. 927 (1995)

#### Rule of Law

**The knock and announce rule is part of the reasonableness test required to assess whether a search was valid under the Fourth Amendment.**

# Silverthorne Lumber Company v. United States

#### United States Supreme Court 251 U.S. 385 (1920)

#### Rule of Law

**Physical evidence obtained in violation of the Fourth Amendment, and information derived from such evidence, may not be presented at court or used by the government to help develop its case.**

# Nix v. Williams

#### United States Supreme Court 467 U.S. 431 (1984)

#### Rule of Law

**Evidence obtained in violation of the Sixth Amendment may be admitted if police would have inevitably discovered it.**

# Murray v. United States

#### United States Supreme Court 487 U.S. 533 (1988)

#### Rule of Law

**The independent-source doctrine does not apply if police officers were subjectively motivated to obtain a search warrant by what they learned during an original warrantless search of the premises, even if the warrant application does not rely on information gained during the original search.**

# January 28, 2021

# Midterm Exam 8:20pm-10:00pm – Worth 1/3 of Final Grade

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**Criminal Procedure and the Constitution**

**Case Briefs & Class Readings**

**Midterm - Final**

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**February 4, 2021**

**Chapter 6 – Section 1- 3 – Police Interrogations and Confessions**

**State v. Philips, 30 S.W.3d 372 (Tenn. Crim. App. 2000)**

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**Chapter 6 – Section 1 – The “Voluntariness” Test**

**\*\*ASHCRAFT v. TENNESSEE\*\***

United States Supreme Court  
322 U.S. 143 (1944)

#### Rule of Law

**Under the Due Process Clauses, confessions obtained through inherently coercive means are deemed involuntary.**

#### Facts

The police took E. E. Ashcraft (defendant) into custody on a Saturday night at 7:30 p.m. to question him regarding the murder of his wife, Zelma, nine days earlier. Ashcraft was seated at a table with a light over his head in a homicide-investigation office at the county jail. Ashcraft was interrogated by officers in shifts for 36 straight hours without a break until Monday morning at 9:30 a.m. The State of Tennessee (plaintiff) alleged that, after the first 28 hours of questioning, Ashcraft said that a man named Ware had abducted Zelma and likely killed her. The police took Ware into custody that night. Ware allegedly confessed to the murder on Monday morning at 5:40 a.m. and stated that Ashcraft had hired him to commit the murder. The state alleged that Ashcraft was presented with Ware’s statement on the same morning at 9:30 a.m. and that he admitted to the truth of the statement. Ashcraft refused to sign a transcript of his purported statement, but the statement was witnessed by several people who had been brought into the room at the end of the examination. The state alleged that Ashcraft was treated kindly throughout the interrogation and appeared normal, with no outward sign of being tired at the time of the alleged confession. The state admitted that the officers questioned Ashcraft in shifts because they needed rest. Ashcraft denied making any confession and alleged that he was threatened and abused in various ways throughout the interrogation. Ashcraft alleged that the light seemed blinding, his body became weary, and the stress became unbearable. Ashcraft was convicted as an accessory before the fact. The Supreme Court of Tennessee affirmed, and the United States Supreme Court granted certiorari.

#### Issue

Under the Due Process Clauses, are confessions obtained through inherently coercive means deemed involuntary?

#### Holding and Reasoning (Black, J.)

Yes. The circumstances of some confessions are so inherently coercive that the confessions must be deemed to have been compelled. Even without resolving the disputed facts that are common when questioning is held in secret, the uncontroverted evidence is sometimes sufficient to conclude that a confession could not have been voluntary. No proper court would ever allow prosecutors to question a defendant in an open trial in shifts for 36 hours in an attempt to gain a “voluntary” confession. There would likewise be a violation of due process if a court accepted a confession that resulted from the same tactics during secret questioning. The United States Constitution prohibits the conviction of any individual based upon a coerced confession. Although some foreign nations allow unrestrained police power in obtaining confessions through physical and mental torture, the United States government does not permit such activity. In this case, this Court does not resolve the facts in dispute regarding the events that took place in the investigation room over the 36 hours of questioning. The mere duration of the examination without rest for Ashcraft, while the officers worked in shifts that were necessary for their rest, was inherently coercive. Thus, if Ashcraft did confess, his confession was improperly compelled and not voluntary. The judgment of the Supreme Court of Tennessee is reversed and remanded.

#### Dissent (Jackson, J.)

The majority improperly creates an irrebuttable presumption that examinations of this duration are inherently coercive. The determination of whether a state has deprived a defendant of due-process rights under the Fourteenth Amendment to the United States Constitution has always been made on a case-by-case basis. In this case, the majority has refused to decide any facts and has ignored the factual findings of the lower courts. Instead, the majority’s decision creates a rule of law that all interrogations of a certain duration are illegal. Interrogation is not per se illegal, and confessions in criminal law are rarely voluntary in the common sense of the word. Rather, detailed and prolonged interrogations are often required for a suspect to finally admit the truth. Criminal interrogations of one hour or 36 hours are inherently coercive, but duration alone should not be the basis of a new rule of law. Beyond the facts of the interrogation, the majority has also improperly ignored the undisputed fact that disinterested witnesses observed Ashcraft’s confession.

**Key Terms:**

**Involuntary Confession -** An admission of guilt by a criminal suspect that would not have been offered in the absence of coercion, inducement, or deceit.

# \*\*SPANO v. NEW YORK\*\*

#### United States Supreme Court 360 U.S. 315 (1959)

#### Rule of Law

**A confession made after hours of interrogation, during which the defendant has been denied his right to counsel, is not made voluntarily and is therefore inadmissible at trial.**

#### Facts

Vincent Spano (defendant), accompanied by his lawyer, turned himself in to the police a few days after he shot a man in a candy store following a barroom brawl. Spano, 25, had no prior history with law enforcement, although he had a history of emotional instability. Spano’s attorney left him in police custody after advising him not to answer any questions. Numerous police officers began to interrogate Spano at about 7:00 p.m., and the questioning continued for almost eight straight hours. Spano repeatedly told the police he was not going to answer their questions and made repeated requests for his attorney to be present, all of which were denied. Gaspar Bruno, an old friend of Spano’s who had become a police officer, was brought in to question Spano when the police could not get him to confess. Bruno played to Spano’s sympathies and explained that he would lose his job if he could not get Spano to confess. Bruno’s job was never in jeopardy. After four sessions with Spano, Bruno finally got him to confess and Spano answered the prosecutor’s leading questions. The trial court allowed the confession to be admitted into evidence, instructing the jury to consider it only if they believed it was made voluntarily. The jury convicted Spano, and he was sentenced to death. The New York Court of Appeals affirmed his conviction and sentence. The United States Supreme Court granted certiorari.

#### Issue

Is a confession made after hours of interrogation, during which the defendant has been denied his right to counsel, made voluntarily?

#### Holding and Reasoning (Warren, C.J.)

No. A confession made after hours of interrogation, during which the suspect has been denied his right to have an attorney present, is not made voluntarily and is inadmissible at trial. The question of whether a confession is involuntary must be analyzed in view of the totality of the circumstances. Here, the tactics used by the police violated Spano’s fundamental rights, protected under the Fourteenth Amendment. The police continued to question Spano after he invoked his right to remain silent and they denied him his right to counsel. Furthermore, the police took advantage of his prior relationship with Bruno, as well as his diminished mental capacity. Spano was questioned by many different officers for eight hours, and then he was forced to answer the district attorney’s leading questions, instead of telling the police what happened in his own words. In addition, the police timed the interrogation to maximize Spano’s fatigue. Spano’s confession was coerced, it may not be admitted as evidence at trial, and the conviction cannot stand. The judgment is reversed.

#### Concurrence (Stewart, J.)

The denial of counsel is sufficient to make Spano’s confession inadmissible.

***Spano v. New York*** showed the Court’s movement in the direction of it’s eventual Fifth and Sixth Amendment decisions concerning defendants’ confessions.

**Key Terms:**

**Fourteenth Amendment Due Process** **Clause** - The provision set forth at Amendment XIV, Section 1 of the United States Constitution prohibiting states from depriving any person of life, liberty, or property by means that are arbitrary or fundamentally unfair.

# Brown v. Mississippi

#### United States Supreme Court 297 U.S. 278 (1936)

#### Rule of Law

**The Due Process Clause of the Fourteenth Amendment requires that state action be consistent with fundamental principles of liberty and justice.**

#### Facts

Brown (defendant) and two other men were found guilty of murdering Reymond Stewart and were sentenced to death. The evidence against them consisted solely of their own confessions which were induced by severe beatings at the hands of the local authorities. At trial, Brown and the others objected to the admission of the confessions and testified to the torture, saying their confessions were false. Other witnesses were called to testify to first-hand knowledge of the beatings and Brown and the other men still bore many of the psychical scars of the whippings when the trial commenced. The judge submitted the case to the jury, instructing them that if they had reasonable doubt as to the veracity of the confessions, the confessions should not be considered as evidence. Brown appealed to the state supreme court and the conviction was affirmed.

#### Issue

Are convictions resting solely on confessions induced by violence perpetrated by state actors, consistent with the Due Process Clause of the Fourteenth Amendment?

#### Holding and Reasoning (Hughes, C.J.)

No. Confessions induced by violence are not consistent with the Due Process Clause and such evidence is therefore inadmissible at trial. Severe beatings to garner a confession clearly violate fundamental principles of justice and therefore amount to a violation of due process. Where such confessions are the only evidence against the defendants, as is the case here, the result is simply the pretense of a fair trial. The trial court had sufficient evidence that the confessions were the result of coercion and brutality and the court wrongly permitted the confessions to be introduced into evidence. Accordingly, the judgment is reversed.

**Key Terms:**

**Fundamental Principles or Rights -** Principles and rights that are so deeply rooted and ingrained in history and tradition as to be central to U.S. notions of liberty and justice.

# Ashcraft v. Tennessee

#### United States Supreme Court 322 U.S. 143 (1944)

#### Rule of Law

**Under the Due Process Clauses, confessions obtained through inherently coercive means are deemed involuntary.**

**Chapter 6 – Section 2 – *Massiah* ad *Escobedo***

# \*\*MASSIAH v. UNITED STATES\*\*

#### United States Supreme Court 377 U.S. 201 (1964)

#### Rule of Law

**A person who has been indicted on criminal charges has as much a constitutional right to have an attorney present during police interrogations as he does during the trial itself.**

#### Facts

Massiah (defendant) was indicted for violating federal narcotics laws. With the assistance of counsel, he pleaded not guilty and was released on bail. Unbeknownst to Massiah, a co-defendant, Colson, had agreed to cooperate with the police. A few days after Massiah was released on bail, Colson, wearing a wire so the police could hear what Massiah said, initiated a conversation with Massiah where Massiah made incriminating statements. These statements were then introduced at trial. Massiah was convicted of several drug offenses. The court of appeals affirmed the convictions. Massiah argued that the statements were introduced at trial in violation of his Fifth and Sixth Amendment rights.

#### Issue

Where a suspect has invoked his right to counsel, are his Fifth and Sixth Amendment rights violated where the police deliberately elicit incriminating statements from him after he has been indicted and in the absence of his retained counsel?

#### Holding and Reasoning (Stewart, J.)

Yes. A suspect’s Fifth and Sixth Amendment rights are violated where he has been indicted, he has invoked his right to counsel, and federal agents have deliberately elicited incriminating statements from him in the absence of his retained counsel. In ***Spano v. New York*** (1959), the defendant had already been indicted at the time of his confession. The Court’s opinion relied on the totality of the circumstances surrounding the interrogation when it held that the confession had been improperly admitted. However, the concurring opinions all emphasized the absence of Spano’s attorney when he was interrogated by the police. In addition, in ***Powell v. Alabama*** (1932), the Court held that from the time of a defendant’s arraignment to the beginning of trial, a defendant is as much entitled to the aid of counsel as he is during the trial itself. Therefore, Massiah’s constitutional rights were violated when his own incriminating statements, intentionally elicited by the police after he had invoked his right to counsel, were introduced against him at trial.

#### Dissent (White, J.)

The Court’s opinion expands the constitutional right to counsel too far. There is no basis for holding that because a defendant has the right to counsel both before and during trial, that any out-of-court statement must be excluded if obtained without the consent of counsel, or his presence. Instead, the presence of counsel is simply one factor of many to consider when determining whether an incriminating statement was voluntarily made.

**Key Terms:**

**Fifth Amendment** - An amendment added to the U.S. Constitution as part of the Bill of Rights that provides important protections from government actions, including a guarantee that no person will be required to answer for a capital crime unless first indicted by a grand jury; no one will suffer double jeopardy; no one must testify against himself or herself; no one will be deprived of life, liberty, or property without due process of law; and no property will be taken for public use without just compensation.

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

# Spano v. New York

#### United States Supreme Court 360 U.S. 315 (1959)

#### Rule of Law

**A confession made after hours of interrogation, during which the defendant has been denied his right to counsel, is not made voluntarily and is therefore inadmissible at trial.**

***Spano v. New York*** showed the Court’s movement in the direction of it’s eventual Fifth and Sixth Amendment decisions concerning defendants’ confessions.

# Powell v. Alabama (Scottsboro Boys Trial)

#### United States Supreme Court 287 U.S. 45 (1932)

#### Rule of Law

**Due process requires that criminal defendants have the right to counsel both at trial and in the time leading up to trial when consultation and preparation take place.**

#### Facts

Ozie Powell and eight other impoverished, illiterate African American teenagers (defendants), were charged with and found guilty of raping two white women. The trial judge neglected to give Powell and the others the chance to secure their own representation by withholding contact with their families who resided in neighboring states. Instead, the judge appointed “all members of the bar” to represent Powell and the others for their arraignment. Three separate trials commenced just six days later, and it was only on the morning of trial when an Alabama attorney and a Tennessee attorney volunteered to represent the nine defendants at trial. Each trial was completed within one day, and all three juries convicted the defendants, sentencing each of them to the death penalty. Powell and the others filed motions for a new trial, but the motions were overruled and the state supreme court affirmed the judgments on appeal. The cases were argued and submitted as one case.

#### Issue

Is the Due Process Clause of the Fourteenth Amendment violated when a trial judge in a capital case fails to appoint the defense counsel until the day of trial?

#### Holding and Reasoning (Sutherland, J.)

Yes. In capital cases, if a defendant is unable to employ his own counsel and cannot adequately represent himself, a trial judge must appoint counsel, whether requested or not by the defendant. The Due Process Clause of the Fourteenth Amendment guarantees criminal defendants the right to notice and a hearing. In capital cases, the right to a hearing includes the right to counsel because a layman is generally not familiar with legal proceedings and is therefore not adequately prepared to assert his own defense. This right to counsel includes the ability to consult with one’s attorney prior to trial in order to properly prepare a defense. In this case, the trial judge violated the Due Process Clause when he failed to give Powell and the other defendants the opportunity to employ their own counsel. Their youth, illiteracy, and the severity of the charges make it clear that Powell and the others could not have effectively represented themselves at trial. Furthermore, by merely appointing “all members of the bar” for the “purpose of arraigning the defendants,” the judge failed to assign proper counsel because no specific attorney was given clear responsibility of the case until the day of trial. There was therefore not enough time for Powell to prepare a proper defense in violation of the Due Process Clause of the Fourteenth Amendment. The judgments are therefore reversed and the case remanded back to the trial court.

#### Dissent (Butler, J.)

There was adequate time to prepare for trial, and therefore there was no due-process violation. The two attorneys who took responsibility of the case on the day of trial never requested a postponement and even now they do not support the claim that they were ill-prepared on the day of trial. In addition, at issue is only whether the trial court denied Powell due process of law when it failed to give him and the others the opportunity to secure their own representation. The Court exceeds its authority when it goes on to hold that the failure of the trial judge to appoint Powell counsel is a violation of the Due Process Clause of the Fourteenth Amendment.

**Key Terms:**

**Fourteenth Amendment Due Process** **Clause** - The provision set forth at Amendment XIV, Section 1 of the United States Constitution prohibiting states from depriving any person of life, liberty, or property by means that are arbitrary or fundamentally unfair.

# \*\*ESCOBEDO v. ILLINOIS\*\*

#### United States Supreme Court 378 U.S. 478 (1964)

#### Rule of Law

**When an investigation shifts from a general inquiry into an unsolved crime to a focus on a particular suspect, that suspect has been taken into police custody for questioning, the suspect has asked for and been denied his lawyer, and the police have not properly warned him of his right to remain silent, any confession made during the remainder of the interrogation is inadmissible.**

#### Facts

Danny Escobedo (defendant) was arrested on suspicion of murder. On the way to the police station he asked to speak to his lawyer. He asked the same many other times once inside the police station as well. Additionally, his lawyer was actually at the police station and asking to see Escobedo, but the police repeatedly refused this request as well. Meanwhile, the police had Di Gerlando, another suspect, in custody and Di Gerlando stated that Escobedo fired the fatal shots. During the interrogation of Escobedo, the police put Escobedo and Di Gerlando in the same room and during the confrontation, Escobedo implicated himself in the murder. The trial court convicted Escobedo and the Supreme Court of Illinois affirmed. The United States Supreme Court granted certiorari.

#### Issue

Is a confession admissible if an investigation has narrowed its focus to a particular suspect, that suspect has been taken into police custody for questioning, the suspect has asked for and been denied his lawyer, and the police have not properly warned him of his right to remain silent?

#### Holding and Reasoning (Goldberg, J.)

No. When an investigation shifts from a general inquiry into an unsolved crime to a focus on a particular suspect, that suspect has been taken into police custody for questioning, the suspect has asked for and been denied his lawyer, and the police have not properly warned him of his right to remain silent, any confession made during the remainder of the interrogation is inadmissible. When the process moves from investigatory to accusatory, the accused must be given access to his lawyer. The fact that an interrogation under these facts may occur before the suspect is indicted makes no difference. In this case, the investigation began to focus specifically on Escobedo and Di Gerlando as the suspects. At this point, Escobedo was in custody and had asked to speak with his lawyer. The police’s refusal to grant this request violates Escobedo’s Sixth Amendment right to counsel and renders the subsequent incriminating statement inadmissible. Although it is said that the right to counsel attaching pretrial will be devastating to law enforcement because law enforcement obtains many confessions at that stage, this reasoning only fortifies the argument that the right to counsel should attach so early in the judicial process. The conviction is reversed.

#### Dissent (Stewart, J.)

The Court improperly disregards an important fact distinguishing this case from *Massiah v. United States*, 377 U.S. 201 (1964): the interrogation in this case occurred before any formal proceedings began. The right to counsel attaches at the point where the formal judicial proceedings begin and the criminal investigation ends—e.g., indictment or arraignment—not before.

#### Dissent (White, J.)

The Sixth Amendment right to counsel is not meant to supersede the Fifth Amendment right against incrimination. Escobedo’s statements were not compelled by the police and he knew that he had the right to remain silent. The Court should continue to use the totality of the circumstances to guide its analysis.

#### Dissent (Harlan, J.)

The Court’s holding will have a deleterious effect on law enforcement.

**Key Terms:**

**Due Process -** A constitutional guarantee that a law shall not be unreasonable, arbitrary, or capricious and that individuals will be given notice of legal proceedings conducted fairly with an opportunity for an individual to be heard before the government may impose sanctions on one’s life, liberty, or property.

**Right to Counsel -** Sixth Amendment guarantee that a defendant is entitled to be represented by an attorney during a criminal prosecution.

# Massiah v. United States

#### United States Supreme Court 377 U.S. 201 (1964)

#### Rule of Law

**A person who has been indicted on criminal charges has as much a constitutional right to have an attorney present during police interrogations as he does during the trial itself.**

# Gideon v. Wainwright

#### United States Supreme Court 372 U.S. 335 (1963)

#### Rule of Law

**The Fourteenth Amendment incorporates the Sixth Amendment right to counsel to the states.**

#### Facts

Gideon (defendant) was charged with a state felony. He asked the court to appoint him a lawyer but his request was denied. Under state law, the court could only appoint counsel in capital cases. Gideon represented himself at trial and was ultimately convicted by a jury. Gideon argues that he has a constitutional right to counsel in a state court. The United States Supreme Court granted certiorari.

#### Issue

Does the Fourteenth Amendment incorporate the Sixth Amendment right to counsel to the states?

#### Holding and Reasoning (Black, J.)

Yes. The Fourteenth Amendment incorporates the Sixth Amendment right to counsel to the states. The Fourteenth Amendment incorporates those provisions of the Bill of Rights that are “fundamental and essential to a fair trial.” The holding in *Betts v. Brady*, 316 U.S. 455 (1942), assumed that the state court’s refusal to appoint counsel did not violate such fundamental principles of fairness and that there was no due process violation. On reconsideration, however, it is clear that *Betts* should now be overruled. Not only is it not good law, but even when it was decided it was not consistent with precedent. *Powell v. Alabama*, 287 U.S. 45 (1932), held that the right to counsel is fundamental. At the time, the *Powell* holding was limited to its facts. However, what it said about the fundamental nature of the right to counsel must now be embraced. Defendants have the constitutional right to a fair trial and this requires having an advocate present who knows the intricacies of the legal system. Accordingly, the decision in *Betts* is now overruled.

#### Concurrence (Harlan, J.)

The Court properly overrules *Betts*. However, the Court is wrong when it criticizes the *Betts* decision as inconsistent with precedence. *Betts* held that courts may need to provide counsel in non-capital state cases but special circumstances had to be shown to demonstrate a denial of due process. This is the approach the Court took in *Powell*. The Court emphasized the reasons that due process was denied to the defendants (they were young, there was lots of public hostility, they could not read) and based on those facts the Court held that the state must provide counsel.

**Key Terms:**

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

**Fourteenth Amendment –** Provides that all persons born or naturalized in the United States are U.S. citizens. Also provides that no state shall: (1) abridge the privileges or immunities of a U.S. citizen; (2) deprive any person of life, liberty, or property, without due process of law; or (3) deny equal protection of the laws to anyone within its jurisdiction.

**Bill of Rights -** The first ten amendments to the U.S. Constitution.

**Petition of Groban**

77 S.Ct. 510

Supreme Court of the United States

**Matter of the Petition for a Writ of Habeas Corpus for Harry A. GROBAN and Nathan Groban, Appellants.**

No. 14.

Argued Nov. 6, 1956.Decided Feb. 25, **1957**.

**Synopsis**

Proceeding, for writ of habeas corpus, by witnesses who had been committed to jail by state fire marshal for refusal to testify, without immediate presence of counsel, in private investigation conducted by marshal into cause of fire. The Ohio Court of Common Pleas entered judgment denying relief and witnesses appealed. The Court of Appeals of Ohio, Franklin County, [99 Ohio App. 512, 135 N.E.2d 477,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1956118465&pubNum=578&originatingDoc=I2215a34d9bf011d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed the judgment, and witnesses appealed. The Supreme Court of [Ohio, 164 Ohio St. 26, 128 N.E.2d 106,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1955108396&pubNum=578&originatingDoc=I2215a34d9bf011d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed the judgment, and the witnesses appealed. The Supreme Court, Mr. Justice Reed, held that Ohio statute permitting state fire marshal to conduct private investigation to determine causes of fire, insofar as it authorizes exclusion of counsel while witness testifies, is not repugnant to due process clause of Fourteenth Amendment of federal Constitution and witnesses so testifying had no constitutional right to be assisted by counsel.

Affirmed.

Mr. Justice Black, Mr. Chief Justice Warren, Mr. Justice Douglas, and Mr. Justice Brennan dissented.

**Chapter 6 – Section 3 - *Miranda***

# \*\*MIRANDA v. ARIZONA\*\*

#### United States Supreme Court 384 U.S. 436 (1966)

#### Rule of Law

**Without certain hallmark warnings regarding the right to remain silent and the right to counsel, statements made during custodial interrogation are inadmissible at trial.**

#### Facts

Ernesto Miranda (defendant) confessed after questioning by Arizona police while he was in custody at a police station. Before confessing, the police did not advise Miranda of his right to counsel. Miranda suffered from a mental illness. The State of Arizona (plaintiff) charged Miranda with kidnapping and rape. At trial, the court admitted his confession, and a jury convicted him. The Supreme Court of Arizona affirmed Miranda’s conviction. Like Miranda, Michael Vignera and Carl Westover (defendants) confessed to crimes after extensive custodial interrogations without being notified of their rights. Their convictions were affirmed. However, the Supreme Court of California reversed Roy Allen Stewart’s (defendant) conviction because the record was silent on whether he had been advised of his rights. Stewart had dropped out of school in the sixth grade. The United States Supreme Court accepted these four cases to determine what kinds of custodial-interrogation procedures were required to adequately safeguard the Fifth Amendment right against self-incrimination. The Court held that without certain hallmark warnings regarding the right to remain silent and the right to counsel, statements made during custodial interrogation were inadmissible at trial.

#### Issue

Without certain hallmark warnings regarding the right to remain silent and the right to counsel, are statements made during custodial interrogation inadmissible at trial?

#### Holding and Reasoning (Warren, C.J.)

Yes. Without certain hallmark warnings regarding the right to remain silent and the right to counsel, statements made during custodial interrogation are inadmissible at trial. Custodial interrogation occurs if law-enforcement officers question a person who has been arrested and taken into custody, or otherwise deprived of freedom of action in any significant way. Custodial interrogation is inherently coercive. Cutting suspects off from contact with the outside world creates an environment ripe for intimidation. Acting within a closed, hostile environment, police officers can prey upon individual weaknesses at the expense of individual liberties. In each of the four cases, the risk of psychological intimidation was plain. Miranda suffered from mental illness and Stewart had dropped out of school in the sixth grade. Due to these concerns, the Constitution requires a number of procedural safeguards that relieve some of the pressure put upon people in custodial interrogation. Prior to any questioning while in custody, a person must be informed of the right to remain silent, and that anything said can be used as evidence of guilt. The arrestee must also be notified of the right to an attorney, and that if the arrestee can’t pay for an attorney, one will be provided for free. Any waiver of these rights must be voluntary. If a person refuses to be questioned at any point, law enforcement cannot continue the questioning. The fact that a person answers some questions doesn’t mean the person waives the right to consult with an attorney or to stop the interrogation at a later point. The statements of all four men were inadmissible because they were not informed of their rights. The convictions of Miranda, Vignera, and Westover are reversed, and the California Supreme Court’s reversal of Stewart’s conviction is affirmed.

#### Dissent (White, J.)

No Fifth Amendment jurisprudence supports the majority’s procedures. While it frequently falls to the Court to make new law, there is no logical basis for assuming that custodial interrogations are inherently coercive, or that the majority’s procedures would render the statements voluntary. Moreover, the majority’s procedures could weaken criminal-law enforcement.

#### Dissent (Harlan, J.)

The Court’s ruling redefines voluntariness in a way that is inconsistent with history and precedent. While interrogation may be unpleasant, the constitution does not prohibit government intrusion if probable cause or a warrant is present. The majority’s procedures discourage any kind of confession. Even if the Fifth Amendment applied to pretrial custodial interrogations, it hardly supported the majority’s strict procedures. Legislative reform could craft a better solution and would be supported by empirical data on the effect of any new procedures on law-enforcement practice.

**Key Terms:**

**Fifth Amendment** - An amendment added to the U.S. Constitution as part of the Bill of Rights that provides important protections from government actions, including a guarantee that no person will be required to answer for a capital crime unless first indicted by a grand jury; no one will suffer double jeopardy; no one must testify against himself or herself; no one will be deprived of life, liberty, or property without due process of law; and no property will be taken for public use without just compensation.

**Custodial Interrogation** - Questioning by law enforcement authorities of a suspect in a criminal investigation under circumstances in which the suspect is not free to terminate the questioning and leave at will or under circumstances that lead the suspect to believe that he is not free to leave at will.

# Escobedo v. Illinois

#### United States Supreme Court 378 U.S. 478 (1964)

#### Rule of Law

**When an investigation shifts from a general inquiry into an unsolved crime to a focus on a particular suspect, that suspect has been taken into police custody for questioning, the suspect has asked for and been denied his lawyer, and the police have not properly warned him of his right to remain silent, any confession made during the remainder of the interrogation is inadmissible.**

# Malloy v. Hogan

#### United States Supreme Court 378 U.S. 1 (1964)

#### Rule of Law

**In state criminal trials, wherever a question arises as to whether a confession is involuntary, the self-incrimination clause of the Fifth Amendment controls the issue.**

#### Facts

[Information not provided in casebook excerpt]

#### Issue

Does the self-incrimination clause of the Fifth Amendment control the issue of whether a confession is involuntary in state criminal trials?

#### Holding and Reasoning (Brennan, J.)

Yes. In state criminal trials, wherever a question arises as to whether a confession is incompetent, the self-incrimination clause of the Fifth Amendment controls the issue. The clause has always applied to federal criminal prosecutions under *Bram v. United States*, 168 U.S. 532 (1897), and the Court in this case applies it to state criminal prosecutions as well.

**Key Terms:**

**Involuntary Confession** - An admission of guilt by a criminal suspect that would not have been offered in the absence of coercion, inducement, or deceit.

# McNabb v. United States

#### United States Supreme Court 318 U.S. 332 (1943)

#### Rule of Law

**A confession obtained while the suspect is illegally detained is inadmissible in federal cases.**

#### Facts

The defendant was arrested, but not promptly taken before a magistrate for a preliminary hearing. During the prolonged detention, the defendant made incriminating statements. At trial in federal court, the defendant sought to have the statements excluded from evidence on account of the prolonged detention. The United States Supreme Court granted certiorari.

#### Issue

Is a confession obtained while the suspect is illegally detained admissible in federal cases?

#### Holding and Reasoning (Frankfurter, J.)

No. A confession obtained while the suspect is illegally detained is inadmissible in federal cases. This exclusionary rule is independent of the Constitution, but rather is derived from the Court’s supervisory powers. Importantly, the rule does not apply to state prosecutions because the Court’s power to overturn state convictions is limited to due process violations under the Fourteenth Amendment. In the present case, the defendant made the incriminating statements during the course of an illegally prolonged detention without a pretrial hearing before a magistrate. Accordingly, the statements are inadmissible.

**Key Terms:**

**Involuntary Confession** - An admission of guilt by a criminal suspect that would not have been offered in the absence of coercion, inducement, or deceit.

**Supervisory Power -** Ability of federal courts to administer procedural rules outside of the Constitution and established law.

**McNabb Mallory -** Rule A confession obtained while the suspect detained for an unreasonably long period of time between arrest and preliminary hearing is inadmissible.

# Mallory v. United States

#### United States Supreme Court 354 U.S. 449 (1957)

#### Rule of Law

**A confession obtained while the suspect is illegally detained is inadmissible in federal cases.**

#### Facts

The defendant was arrested, but held and interrogated for seven hours before taken before a magistrate for a preliminary hearing on probable cause. During the prolonged detention, the defendant confessed to the crime. At trial in federal court, the defendant sought to have the statements excluded from evidence on account of the prolonged detention. The United States Supreme Court granted certiorari.

#### Issue

Is a confession obtained while the suspect is illegally detained admissible in federal cases?

#### Holding and Reasoning (Frankfurter, J.)

No. A confession obtained while the suspect is illegally detained is inadmissible in federal cases. Rule 5(a) of the Federal Rules of Criminal Procedure requires that an arrestee be taken before a magistrate for a probable cause hearing “without unnecessary delay.” Police may not arrest a group of individuals together and then interrogate each one until they determine who they have probable cause to charge. In the case at bar, the defendant confessed after an unreasonable delay prior to his probable cause hearing. This delay constituted a violation of the Federal Rules of Criminal Procedure. Accordingly, the confession is inadmissible.

**Key Terms:**

**Involuntary Confession** - An admission of guilt by a criminal suspect that would not have been offered in the absence of coercion, inducement, or deceit.

**Supervisory Power -** Ability of federal courts to administer procedural rules outside of the Constitution and established law.

**McNabb Mallory -** Rule A confession obtained while the suspect detained for an unreasonably long period of time between arrest and preliminary hearing is inadmissible.

**People v. Donovan**

13 N.Y.2d 148

Court of Appeals of New York.

**The PEOPLE of the State of New York, Respondent,**

**v.**

**Peter DONOVAN and Harry Mencher, Appellants.**

Oct. 8, 1963.

**Synopsis**

The defendants were convicted of first degree murder. The County Court, Queens County, Albert H. Bosch, J., rendered judgments, and the defendants appealed. The Court of Appeals, Fuld, J., held that written confession taken from one defendant while he was being unlawfully detained in violation of prompt arraignment statute and after police had refused to allow his attorney to see or speak with him was inadmissible.

Judgments of conviction reversed and new trial ordered as to each defendant.

Burke, Van Voorhis and Foster, JJ., dissented.

# Griffin v. California

#### United States Supreme Court 380 U.S. 609 (1965)

#### Rule of Law

**It is a violation of the Fifth Amendment for the prosecution to comment on the defendant’s silence or for the trial judge to instruct the jury that the defendant’s silence can be evidence of guilt.**

#### Facts

Griffin (defendant) was convicted of first degree murder. He did not testify at his trial. During its closing, the prosecution repeatedly referred to Griffin’s failure to testify, implying that it indicated guilt. The judge instructed the jury that Griffin had a constitutional right not to testify. However, pursuant to a California statute, the judge told the jury that it could infer as true any evidence or facts that Griffin could have reasonably been expected to deny or explain. The state supreme court affirmed the conviction. The United States Supreme Court granted certiorari.

#### Issue

Is the Fifth Amendment violated where a prosecutor indicates to the jury that the defendant’s failure to testify is an indication of his guilt and where a trial judge tells the jury that it may take a defendant’s failure to deny or explain a piece of evidence as tending to indicate the truth of that evidence?

#### Holding and Reasoning (Douglas, J.)

Yes. The Fifth Amendment, incorporated to the states through the Fourteenth Amendment, forbids the prosecution from commenting on a defendant’s failure to testify and forbids a judge from instructing the jury that such silence is evidence of guilt. A defendant has the right not to testify and to rely on the presumption of innocence. Furthermore, a defendant may decide not to testify for a number of reasons, from nervousness to embarrassment, or the desire to keep prior convictions out of evidence. Commenting on the defendant’s failure to testify imposes an unconstitutional penalty on the defendant for exercising his Fifth Amendment right.

#### Concurrence (Harlan, J.)

In light of current jurisprudence, the Court’s decision today is correct. However, hopefully the Court will soon overrule the decision in *Malloy v. Hogan*, 378 U.S. 1 (1964), that the Fifth Amendment is incorporated to the states through the Fourteenth Amendment.

#### Dissent (Stewart, J.)

The Constitution demands that a defendant not be compelled to testify against himself. The California statute allowing the judge to instruct the jury on the defendant’s failure to testify does not act as an unconstitutional compulsion and actually protects the defendant. The jury will notice that the defendant has not testified and it will naturally draw conclusions about what this means. Without a limiting instruction, the jury may draw inferences that are far too broad.

**Key Terms:**

**Fifth Amendment** - An amendment added to the U.S. Constitution as part of the Bill of Rights that provides important protections from government actions, including a guarantee that no person will be required to answer for a capital crime unless first indicted by a grand jury; no one will suffer double jeopardy; no one must testify against himself or herself; no one will be deprived of life, liberty, or property without due process of law; and no property will be taken for public use without just compensation.

# Crooker v. California

#### United States Supreme Court 357 U.S. 433 (1958)

#### Rule of Law

**Police do not violate a suspect’s due process rights per se by continuing to interrogate him after denying his specific request to contact his lawyer.**

#### Facts

Crooker (defendant) was arrested for murder and told police that he was fully aware of his right to remain silent. He had been studying criminal law at law school. He asked permission to contact his lawyer during interrogation, but the police denied this request. Crooker eventually confessed to the murder. He was convicted. He appealed on the grounds that his due process rights were violated when the police refused him the opportunity to contact his lawyer. As a result, he contended, the trial court should not have admitted the confession into evidence. The United States Supreme Court granted certiorari.

#### Issue

Do police violate a suspect’s due process rights by continuing to interrogate him after denying his specific request to contact his lawyer?

#### Holding and Reasoning (Clark, J.)

No. Police do not violate a suspect’s due process rights per se by continuing to interrogate him after denying his specific request to contact his lawyer. If the Court held that due process rights are violated in this way, then *all* police questioning would be prohibited until they gave the suspect the opportunity to call his lawyer. This rule would be entirely too rigid and would hamstring law enforcement, preventing them from obtaining information from suspects. Due process is a more fluid concept and does not require such a rule. Accordingly, in this case, although Crooker asked to call his lawyer, the fact that the police did not stop interrogating him immediately does not render the subsequent confession inadmissible. The conviction is affirmed.

#### Dissent (Douglas, J.)

Due process requires that an accused be given the right to counsel at any and all times after arrest. The right to counsel pretrial is often necessary to effectuate the right to be heard at the trial.

**Key Terms:**

**Due Process -** A constitutional guarantee that a law shall not be unreasonable, arbitrary, or capricious and that individuals will be given notice of legal proceedings conducted fairly with an opportunity for an individual to be heard before the government may impose sanctions on one’s life, liberty, or property.

**Right to Counsel -** Sixth Amendment guarantee that a defendant is entitled to be represented by an attorney during a criminal prosecution.

# Betts v. Brady

#### United States Supreme Court 316 U.S. 455 (1942)

#### Rule of Law

**Under the Due Process Clause of the Fourteenth Amendment, states are not required to appoint counsel for a criminal defendant unable to secure her own in all cases, provided that the trial is fundamentally fair.**

#### Facts

Betts (defendant) was charged with robbery. Betts could not afford counsel and requested that the state of Maryland appoint him an attorney. This request was denied, because the state only appointed counsel in rape and murder cases. Betts elected to have a non-jury trial. At trial, Betts chose not to testify. Betts did, however, call witnesses who testified that he was somewhere else when the robbery occurred. The main issue at trial was the veracity of the witnesses for the defense. Betts was convicted and sentenced to eight years in prison. Betts twice petitioned for habeas corpus, alleging the denial of his right to counsel violated the Fourteenth Amendment. Each time, the writ was granted, but relief was denied. Betts petitioned the United States Supreme Court for a writ of certiorari, which was granted.

#### Issue

Must a state provide counsel for any indigent defendant, regardless of the crime charged?

#### Holding and Reasoning (Roberts, J.)

No. At the state level, due process does not necessarily require that the appointment of counsel for any defendant that cannot obtain counsel on her own, regardless of the crime charged and the nature of the trial. The Due Process Clause of the Fourteenth Amendment does not specifically incorporate every right in the Sixth Amendment against the states. Nevertheless, a state’s denial of one of the guarantees contained in the first eight amendments may constitute a violation of the Fourteenth Amendment. In any given case, the totality of the circumstances must be judged to determine whether due process was violated. In *Powell v. Alabam*a, 287 U.S. 45 (1932), the Court held that “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." That case, however, involved a state’s refusal to appoint counsel, which was required by its own statute, to “ignorant and friendless” black youths for a capital offense. In English common law, prisoners were denied the right to consult with counsel for certain offenses. American colonies did away with these restrictions, usually by statute rather than constitutional provision. Only later did some state legislatures begin affirmatively requiring the appointment of counsel for defendants unable to secure their own, and even then, typically only in certain cases. This suggests that the right to have court-appointed counsel has not attained the status of a fundamental right. Thus, the Fourteenth Amendment’s Due Process Clause does not incorporate the right to appointed counsel against the states. In this case, Betts asks for a hard-and-fast rule that a state’s refusal to appoint counsel in every case constitutes a denial of the right to due process. In Maryland, however, defendants typically waive the right to a jury, and bench trials are more informal, with more oversight by the judge. Betts waived a jury trial, and the only issue is whether his alibi witnesses were believable. Betts was an adult, of ordinary intelligence, and had previously been through the court system. It does not appear that Betts was at a serious disadvantage due to his lack of counsel or that his trial offended “fundamental ideas of fairness and right.” Accordingly, Betts was afforded due process, even without appointment of counsel. The conviction is affirmed.

#### Dissent (Black, J.)

Although the majority does not agree, the Fourteenth Amendment made the Sixth Amendment applicable to the states. The right to assistance of counsel in a serious criminal trial is “fundamental.” *Powell*, *supra*. Even smart, educated laymen are at a disadvantage without an attorney. *Id*. It is impossible to determine whether a person is innocent if she was unable to adequately present her defense. Denying the right to counsel on the basis of poverty “shock[s]…the universal sense of justice” and denies equal justice under the law. Further, it is not necessary to hold that states must always provide counsel to indigent defendants in every case to overturn Betts conviction. Betts was poor and uneducated and on trial for the serious offense of robbery. Under these circumstances, the state court’s denial of Betts’s right to counsel violated his due process.

**Key Terms:**

**Fourteenth Amendment –** Provides that all persons born or naturalized in the United States are U.S. citizens. Also provides that no state shall: (1) abridge the privileges or immunities of a U.S. citizen; (2) deprive any person of life, liberty, or property, without due process of law; or (3) deny equal protection of the laws to anyone within its jurisdiction.

**Fourteenth Amendment Due Process** **Clause** - The provision set forth at Amendment XIV, Section 1 of the United States Constitution prohibiting states from depriving any person of life, liberty, or property by means that are arbitrary or fundamentally unfair.

**Right to Counsel -** Sixth Amendment guarantee that a defendant is entitled to be represented by an attorney during a criminal prosecution.

# Gideon v. Wainwright

#### United States Supreme Court 372 U.S. 335 (1963)

#### Rule of Law

**The Fourteenth Amendment incorporates the Sixth Amendment right to counsel to the states.**

# Douglas v. California

#### United States Supreme Court 372 U.S. 353 (1963)

#### Rule of Law

**An indigent defendant has a right to have counsel appointed during the defendant's first appeal as a matter of right.**

#### Facts

Bennie Meyes and William Douglas (defendants) were charged with 13 different felonies. They were both indigent and were represented by one public defender. The attorney requested a continuance when the trial began, claiming he was not as prepared as he should have been given the number of charges against his clients. He also claimed there was a conflict of interest between his clients, and the court should appoint separate counsel for each of them. The motion was denied. Meyes and Douglas then dismissed their attorney and renewed the motions for a continuance and separate counsel. The motions were again denied. Meyes and Douglas were jointly tried and convicted of all 13 felonies. They each appealed as of right. Both Meyes and Douglas requested the assistance of counsel on appeal, but their requests were denied. The court of appeals affirmed their convictions. They then petitioned the state supreme court for discretionary review, but their petitions were denied. The United States Supreme Court granted certiorari.

#### Issue

Does an indigent defendant have a right to have counsel appointed during the defendant's first appeal as a matter of right?

#### Holding and Reasoning (Douglas, J.)

Yes. An indigent defendant has a right to have counsel appointed during the defendant's first appeal as a matter of right. Denying an indigent defendant the right to counsel during an appeal as of right is a violation of the Fourteenth Amendment. A rich defendant can effectively appeal his case with the help of counsel. He can present his case to the court, and the court can make a decision based on the merits. A poor defendant, on the other hand, will be prevented from effectively exercising his right to appeal and instead only has the right to a “meaningless ritual.” Here, therefore, Meyes and Douglas should have been appointed counsel for their appeal as of right. The judgment is vacated, and the case is remanded for further proceedings.

#### Dissent (Harlan, J.)

The Court’s opinion seems to rely on both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment. However, neither clause supports the Court’s holding that defendants have a right to counsel during appeals as of right. First, the equal-protection analysis is not appropriate here. Although states cannot discriminate between the rich and the poor, they may adopt laws of general applicability that affect the poor more than the rich. In fact, most state policies that require citizens to make payments, from instate tuition to attend state universities to uniform sales taxes, hurt the poor more than the rich. The Equal Protection Clause does not require states to place the poor and the rich on equal levels. In addition, due process does not require that indigent defendants be appointed counsel during an appeal as of right. There is nothing in the record that indicates that the state system has resulted in injustice. Furthermore, appellate procedures are different from trial where the right to counsel is absolute. First, because appellate review is not required by the constitution, the question regarding state appellate procedure is whether it is so arbitrary and unreasonable to require invalidation. Second, far fewer legal questions arise on appeal than at trial. Finally, an appeal as of right guarantees the defendant a complete consideration of his case, whether or not he has an attorney present.

**Key Terms:**

**Fourteenth Amendment Due Process** **Clause** - The provision set forth at Amendment XIV, Section 1 of the United States Constitution prohibiting states from depriving any person of life, liberty, or property by means that are arbitrary or fundamentally unfair.

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

# Johnson v. Zerbst

#### United States Supreme Court 304 U.S. 458 (1938)

#### Rule of Law

**The Sixth Amendment guarantees the right of a criminal defendant to a lawyer's assistance, unless the defendant knowingly and intelligently waives that right.**

#### Facts

The federal government prosecuted Johnson (plaintiff) for counterfeiting. Trial in the United States District Court for the Eastern District of South Carolina commenced after Johnson told the judge he was willing to proceed without a lawyer. Johnson was convicted and sent to prison, where he was deprived of legal representation to help in filing an appeal; consequently, he missed the appeal deadline. Johnson then petitioned the district court to issue a writ of habeas corpus to Zerbst (defendant), the prison warden, on the grounds Johnson was tried without the assistance of counsel guaranteed him by the Sixth Amendment to the United States Constitution. The district court did not determine whether Johnson waived his right to counsel. The court dismissed Johnson's petition, ruling that Johnson's failure to file a timely appeal, whether from ignorance or negligence, was insufficient to give the court habeas corpus jurisdiction to reopen Johnson's case. Johnson appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed the district court's ruling. The United States Supreme Court granted certiorari to hear Johnson's appeal.

#### Issue

Does the Sixth Amendment guarantee the right of a criminal defendant to a lawyer's assistance, unless the defendant knowingly and intelligently waives that right?

#### Holding and Reasoning (Black, J.)

Yes. The Sixth Amendment guarantees the right of a criminal defendant to a lawyer's assistance, unless the defendant knowingly and intelligently waives that right. The Sixth Amendment recognizes that a lay defendant may lack the professional skills needed to conduct an effective legal defense. Without a lawyer to represent the defendant, the court loses its jurisdiction to try the defendant, unless the defendant waives representation. It is up to the trial judge to determine whether the defendant's waiver is knowing and intelligent, given all the facts and circumstances surrounding the case, including the defendant's background, experience, and conduct. On appeal, if the trial record does not show that the trial judge made this determination, the appellate court itself must hear evidence as to whether the defendant's waiver of counsel was competent. Here, Johnson should have challenged his conviction by filing a timely appeal. Having missed the filing deadline, Johnson petitioned for habeas corpus. Ordinarily, habeas corpus is an inappropriate procedure for challenging a trial court's errors. However, if Johnson had no lawyer and did not waive his right to counsel, the trial court had no jurisdiction to try him. If Johnson's failure to file a timely appeal was due to his lack of access to a lawyer, then habeas corpus proceedings are the only remaining and effective way to protect Johnson's Sixth Amendment right. Under these circumstances, the district court erred in ruling it had no habeas corpus jurisdiction. The court of appeals judgment affirming that ruling is reversed. The case is remanded for the district court to determine, from the trial record or its own inquiry, whether Johnson knowingly and intelligently waived his right to counsel.

#### Dissent (Butler, J.)

The record shows that Johnson waived his right to counsel. Therefore, the trial court had jurisdiction to try Johnson, and the court of appeals judgment upholding the district court's dismissal of Johnson's petition for a writ of habeas corpus should be affirmed.

#### Dissent (McReynolds, J.)

The court of appeals ruling upholding the district court's dismissal of Johnson's petition for a writ of habeas corpus should be affirmed.

**Key Terms:**

**Remand -** Returning a case back to the previous court, such as the trial court or the state court, for some additional action.

**Sixth Amendment Right to Counsel -** Right of a person accused of a crime to have the help of an attorney throughout any criminal prosecution.

**Carnely v. Cochran**

82 S.Ct. 884

Supreme Court of the United States

**Willard CARNLEY, Petitioner,**

**v.**

**H. G. COCHRAN, Jr., Director of the Division of Corrections, State of Florida.**

No. 158.

Argued Feb. 20 and 21, 1962.Decided April 30, 1962.

**Synopsis**

Habeas corpus proceeding seeking release on ground that defendant's conviction without assistance of counsel was unconstitutional. The Florida Supreme Court, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ie4bcd7550c6d11d98220e6fa99ecd085&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[123 So.2d 249,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1960128693&pubNum=735&originatingDoc=Id8f9d7d99c1c11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) discharged the writ. On certiorari, the United States Supreme Court, Mr. Justice Brennan, held that where assistance of counsel would have materially assisted petitioner by invoking in his behalf special provisions of law under which he was prosecuted, and court, in attempting to assist petitioner, made some significant omissions, trial without assistance of counsel denied a right guaranteed petitioner by the Fourteenth Amendment and right was not intelligently and understandingly waived when there was no guilty plea and no showing of an affirmative waiver.

Reversed and remanded.

**Rogers v. United States**

71 S.Ct. 438

Supreme Court of the **United** **States**

**ROGERS**

**v.**

**UNITED STATES.**

No. 20.

Argued Nov. 7, 1950.Decided Feb. 26, **1951**.Rehearing Denied April 16, **1951**.

See [341 **U.S**. 912, 71 S.Ct. 619](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1951200368&pubNum=708&originatingDoc=I0a41eff29bf011d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

**Synopsis**

Contempt proceedings by the **United** **States** of America against Jane **Rogers** and others based on refusal to answer questions propounded by grand jury and by the court.

 The **United** **States** Court of Appeals for the Tenth Circuit, Huxman, Circuit Judge, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I3b97215f8e4811d9a707f4371c9c34f0&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=6bd4c89372934ebfbe1c1f84cebc07bd&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[179 F.2d 559,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1950118885&pubNum=350&originatingDoc=I0a41eff29bf011d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed the judgment of the **United** **States** District Court for the District of Colorado, J. Foster Symes, District Judge, in so far as it found named defendant and others guilty of contempt, and named defendant brought certiorari. The Supreme Court, Mr. Chief Justice Vinson, held that since named defendant had testified before grand jury that she had been treasurer of Communist Party until stated date at which time she had turned over books and records of party to another person, she could not justify refusal to answer further inquiry as to identity of person to whom she had delivered the books on ground of privilege against self-incrimination, since answer to such inquiry would not further incriminate her.

Affirmed.

Mr. Justice Black, Mr. Justice Frankfurter, and Mr. Justice Douglas, dissented.

**Chalmers v. H.M. Advocate**

**Chalmers v HM Advocate: HCJ 1954**

Where a defendant failed to prevent a statement being admitted in evidence, and sought to be able to challenge it again before the jury, this was a situation where logic must yield, since the jury cannot be asked to accept as an item of evidence a statement made by an accused, while being prevented from considering the circumstances under which it was made. So the jury must be able to take account of those circumstances in deciding what weight and value to attach to the confession.   
The law must reconcile two principles: (1) that no accused person is bound to incriminate himself, and (2) that what an accused person says is admissible evidence against him, provided he says it freely and voluntarily.   
Lord Justice Clerk Thomson   
1954 JC 66   
Scotland   
**Cited by:**   
**Cited** – [Regina v Mushtaq](https://swarb.co.uk/regina-v-mushtaq-hl-21-apr-2005/) HL 21-Apr-2005    
The defendant was convicted of fraud charges. He sought to have excluded statements made in interview on the basis that they had been obtained by oppressive behaviour by the police. His wife was very seriously ill in hospital and he had made the . .  
[2005] UKHL 25, Times 28-Apr-05, [2005] 1 WLR 1513  
**Cited** – [Her Majesty’s Advocate v P](https://swarb.co.uk/her-majestys-advocate-v-p-sc-6-oct-2011/) SC 6-Oct-2011    
(Scotland) The appellant had been interviewed by police without being offered access to a solicitor. He complained that the interview and information obtained only through it had been used to found the prosecution.   
Held: The admission of the . .  
[2011] UKSC 44, 2012 SC (UKSC) 108

These lists may be incomplete.

# Watts v. Indiana

#### United States Supreme Court 338 U.S. 49 (1949)

#### Rule of Law

**Police procedures that elicit a confession by subjecting a defendant to physical or emotional distress violate constitutional due process requirements.**

#### Facts

Watts (defendant) was arrested on suspicion of criminal assault. After Watts’ arrest, a dead body was discovered. The deceased appeared to have been the victim of criminal assault. Police suspected Watts was the perpetrator of the fatal assault. Watts was transported from the county jail to State Police Headquarters. For the first two days, Watts was held in solitary confinement and interrogated by officers rotating in shifts. The schedule of interrogation each day ran into the early hours of the morning. Watts was interrogated in rotating shifts for five consecutive days. On three of those days, officers put Watts in a car and drove him around town for several hours. He was given a reprieve from interrogation on Sunday. Interrogation resumed on Monday and continued into Tuesday morning, at which time Watts confessed to the killing. Watts did not have the assistance of legal counsel at any time during the interrogations. Watts was not advised of his constitutional rights and was not afforded a preliminary hearing. Watts was convicted and the state courts upheld the judgment on appeal. Watts appealed to the United States Supreme Court and his case was reviewed in conjunction with similar cases from two different states.

#### Issue

Do police procedures that elicit a confession by subjecting a defendant to physical or emotional distress violate constitutional due process requirements?

#### Holding and Reasoning (Frankfurter, J.)

Yes. Police procedures that elicit a confession to a crime by subjecting a defendant to physical or emotional distress violate constitutional due process requirements. On review of criminal convictions, this Court will generally not disturb the findings of fact made by the state court. Conclusions drawn by the state court from undisputed facts are subject to review when the facts supporting the court’s conclusion implicate a defendant’s constitutional rights. We base our review upon the state’s findings of fact about events leading to a purportedly coerced confession. We do not consider any disputed issues regarding the state’s findings of fact. The undisputed facts demonstrate that Watts was subjected to repeated and nearly continuous cycles of interrogation without the assistance of counsel, and that Watts was deprived of sleep and adequate food. Watts’ confession was clearly the product of duress. Whether the instrument of duress is physical distress or emotional distress makes no difference when the extent of coercion inevitably leads the defendant to conclude that confession will be in his best interest. The American criminal justice system is an accusatorial system. The American system is specifically designed to repudiate the inquisitorial system employed by the monarchy in colonial times. Under the accusatorial system, the state bears the burden of proving criminal conduct through independent investigation and evidence. The accusatorial system mandates a prompt hearing and access to legal counsel. Deprivation of the safeguards of the accusatorial system amounts to a violation of a defendant’s due process rights. The state court judgment is reversed.

#### Concurrence (Douglas, J.)

The conditions of Watts’ custody clearly amount to inquisition. Watts was held under the exclusive control of the police until he succumbed to the pressure of coercion. Only after he capitulated to the pressure was Watts afforded a hearing and the advice of counsel. We should declare unconstitutional any confession made during a period of illegal custody.

#### Concurrence (Jackson, J.)

I concur with the decision in Watts’ case, but dissent with respect to the decision in the two companion cases. In each of the three cases, the defendant offered a confession while in police custody without the assistance of legal counsel. In all three cases, evidence considered by the trial court tended to validate the truth of the confessions. To adopt the position of Justice Douglas would invalidate any confession offered prior to a hearing and consultation with counsel, even in cases in which the confession was offered without any form of physical or psychological coercion. Given that any reasonably competent attorney will immediately advise his client to offer no information to police, this position would deprive police of their best opportunity to solve crimes. In light of the fact that two-thirds of murder cases go unsolved, the implications of the proposed rule are significant. A confession procured through threats or violence should not be held against a defendant, but a confession freely given is subject to confirmation through the adversarial process of trial. A confession that is not supported by additional evidence will seldom lead to conviction. In all of these cases, the trial court found evidence sufficient to validate the defendants’ confessions. That evidence was reviewed by the state appellate courts on the same limited record presented to this Court. Unless we intend to hold that the state has no right to interrogate prisoners outside the adversarial context of the judicial system, we should defer to the factual findings of the state courts and subject to review only the state courts’ application of appropriate standards of law.

#### Concurrence (Black, J.)

I concur based on the precedent set forth in *Chambers v. Florida*, 309 U.S. 227 (1940), and *Ashcraft v. Tennessee*, 322 U.S 143 (1944).

**Key Terms:**

**Due Process -** A constitutional guarantee that a law shall not be unreasonable, arbitrary, or capricious and that individuals will be given notice of legal proceedings conducted fairly with an opportunity for an individual to be heard before the government may impose sanctions on one’s life, liberty, or property

# Mapp v. Ohio

#### United States Supreme Court 367 U.S. 643 (1961)

#### Rule of Law

**Evidence obtained through an unreasonable search and seizure in violation of the Fourth Amendment is inadmissible in state criminal proceedings.**

#### Facts

Police got a tip that a suspect wanted for questioning related to a bombing was hiding in Dollree Mapp’s (defendant) home. Officers forcibly entered the home without Mapp’s consent. When Mapp demanded to see the warrant, police showed her a piece of paper purported to be a “warrant.” However, when Mapp took the “warrant,” police engaged in a physical altercation to retrieve it from her. After searching the home, the officers found and seized books and photos that were introduced as evidence in Mapp’s criminal trial for possessing lewd and obscene materials in violation of Ohio state law. Mapp was convicted, even though there was no evidence that the police ever obtained a warrant to search Mapp’s home. The Ohio Supreme Court sustained the conviction, even though it concluded there was a reasonable argument for reversal due to the unjust manner in which the evidence was obtained. Mapp appealed to the United States Supreme Court, claiming that her conviction was the product of an unreasonable search and seizure.

#### Issue

Is evidence obtained through unreasonable search and seizure admissible in state court for state offenses?

#### Holding and Reasoning (Clark, J.)

No. Evidence obtained illegally by state officials is inadmissible in state court. When the government invades a person’s privacy in violation of the Fourth and Fifth Amendments to the Constitution, any evidence obtained by that invasion is unconstitutional. *Boyd v. United States*, 116 U.S. 616 (1886). As a result, in *Weeks v. United States*, 232 U.S. 383 (1914), this court held that evidence derived from an unreasonable search and seizure was inadmissible in federal courts, because excluding such evidence was the only way to vindicate the rights guaranteed by the Fourth Amendment. Nevertheless, in *Wolf v. Colorado*, 338 U.S. 25 (1949), the Court concluded that despite the fact that the Fourth Amendment was incorporated against the states by the Due Process Clause of the Fourteenth Amendment, the exclusionary principle was “not an essential ingredient of the right.” Thus, states were not prohibited from admitting evidence derived from an unreasonable search and seizure. The factual underpinnings of that decision have changed. Since then, many states have adopted laws forbidding the introduction of illegally obtained evidence in criminal proceedings, and more than half have now adopted some form of the *Weeks* rule. This development is the result of the growing understanding that only the exclusion of illegally obtained evidence provides the necessary incentive to state officials to refrain from unreasonable searches and seizures; other remedies are simply ineffective at securing compliance. The Court was repeatedly asked to overturn *Wolf*, *supra*, but elected to wait until the states had the opportunity to decide for themselves. *Irvine v. California*, 347 U.S. 128 (1954). The time has now come to “close the only courtroom door remaining open to evidence secured by official lawlessness in flagrant abuse of that basic right.” The right to privacy is just as important as any other fundamental right, and there is no reason it should be afforded less protection in state courts. Therefore, evidence obtained through unreasonable search and seizure is inadmissible in state courts. Accordingly, the conviction is reversed, and the case is remanded back to the trial court.

#### Concurrence (Douglas, J.)

The Ohio Supreme Court sustained Mapp's conviction even though it was based on evidence obtained in an unlawful search. The evidence would not have been admissible in a federal prosecution, but it was admissible in the state prosecution because it was not taken from Mapp's person through the use of brutal or offensive force. It is important to address the inconsistent application of the exclusionary rule between the state and federal courts.

#### Concurrence (Black, J.)

The Fourth Amendment prohibition of unreasonable searches and seizures does not specifically require exclusion of illegally obtained evidence. Nevertheless, when the Fourth Amendment’s requirements are “considered together with” the Fifth Amendment right against self-incrimination, a constitutional requirement barring the use of illegally seized evidence in criminal trials emerges.

#### Dissent (Harlan, J.)

The Court exceeds its authority and violates the doctrine of stare decisis when it holds that the Fourteenth Amendment incorporates the Fourth Amendment and the exclusionary rule to the states. The real issue in this case was whether Ohio’s obscenity law violated the guarantees of free expression contained in the First Amendment and incorporated against the states by the Fourteenth. It was inappropriate for the majority to “reach…out” and overturn *Wolf*, and the Court did not need to do so to do justice in this case.

The ***Mapp*** decision **extended** the exclusionary rule to state courts.

**Key Terms:**

**Fourteenth Amendment Due Process** **Clause** - The provision set forth at Amendment XIV, Section 1 of the United States Constitution prohibiting states from depriving any person of life, liberty, or property by means that are arbitrary or fundamentally unfair.

**Stare Decisis** - A legal principle under which legal precedents are adhered to and predictability is garnered.

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**State v. Philips, 30 S.W.3d 372 (Tenn. Crim. App. 2000)**

**\*\*STATE v. PHILIPS\*\***

#### Rule of Law

**Criminal Law**

**Findings of fact made by trial court at hearing on motion to suppress are binding upon Court of Criminal Appeals unless the evidence contained in record preponderates against them.**

**Criminal Law**

**Court of Criminal Appeals is not bound by trial court's conclusions of law.**

**Criminal Law**

**Defendant was not “in custody” for Miranda purposes when he gave his pretrial statement to investigators from “child protective team,” where defendant came voluntarily to Department of Human Services for interview and was never deprived of freedom of movement to a degree associated with a formal arrest.**

**Criminal Law**

**Non-custodial interrogation must be voluntary to be admissible.**[**U.S.C.A. Const.Amend. 5**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDV&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**;**[**Const. Art. 1, § 9**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S9&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Criminal Law**

**Confessions that are “involuntary,” that is, the product of coercion, whether it be physical or psychological, are not admissible.**[**U.S.C.A. Const.Amend. 5**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDV&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**;**[**Const. Art. 1, § 9**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S9&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Criminal Law**

**Test of voluntariness of confession under state privilege against self-incrimination is broader and more protective of individual rights than test of voluntariness under federal privilege against self-incrimination.**[**U.S.C.A. Const.Amend. 5**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDV&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**;**[**Const. Art. 1, § 9**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S9&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Criminal Law**

**To determine voluntariness of confession, court must examine particular circumstances of each case.**[**U.S.C.A. Const.Amend. 5**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDV&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**;**[**Const. Art. 1, § 9**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S9&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))

**Criminal Law**

**Coercive police activity is a necessary prerequisite to find a confession involuntary.**[**U.S.C.A. Const.Amend. 5**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDV&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**;**[**Const. Art. 1, § 9**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S9&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Criminal Law**

**Crucial question for determining voluntariness of confession is whether the behavior of state officials was such as to overbear defendant's will to resist and bring about confess**

**Criminal Law**

**Question of voluntariness of confession must be answered with complete disregard of whether or not the accused was truthful in the statement.**[**U.S.C.A. Const.Amend. 5**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDV&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**;**[**Const. Art. 1, § 9**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S9&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Criminal Law**

**Defendant's noncustodial pretrial statement to investigators from “child protective team” was involuntary, where interrogation included: (1) misrepresentations by investigator, (2) numerous steadfast denials by defendant, (3) statements that law enforcement officials would be involved if defendant did not confess, and (4) repeated promises of treatment for defendant and his stepdaughter only if he fully confessed.**[**U.S.C.A. Const.Amend. 5**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDV&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**;**[**Const. Art. 1, § 9**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S9&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

30 S.W.3d 372

Court of Criminal Appeals of **Tennessee**,

at Knoxville.

**STATE of Tennessee, Appellant,**

**v.**

**Daniel PHILLIPS, Jr., Appellee.**

March 31, **2000**.No Permission to Appeal Appliedfor to the Supreme Court.

**Synopsis**

Defendant was indicted for child rape. The Anderson County Criminal Court, [James B. Scott](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0259379201&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I4001c6f4e7b711d98ac8f235252e36df), J., suppressed defendant's pretrial statement to investigators from “child protective team.” **State** appealed. The Court of Criminal Appeals, Riley, J., held that defendant's statement was involuntary.

Affirmed.

***OPINION***

[JOE G. RILEY](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0210144501&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I4001c6f4e7b711d98ac8f235252e36df), Judge.

The **State** of **Tennessee** appeals the order of the Anderson County Criminal Court suppressing the pretrial statement of the defendant who was indicted on two counts of child rape. The **state** appeals as of right, pursuant to [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=NF078AD8003A511DCA094A3249C637898&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=8542b4852fd14a19a623b47267e72f3d&Rank=3&RuleBookModeDisplay=False&contextData=(sc.Search))[Tenn.R.App.P. 3(c)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1008880&cite=TNRRAPR3&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), since it alleges the substantive effect of the suppression is dismissal of the indictment. Finding no error in the trial court's suppression of the pretrial statement, we **AFFIRM**the judgment of the trial court.

***PROCEDURAL HISTORY***

This case has followed a very unique procedural trail.

 After the trial court ordered that the pretrial statement of the defendant be suppressed, the **state** properly and timely sought from the trial court an interlocutory appeal pursuant to [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=NC495783035A711E78795AC032837B7FD&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=8542b4852fd14a19a623b47267e72f3d&Rank=3&RuleBookModeDisplay=False&contextData=(sc.Search))[Tenn.R.App.P. 9](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1008880&cite=TNRRAPR9&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). At the hearing, the prosecutor indicated the **state** could seek either a [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=NC495783035A711E78795AC032837B7FD&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=8542b4852fd14a19a623b47267e72f3d&Rank=3&RuleBookModeDisplay=False&contextData=(sc.Search))[**Tenn**.R.App.P. 9](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1008880&cite=TNRRAPR9&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) interlocutory appeal or a [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=NF078AD8003A511DCA094A3249C637898&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=8542b4852fd14a19a623b47267e72f3d&Rank=3&RuleBookModeDisplay=False&contextData=(sc.Search))[Tenn.R.App.P. 3](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1008880&cite=TNRRAPR3&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) appeal as of right. The prosecutor requested a [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=NC495783035A711E78795AC032837B7FD&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=8542b4852fd14a19a623b47267e72f3d&Rank=3&RuleBookModeDisplay=False&contextData=(sc.Search))[Tenn.R.App.P. 9](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1008880&cite=TNRRAPR9&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) interlocutory appeal since this would “speed it along.” Upon being reminded by the trial court that a [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=NF078AD8003A511DCA094A3249C637898&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=8542b4852fd14a19a623b47267e72f3d&Rank=3&RuleBookModeDisplay=False&contextData=(sc.Search))[Tenn.R.App.P. 3](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1008880&cite=TNRRAPR3&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) appeal is only available when the ruling is “tantamount to dismissal,” the prosecutor responded, “We can't prosecute this case without the statement.”

Thereafter, the trial court denied the [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=NC495783035A711E78795AC032837B7FD&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=8542b4852fd14a19a623b47267e72f3d&Rank=3&RuleBookModeDisplay=False&contextData=(sc.Search))[Tenn.R.App.P. 9](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1008880&cite=TNRRAPR9&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) interlocutory appeal; the **state** did not seek a [Tenn.R.App.P. 10](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1008880&cite=TNRRAPR10&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) extraordinary appeal; and the **state** filed a [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=NF078AD8003A511DCA094A3249C637898&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=8542b4852fd14a19a623b47267e72f3d&Rank=3&RuleBookModeDisplay=False&contextData=(sc.Search))[Tenn.R.App.P. 3](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1008880&cite=TNRRAPR3&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) appeal as of right **stating** in its notice that the suppression of the pretrial statement “is the equivalent of dismissing the case.”

By seeking a [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=NC495783035A711E78795AC032837B7FD&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=8542b4852fd14a19a623b47267e72f3d&Rank=3&RuleBookModeDisplay=False&contextData=(sc.Search))[Tenn.R.App.P. 9](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1008880&cite=TNRRAPR9&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) interlocutory appeal from the trial court, the **state** did that which should be done if the **state** desires relief from an order suppressing a confession. If a trial court denies a [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=NC495783035A711E78795AC032837B7FD&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=8542b4852fd14a19a623b47267e72f3d&Rank=3&RuleBookModeDisplay=False&contextData=(sc.Search))[Tenn.R.App.P. 9](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1008880&cite=TNRRAPR9&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))application relating to the suppression of a confession, the **state** should ordinarily consider a [Tenn.R.App.P. 10](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1008880&cite=TNRRAPR10&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))extraordinary appeal if proper grounds exist. In most instances the suppression of a defendant's pretrial statement would not preclude further prosecution and would not have the substantive effect of the dismissal of an indictment. Although the grounds for granting a [Tenn.R.App.P. 10](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1008880&cite=TNRRAPR10&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) extraordinary appeal are limited, a [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=NF078AD8003A511DCA094A3249C637898&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=8542b4852fd14a19a623b47267e72f3d&Rank=3&RuleBookModeDisplay=False&contextData=(sc.Search))[Tenn.R.App.P. 3](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1008880&cite=TNRRAPR3&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) appeal by the **state** seeking relief from suppression of a confession can only be sought where the substantive effect of the ruling results in a dismissal of the indictment. Since the **state** can ordinarily proceed with prosecution despite the suppression, the **state** should not seek a [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=NF078AD8003A511DCA094A3249C637898&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=8542b4852fd14a19a623b47267e72f3d&Rank=3&RuleBookModeDisplay=False&contextData=(sc.Search))[Tenn.R.App.P. 3](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1008880&cite=TNRRAPR3&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) appeal in such situations.[1](https://1.next.westlaw.com/Document/I4001c6f4e7b711d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad604ab00000177656e8a518d11a80c%3FNav%3DCASE%26fragmentIdentifier%3DI4001c6f4e7b711d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=2fad5caee4ae2bf71b2b7c480859311a&list=CASE&rank=3&sessionScopeId=633aad1840c732d9b42d12cc81666fc849e8be83b58e4d92e4dcc3368bffe23e&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00112000089184)

In the case at bar, the **state** has expressly represented to the trial court and this court that it cannot prosecute without the defendant's pretrial statement.[2](https://1.next.westlaw.com/Document/I4001c6f4e7b711d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad604ab00000177656e8a518d11a80c%3FNav%3DCASE%26fragmentIdentifier%3DI4001c6f4e7b711d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=2fad5caee4ae2bf71b2b7c480859311a&list=CASE&rank=3&sessionScopeId=633aad1840c732d9b42d12cc81666fc849e8be83b58e4d92e4dcc3368bffe23e&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00222000089184) Based  **\*374** upon this representation, we entertain this [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=NF078AD8003A511DCA094A3249C637898&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=8542b4852fd14a19a623b47267e72f3d&Rank=3&RuleBookModeDisplay=False&contextData=(sc.Search))[Tenn.R.App.P. 3](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1008880&cite=TNRRAPR3&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) appeal as of right.

***SUPPRESSION HEARING***

Prior to any charges being lodged against the defendant, he was interviewed by two investigators from the “Child Protective Team.” Upon motion of the defendant the trial court suppressed the defendant's pretrial statement to these investigators, finding his statement involuntary. **The sole issue for review is whether the trial court erred in suppressing the pretrial statement.** We find no error.

**A.**

Shortly after allegations of the alleged sexual misconduct, an investigator with the Department of Children's Services requested that the defendant come to the Department of Human Services for an interview. The defendant drove himself to the interview where he was interrogated by Child Protective Services investigator, Mardell Mullins, and co-worker, Stacey Griffin. The defendant was intensively interrogated for approximately one hour on Friday afternoon, May 8, 1998.

Investigator Mullins advised the defendant that his young stepdaughters had made allegations of sexual misconduct against him. Defendant was further advised that his wife had **stated** that the defendant had admitted sexual misconduct. For much of the interview the defendant repeatedly and steadfastly denied any sexual misconduct in spite of the intensive and persistent questioning. Thereafter, he became equivocal by agreeing that it was possible that misconduct occurred during his drunken condition, but he did not remember any such misconduct. Finally, during the last few minutes of the interview, **the defendant conceded sexual misconduct with one of his stepdaughters.** He **stated** it took place at night outside the residence; claimed he was in a drunken **state**; and thought his stepdaughter was his wife. Upon realizing it was his stepdaughter, he **stated** that he ceased all sexual activities.

Two weeks later the defendant was asked to return and sign a written statement. The statement had been written out by one of the investigators. The defendant brought his mother and asked that the statement be read to him since he did not read very well. The defendant signed a statement consistent with the last few minutes of his interview. The written statement ends with the words, “I am signing and agreeing to this because I want to get help, and I know that admitting what I did is the first step.” **It is the conduct of the investigators leading to the defendant's statement that is the subject of this appeal.**

**B.**

At the motion to suppress Investigator Mullins testified that no promises or threats were made to the defendant prior to his alleged admission. A transcript of the interrogation was then introduced into evidence.

The transcript reveals numerous instances in which the investigator informed the defendant that they had DNA samples from the alleged victim. At one point the investigator **stated**, “Your time in prison is being written because we have got a D & A(sic) smear of male ejaculate in this child's vagina ... that is good for three months.” At the hearing the investigator conceded she did not have a DNA test; did not know whether there was any DNA evidence; “pretty much” knew there was no DNA evidence at the time of the interrogation; and said “my job is not to tell the defendants the truth, my job is to get the truth.”

**\*375** The transcript also includes numerous instances in which **the defendant was requested to confess in order to avoid the intervention of law enforcement**. Furthermore, during the continual denials as well as the equivocal statements by the defendant, **the interrogators insisted that a full confession was necessary in order for him and his stepdaughter to secure treatment.**

The following excerpts appear in the transcript after numerous steadfast denials of wrongdoing by the defendant:

**Mardell**: Well, like I say, Mr. **Phillips**, you can expect the cops to come knocking on your door because ... I think you can really say when they do that, Mardell gave me my chance because I have the numbers laid out on my desk right now to give you numbers for treatment ...

............

**Mardell**: And that is why we want to give you the opportunity now so we can give you some numbers for free treatment programs.

Stacey: We can help you with the treatment. We can help you with things like that.

............

**Stacey**: ... We are not just saying that you come in and then you are out of here ... that is not how it works. What we want you to do is to come in here and talk to us and be honest with us and then we can help you.

**Daniel**: I am being honest.

**Stacey**: If you lie to us ... then we can't help you.

**Daniel**: I am being honest with you ... I haven't....

............

**Daniel**: ... I will start those counseling ...

**Mardell**: I am not going to offer the counseling unless you are able to tell me ...

**Daniel**: Well ... I don't know, like I said, that night ...

**Mardell**: Because this child ... is the one that the doctor says has had sex ... she is the one that has got to hear that ... she is the one that needs to know that I can go to her tonight and say ... Daniel said that, yes, this happened, that you are telling the truth and he is sorry and he is going to get in treatment right now and then I can start her treatment ...

............

**Mardell**: I want you to know that if this goes all the way to D & A(sic) testing ... where they have to call you in to take the test ... I want you to know that law enforcement will have a hold of it then and I will be out of it.

Daniel: That is what I am trying to tell you. I don't know if I did and I don't know if I didn't.

............

**Mardell**: They won't accept you into this program unless you are able to say ... yeah, I did it.

**Daniel**: Well, I am not saying that I did do it and I'm not saying that I didn't do it ... I don't know if I did ... I don't know if I did.

**Mardell**: What I am trying to tell you is that as long as you straddle the fence that way, then this treatment program is not going to accept you and not only that, but law enforcement will pick it up at that point and they will go over and do the D.A.(sic) testing and when that happens ... there is only one person in the world who has your D & A(sic) ... Sir, and that is you and when law enforcement gets those results back ... let me tell you what ... Anderson County Jail will be for you and that is where they will put you and we have nothing to do with it at that point ... we are out of it ...

............

**Mardell:** Do you know what I am going to do ... I am not going to waste any more of my time. I am not going to waste any more of my time ... I am  **\*376** trying my best to give you an opportunity for treatment ...

**Daniel**: It could have happened ... alright (sic) ...

**Mardell**: ... [F]or you to sit here and tell me that ... I will take your treatment program but I don't know if I did it or not ... I am not going to buy that ... I am not going to waste any more of my time ...

**Daniel:** What do you want me to say ... to say that I did it and not knowing if I did it or not ...

**Mardell:** ... Mr. **Phillips** ... we have given you every opportunity to come clean right now and get into treatment, take care of some of your problems ... right now ... and you are sitting here trying to play tap dance games with me and I don't want to play games because I am very very tired because I have worked a very long hard week. Now, I am just telling you in about **thirty** seconds I am going to get up and walk out of here and when I walk out of here, your opportunities are over with because on Monday morning this will be on [the assistant district attorney's] desk and Monday afternoon, maybe Tuesday morning ... they are going to have detectives at your door, picking you up and taking you to the hospital for a D & A(sic) sample and when that happens, Sir, you have signed your time in prison. I want you to understand that ... that your time in prison is being written **because we have got a D & A(sic) smear of male ejaculate in this child's vagina ... that is good for three months.**

............

**Mardell**: ... I am telling you when I finish this cup of coffee, I am out that door and I am on my way to Children's Hospital and the detective from Anderson County is going to be calling over there to pick up the D & A(sic) sample and I can tell you right now ... old boy ... that they are going to be knocking on your door and I will be subpoena (sic) to court as a witness and I will go to court and I will stand there and tell the judge, well, your Honor, I gave him the opportunity ... he just wanted to straddle the fence ... well, maybe I did or maybe I didn't ... I don't know ... I can't remember. If you get a blow job by a ten year old girl ... you remember ... if you screwed a ten year old girl ... you remember.

Based upon the testimony at the hearing and the transcript of the interrogation, the trial court found the defendant's pretrial statement to be **involuntary** and ordered its suppression.

***STANDARD OF REVIEW***

[1](https://1.next.westlaw.com/Document/I4001c6f4e7b711d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad604ab00000177656e8a518d11a80c%3FNav%3DCASE%26fragmentIdentifier%3DI4001c6f4e7b711d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=2fad5caee4ae2bf71b2b7c480859311a&list=CASE&rank=3&sessionScopeId=633aad1840c732d9b42d12cc81666fc849e8be83b58e4d92e4dcc3368bffe23e&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F12000089184)[2](https://1.next.westlaw.com/Document/I4001c6f4e7b711d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad604ab00000177656e8a518d11a80c%3FNav%3DCASE%26fragmentIdentifier%3DI4001c6f4e7b711d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=2fad5caee4ae2bf71b2b7c480859311a&list=CASE&rank=3&sessionScopeId=633aad1840c732d9b42d12cc81666fc849e8be83b58e4d92e4dcc3368bffe23e&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F22000089184)The findings of fact made by the trial court at the hearing on a motion to suppress are binding upon this Court unless the evidence contained in the record preponderates against them. [***State***v. Carter, 988 S.W.2d 145, 149 (**Tenn**.1999)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999041880&pubNum=713&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=RP&fi=co_pp_sp_713_149&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_149). However, this Court is not bound by the trial court's conclusions of law. [***State***v. Simpson, 968 S.W.2d 776, 779 (**Tenn**.1998)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1998057075&pubNum=713&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=RP&fi=co_pp_sp_713_779&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_779).

***VOLUNTARINESS***

[3](https://1.next.westlaw.com/Document/I4001c6f4e7b711d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad604ab00000177656e8a518d11a80c%3FNav%3DCASE%26fragmentIdentifier%3DI4001c6f4e7b711d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=2fad5caee4ae2bf71b2b7c480859311a&list=CASE&rank=3&sessionScopeId=633aad1840c732d9b42d12cc81666fc849e8be83b58e4d92e4dcc3368bffe23e&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F32000089184)We first note that at the time of the pretrial statement the defendant was not “in custody” as contemplated by Miranda. The defendant came voluntarily to the Department of Human Services for the interview and was never deprived of freedom of movement to a degree associated with a formal arrest. [***State***v. Anderson, 937 S.W.2d 851, 855 (**Tenn**.1996)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996209712&pubNum=713&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=RP&fi=co_pp_sp_713_855&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_855). Thus, the Miranda requirements are not applicable.

[4](https://1.next.westlaw.com/Document/I4001c6f4e7b711d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad604ab00000177656e8a518d11a80c%3FNav%3DCASE%26fragmentIdentifier%3DI4001c6f4e7b711d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=2fad5caee4ae2bf71b2b7c480859311a&list=CASE&rank=3&sessionScopeId=633aad1840c732d9b42d12cc81666fc849e8be83b58e4d92e4dcc3368bffe23e&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F42000089184)[5](https://1.next.westlaw.com/Document/I4001c6f4e7b711d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad604ab00000177656e8a518d11a80c%3FNav%3DCASE%26fragmentIdentifier%3DI4001c6f4e7b711d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=2fad5caee4ae2bf71b2b7c480859311a&list=CASE&rank=3&sessionScopeId=633aad1840c732d9b42d12cc81666fc849e8be83b58e4d92e4dcc3368bffe23e&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F52000089184)[6](https://1.next.westlaw.com/Document/I4001c6f4e7b711d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad604ab00000177656e8a518d11a80c%3FNav%3DCASE%26fragmentIdentifier%3DI4001c6f4e7b711d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=2fad5caee4ae2bf71b2b7c480859311a&list=CASE&rank=3&sessionScopeId=633aad1840c732d9b42d12cc81666fc849e8be83b58e4d92e4dcc3368bffe23e&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F62000089184)[7](https://1.next.westlaw.com/Document/I4001c6f4e7b711d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad604ab00000177656e8a518d11a80c%3FNav%3DCASE%26fragmentIdentifier%3DI4001c6f4e7b711d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=2fad5caee4ae2bf71b2b7c480859311a&list=CASE&rank=3&sessionScopeId=633aad1840c732d9b42d12cc81666fc849e8be83b58e4d92e4dcc3368bffe23e&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F72000089184)[8](https://1.next.westlaw.com/Document/I4001c6f4e7b711d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad604ab00000177656e8a518d11a80c%3FNav%3DCASE%26fragmentIdentifier%3DI4001c6f4e7b711d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=2fad5caee4ae2bf71b2b7c480859311a&list=CASE&rank=3&sessionScopeId=633aad1840c732d9b42d12cc81666fc849e8be83b58e4d92e4dcc3368bffe23e&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F82000089184)[9](https://1.next.westlaw.com/Document/I4001c6f4e7b711d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad604ab00000177656e8a518d11a80c%3FNav%3DCASE%26fragmentIdentifier%3DI4001c6f4e7b711d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=2fad5caee4ae2bf71b2b7c480859311a&list=CASE&rank=3&sessionScopeId=633aad1840c732d9b42d12cc81666fc849e8be83b58e4d92e4dcc3368bffe23e&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F92000089184)[10](https://1.next.westlaw.com/Document/I4001c6f4e7b711d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad604ab00000177656e8a518d11a80c%3FNav%3DCASE%26fragmentIdentifier%3DI4001c6f4e7b711d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=2fad5caee4ae2bf71b2b7c480859311a&list=CASE&rank=3&sessionScopeId=633aad1840c732d9b42d12cc81666fc849e8be83b58e4d92e4dcc3368bffe23e&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F102000089184)Nevertheless, a non-custodial interrogation must be voluntary in order to be admissible**. Confessions that are involuntary,** i.e., the product of coercion, whether it be physical or psychological, **are not admissible**. [Rogers v. Richmond, 365 U.S. 534, 540, 81 S.Ct. 735, 739, 5 L.Ed.2d 760 (1961)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1961103846&pubNum=708&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=RP&fi=co_pp_sp_708_739&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_739). The test of voluntariness under **\*377** the **Tennessee** Constitution is broader and more protective of individual rights than the test of voluntariness under the United **States** Constitution. [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ia7fe08bfe7c411d9bf60c1d57ebc853e&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=8542b4852fd14a19a623b47267e72f3d&Rank=3&RuleBookModeDisplay=False&contextData=(sc.Search))[***State***v. Stephenson, 878 S.W.2d 530, 544 (**Tenn**.1994)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1994135296&pubNum=713&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=RP&fi=co_pp_sp_713_544&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_544). In order to make the determination, the particular circumstances of each case must be examined. [Monts v.***State***, 218 **Tenn**. 31, 400 S.W.2d 722, 733 (1966)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966133108&pubNum=713&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=RP&fi=co_pp_sp_713_733&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_733). Coercive police activity is a necessary prerequisite in order to find a confession involuntary. [***State***v. Brimmer, 876 S.W.2d 75, 79 (**Tenn**.1994)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1994103650&pubNum=713&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=RP&fi=co_pp_sp_713_79&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_79). **The crucial question** is whether the behavior of the **state's** officials was “such as to overbear petitioner's will to resist and bring about confessions not freely self-determined.” [***State***v. Kelly, 603 S.W.2d 726, 728 (**Tenn**.1980)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980137203&pubNum=713&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=RP&fi=co_pp_sp_713_728&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_728)(quoting [Rogers, 365 U.S. at 544, 81 S.Ct. at 741).](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1961103846&pubNum=708&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=RP&fi=co_pp_sp_708_741&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_741) The question must be answered with “complete disregard” of whether or not the accused was truthful in the statement. [Rogers, 365 U.S. at 544, 81 S.Ct. at 741.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1961103846&pubNum=708&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=RP&fi=co_pp_sp_708_741&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_741)

In [***State***v. Smith, 933 S.W.2d 450 (**Tenn**.1996)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996251591&pubNum=713&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), the Supreme Court concluded that a **social worker's statement to the defendant that the district attorney might not prosecute him for sexual abuse**, if he were truthful and received counseling**, could not reasonably be interpreted as a promise that there would be no prosecution.** [Id. at 456.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996251591&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) **The court further concluded that a statement that the defendant would be prosecuted if he chose not to admit unlawful conduct was insufficient to render his subsequent statement involuntary**. [Id.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996251591&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) Under all the circumstances, the court concluded that the defendant's statements were not “compelled” in violation of the **state** or federal constitution. [Id.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996251591&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) However, the court noted the interrogator's remarks were “on the line, but did not cross it.” [Id. at 458.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996251591&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) The court then expressed “the strongest disapproval of any practice whereby **state** agents encourage suspects to seek counseling for the purpose of eliciting incriminating statements for use in a subsequent prosecution.” [Id.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996251591&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))

[11](https://1.next.westlaw.com/Document/I4001c6f4e7b711d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad604ab00000177656e8a518d11a80c%3FNav%3DCASE%26fragmentIdentifier%3DI4001c6f4e7b711d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=2fad5caee4ae2bf71b2b7c480859311a&list=CASE&rank=3&sessionScopeId=633aad1840c732d9b42d12cc81666fc849e8be83b58e4d92e4dcc3368bffe23e&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F112000089184)A review of the 36–page transcript of the interrogation in the case at bar reveals (1) misrepresentations by an investigator, (2) numerous steadfast denials by the defendant, (3) statements that law enforcement officials would be involved if defendant did not confess, and (4) promises of treatment for the defendant and his stepdaughter only if he fully confessed. The promises and inducements were made repeatedly prior to defendant's incriminatory statements. The actions of the interrogators were much more coercive than those found in [Smith](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996251591&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and, **unlike**[**Smith,**](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996251591&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**crossed the line**.

After hearing the testimony of one of the interrogators and considering the interrogation transcript, **the trial court found** “sufficient coercion and promises of leniency by the **state** actors to overbear the defendant's will and render his statements involuntary.”[3](https://1.next.westlaw.com/Document/I4001c6f4e7b711d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad604ab00000177656e8a518d11a80c%3FNav%3DCASE%26fragmentIdentifier%3DI4001c6f4e7b711d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=2fad5caee4ae2bf71b2b7c480859311a&list=CASE&rank=3&sessionScopeId=633aad1840c732d9b42d12cc81666fc849e8be83b58e4d92e4dcc3368bffe23e&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00332000089184) **Based upon our review of the record, we are unable to conclude that the trial court erred**.[4](https://1.next.westlaw.com/Document/I4001c6f4e7b711d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad604ab00000177656e8a518d11a80c%3FNav%3DCASE%26fragmentIdentifier%3DI4001c6f4e7b711d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=2fad5caee4ae2bf71b2b7c480859311a&list=CASE&rank=3&sessionScopeId=633aad1840c732d9b42d12cc81666fc849e8be83b58e4d92e4dcc3368bffe23e&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00442000089184)

***CONCLUSION***

Accordingly, we **AFFIRM** the judgment of the trial court. Based upon the **state's** representation to the trial court and this Court that the **state** may not proceed with further prosecution absent the defendant's pretrial statement, the indictment is **DISMISSED.**

[WOODALL](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0168123103&originatingDoc=I4001c6f4e7b711d98ac8f235252e36df&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I4001c6f4e7b711d98ac8f235252e36df) and WITT, JJ., concur.

**Rogers v. Richmond**

81 S.Ct. 735

Supreme Court of the United States

**Harold D. ROGERS, Petitioner,**

**v.**

**Mark S. RICHMOND, Warden.**

No. 40.

Argued Nov. 8 and 9, 1960.Decided March 20, 1961.

**Synopsis**

Habeas corpus proceeding by a state prisoner. The United States District Court for the District of Connecticut, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ib582206054b811d997e0acd5cbb90d3f&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.DocLink))[178 F.Supp. 69,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1959105029&pubNum=345&originatingDoc=Iab84702b9bf011d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)) dismissed the writ and the relator appealed. The United States Court of Appeals for the Second Circuit, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I6736dc388f0411d9a707f4371c9c34f0&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.DocLink))[271 F.2d 364,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1959111115&pubNum=350&originatingDoc=Iab84702b9bf011d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)) affirmed the judgment, and the relator obtained certiorari. The Supreme Court, Mr. Justice Frankfurter, J., held that **the test of the admissibility of confessions as voluntary was whether the state officials' behavior had been such as to overbear the defendant's will to resist and bring about confessions not freely self-determined, not the probable truth or falsity of the confessions, and that the federal courts would not determine whether the confessions would have met an adequate test.**

Reversed.

Mr. Justice Stewart and Mr. Justice Clark dissented.

**State v. Anderson**

937 S.W.2d 851

Supreme Court of Tennessee,

at Jackson.

**STATE of Tennessee, Appellant,**

**v.**

**Joe L. ANDERSON, Appellee.**

Sept. 16, 1996.

**Synopsis**

Defendant was indicted for arson. The Decatur Criminal Court, [C. Creed McGinley](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0316936701&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)&analyticGuid=Idd7e0e28e7d011d99439b076ef9ec4de), J., sustained defendant's motion to suppress statements given to arson investigator, and state appealed. The Court of Criminal Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I22d436a0eb3411d98ac8f235252e36df&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.DocLink))[1995 WL 467662,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995163367&pubNum=999&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)) Gasaway, J., affirmed trial court. State appealed. The Supreme Court, [Anderson](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0157496001&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)&analyticGuid=Idd7e0e28e7d011d99439b076ef9ec4de), J., held that **test to determine whether individual is in custody for purposes of**[***Miranda***](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink))**is objective from viewpoint of individual being questioned, and unarticulated, subjective view of law enforcement officials that such individual is or is not a suspect is irrelevant**, overruling *[](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Idd5255c4ec5b11d99439b076ef9ec4de&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.DocLink))*[*State v. Morris*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1970138176&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink))*.*

Reversed and remanded.

**State v. Stephenson**

878 S.W.2d 530

Supreme Court of Tennessee,

at Knoxville.

**STATE of Tennessee, Appellee,**

**v.**

**Jonathan Wesley STEPHENSON, Appellant.**

May 9, 1994.Rehearing Denied June 20, 1994.

## Synopsis

Defendant was convicted in the Criminal Court, Cocke County, J. Kenneth Porter, J., of first-degree premeditated murder and conspiracy to commit first-degree murder, and he was sentenced to death. Defendant appealed. The Supreme Court, [Anderson](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0157496001&originatingDoc=Ia7fe08bfe7c411d9bf60c1d57ebc853e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)&analyticGuid=Ia7fe08bfe7c411d9bf60c1d57ebc853e), J., held that: (1**) failure of law enforcement officials to inform defendant that attorney was present and attempting to see him did not invalidate waiver of Mirandarights**; (2) **defendant equivocally invoked right to counsel by asking law enforcement officer whether defendant needed attorney**; (3**) there is no statutory, common-law, or constitutional right to allocution in capital case**; and (4) **reversal of death sentence was required by failure to require jury to determine whether state proved beyond a reasonable doubt that statutory aggravating circumstance outweighed any mitigating circumstances.**

Convictions affirmed, death sentence reversed, and case remanded.

[Reid](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0259686601&originatingDoc=Ia7fe08bfe7c411d9bf60c1d57ebc853e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)&analyticGuid=Ia7fe08bfe7c411d9bf60c1d57ebc853e), C.J., concurred in part, dissented in part, and filed opinion.

**Monts v. State**

22 McCanless 31

Supreme Court of Tennessee.

**Henry Clay MONTS and Johnnie West, Plaintiffs in Error,**

**v.**

**STATE of Tennessee, Defendant in Error.**

March 2, 1966.

**Synopsis**

Prosecution of codefendants for first-degree murder. The Criminal Court, Shelby County, Sam D. Campbell, J., entered judgments of conviction and the defendants brought error. The Supreme Court, White, J., held that **evidence sustained the convictions and the finding that confession of one of the two defendants, made after he had been advised by police officers of right to remain silent, was freely and voluntarily given was not against the preponderance of the evidence**.

Affirmed.

**State v. Brimmer**

876 S.W.2d 75

Supreme Court of Tennessee,

at Knoxville.

**STATE of Tennessee, Appellee,**

**v.**

**David Allen BRIMMER, Appellant.**

Feb. 7, 1994.Rehearing Denied May 2, 1994.

**Synopsis**

Defendant was convicted in the Anderson County Court, [James B. Scott, Jr.](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0259379201&originatingDoc=I20b88f08e7c511d983e7e9deff98dc6f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)&analyticGuid=I20b88f08e7c511d983e7e9deff98dc6f), J., of first-degree premeditated homicide and sentenced to death. Defendant appealed. The Supreme Court, [O'Brien](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0291723201&originatingDoc=I20b88f08e7c511d983e7e9deff98dc6f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)&analyticGuid=I20b88f08e7c511d983e7e9deff98dc6f), J., held that: (1) **evidence was sufficient for conviction**; (2) **evidence was sufficient to support finding of aggravating circumstance of murder in perpetration of robbery**; and (3**) death sentence was not disproportionate or excessive.**

Affirmed.

[Reid](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0259686601&originatingDoc=I20b88f08e7c511d983e7e9deff98dc6f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)&analyticGuid=I20b88f08e7c511d983e7e9deff98dc6f), C.J., filed concurring and dissenting opinion.

Daughtrey, J., filed opinion concurring in part and dissenting in part.

**State v. Kelly**

603 S.W.2d 726

Supreme Court of Tennessee.

**STATE of Tennessee, Petitioner,**

**v.**

**Walter Thomas KELLY, Respondent.**

Aug. 25, 1980.

**Synopsis**

Defendant was convicted before the Criminal Court, Hamblen County, James E. Beckner, J., of second-degree burglary, and he appealed. The Court of Criminal Appeals reversed and remanded for new trial. After granting certiorari review, the Supreme Court, Brock, C. J., held that: (1) **evidence did not preponderate against finding that defendant's confession was voluntary**, but (2) **failure to instruct jury that it could fix maximum sentence at minimum prescribed by statute was reversible error**.

Reversed in part; affirmed in part; remanded.

**State v. Smith**

933 S.W.2d 450

Supreme Court of Tennessee,

at Nashville.

**STATE of Tennessee, Appellee,**

**v.**

**Nathan SMITH, Appellant.**

Nov. 12, 1996.

**Synopsis**

Defendant was convicted in the Criminal Court, Davidson County, [Seth Norman](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0259748401&originatingDoc=Idd7386e0e7d011d99439b076ef9ec4de&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)&analyticGuid=Idd7386e0e7d011d99439b076ef9ec4de), J., of aggravated sexual battery. He appealed. The Court of Criminal Appeals, [1995 WL 123155,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995071585&pubNum=999&originatingDoc=Idd7386e0e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)) affirmed. Defendant appealed. The Supreme Court, [Birch](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0259809301&originatingDoc=Idd7386e0e7d011d99439b076ef9ec4de&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)&analyticGuid=Idd7386e0e7d011d99439b076ef9ec4de), C.J., held that: (1) **defendant was not “in custody” when he met with mental health counselor**; (2) **social worker with Department of Human Services (DHS) did not coerce defendant's statements by referring him to counseling**; and (3) **admission of defendant's statements to counselor did not violate defendant's due process rights.**

Affirmed.

[White](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0163409201&originatingDoc=Idd7386e0e7d011d99439b076ef9ec4de&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)&analyticGuid=Idd7386e0e7d011d99439b076ef9ec4de) and [Reid](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0259686601&originatingDoc=Idd7386e0e7d011d99439b076ef9ec4de&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)&analyticGuid=Idd7386e0e7d011d99439b076ef9ec4de), JJ., dissented and filed separate opinions.

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**February 11, 2021**

**Chapter 6 – Section 4 – Applying and Explaining Miranda**

**Part 1 – What is Custody; State v. Anderson, 937 S.W.2d 851 (Tenn.1996)**

**Part 2 – What is Interrogation; State v. Sawyer, 156 S.W.3d 531 (Tenn. 2005)**

**Part 3 – Waiver of Right to Remain Silent**

**Part 4 – Wavier of Right to Counsel**

**Part 5 – Break in Miranda Custody and the Right to Counsel**

**Part 6 – Police Initiated Interrogation After Appointment of Counsel**

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**Chapter 6 – Section 4 – Applying and Explaining Miranda**

**Part 1 – What is Custody**

**\*\*J.D.B. v. NORTH CAROLINA\*\***

United States Supreme Court  
564 U.S. 261 (2011)

#### Rule of Law

**The age of a child subjected to police questioning is relevant to whether the child is in custody under *Miranda*.**

#### Facts

Police suspected J.D.B. (defendant), a 13-year-old seventh-grader, of involvement in home break-ins. A uniformed police officer pulled J.D.B. out of his classroom, took him to a conference room, and questioned him for at least 30 minutes without giving him *Miranda* warnings. The door to the conference room remained closed during the questioning, and J.D.B. was not told that he was free to leave the room. J.D.B. confessed to the break-ins during this questioning. Only after J.D.B. confessed did an officer tell him that he did not have to answer the investigator's questions and that he could leave the conference room. Two juvenile petitions were filed against J.D.B. His public defender moved to suppress his confession and the resulting evidence, arguing that J.D.B. had been interrogated in a custodial setting without proper *Miranda*warnings. The trial court denied the motion and ultimately adjudicated J.D.B. delinquent. The appellate court affirmed the judgment. The North Carolina Supreme Court also affirmed, specifically finding that J.D.B. was not in custody when he confessed and that J.D.B.’s age was not relevant to the analysis of whether he was in custody. The United States Supreme Court granted certiorari.

#### Issue

Is the age of a child subjected to police questioning relevant to whether the child is in custody under *Miranda*?

#### Holding and Reasoning (Sotomayor, J.)

Yes. The age of a child subjected to police questioning is relevant to whether the child is in custody under *Miranda*. Whether a suspect is in custody for *Miranda* purposes is an objective inquiry*.*The age of a child subjected to police questioning is relevant to whether that child is in custody, so long as the age was known to the officer or would be objectively apparent to a reasonable officer. There are many aspects of law in which children are treated differently from adults, and a custody analysis should be no different. Simply put, a reasonable child will feel more pressure than a reasonable adult to submit to police questioning. Failing to distinguish between them would deprive children of their constitutional rights. Moreover, this case exemplifies the absurdity of treating children with the same standard as adults. Without taking age into account, law enforcement and courts use a reasonable person of average years for custody analysis. J.D.B. was pulled out of his seventh-grade classroom to be questioned, so the analysis would have to take into account how a person of average years would react to being pulled out of a seventh-grade classroom. This analysis is impracticable. J.D.B.’s age should have been taken into account when determining whether or not he was in custody while the police were questioning him. Because this was not considered, the judgment of the Supreme Court of North Carolina is reversed, and the case is remanded to determine whether J.D.B. was in custody taking into account all relevant factors, including his age.

#### Dissent (Alito, J.)

The Court’s holding is inconsistent with one of the main reasons behind *Miranda*, namely that there is a clear, widely applicable rule. The fact that not all suspects are the same as the “reasonable person” applied in a custody analysis is a necessary consequence of the uniformity that *Miranda* provides. Many people over the age of 18 are more susceptible to police interrogation pressures than the “reasonable person,” but there is just no way to take everyone’s differences explicitly into account. Why, for example, is age more important than other personal characteristics such as intelligence? Prior to this case, under *Miranda*, courts were able to take into account the setting where the interrogation took place—in this case, a school—and ensure that police did not obtain confessions under the force of coercion. Moreover, minors who are subject to police interrogation are generally close to legal maturity anyway. Finally, while stating that a custody analysis is objective, the Court nevertheless holds that the age of a child is relevant if the age was known to the officer—clearly placing subjectivity into the analysis.

**Key Terms:**

**Custodial Interrogation** - Questioning by law enforcement authorities of a suspect in a criminal investigation under circumstances in which the suspect is not free to terminate the questioning and leave at will or under circumstances that lead the suspect to believe that he is not free to leave at will.

# Miranda v. Arizona

#### United States Supreme Court 384 U.S. 436 (1966)

#### Rule of Law

**Without certain hallmark warnings regarding the right to remain silent and the right to counsel, statements made during custodial interrogation are inadmissible at trial.**

# Yarborough v. Alvarado

#### United States Supreme Court 541 U.S. 652 (2004)

#### Rule of Law

**The reasonable person standard of the *Miranda*custody test does not require courts to consider a suspect’s age.**

#### Facts

17-year-old Michael Alvarado (defendant) agreed to help Paul Soto (defendant) steal Francisco Castaneda’s truck. Soto demanded Castaneda’s money and keys at gunpoint while Alvarado waited on the passenger side. Soto shot and killed Castaneda, and Alvarado helped hide the gun. Police requested a meeting, and Alvarado’s parents took him to the station for the two-hour interview. Alvarado’s parents claim that police would not allow them to be present for the interview. Alvarado was not given the *Miranda* warnings. The interviewer encouraged Alvarado to tell the truth, and Alvarado ultimately confessed. Months later, Alvarado was arrested for robbery and murder. Alvarado made a pretrial motion to suppress his statements. The motion was denied since the statements were made during a noncustodial interview. A jury found Alvarado guilty of first-degree murder and attempted robbery, but the judge reduced the charge to second-degree murder and sentenced Alvarado to 15 years to life imprisonment. The appellate court affirmed the conviction. Alvarado petitioned for habeas corpus in federal district court. The district court denied the petition. The United States Court of Appeals for the Ninth circuit reversed on the grounds that the trial court did not consider Alvarado’s age and inexperience in its determination that a reasonable person would have felt free to terminate the interview. The United States Supreme Court granted certiorari.

#### Issue

Does the reasonable person standard of the *Miranda* custody test require courts to consider a suspects’ age?

#### Holding and Reasoning (Kennedy, J.)

No. *Miranda* warnings must be given to a suspect in custody before an interrogation. The test for whether a suspect is in custody for purposes of the *Miranda* warning is whether a reasonable person in the suspect’s situation would have believed he was free to leave. The test is objective to ensure that police can easily determine when the *Miranda*warnings are necessary. In this case, there are many factors that weigh in favor of a finding that Alvarado was not in custody. Alvarado was brought to the station by his parents, who waited outside, rather than police. Alvarado answered questions after being urged to tell the truth and help police, not after being threatened with arrest. Nevertheless, there are other factors that suggest that Alvarado was in custody, including the length of the interview and Alvarado’s parents’ claims that they were not permitted to be present during the interview. The trial court’s conclusion was not unreasonable in light of previous case law. Further, the court of appeals’ finding that Alvarado’s age and inexperience should have been considered in the custody determination based on the holdings of this Court in other contexts is flawed. Those factors may be important in determining voluntariness, but the custody inquiry is an objective test meant to be easily applicable by law enforcement. The ruling of the trial court is affirmed.

#### Concurrence (O’Connor, J.)

Age may be a factor in some *Miranda* custody assessments, but it was not here. Alvarado was nearly 18, and police may not realize a person so close to adulthood is still underage. The trial court’s ruling was not unreasonable.

#### Dissent (Breyer, J.)

Alvarado was in custody. Taking all of the relevant facts and circumstances surrounding Alvarado’s interrogation into account, no reasonable person would have believed he was free to leave. The reasonable person standard does not require courts to ignore a suspect’s age. The standard could allow the consideration of factors such as a suspect’s age or disability in some situations. A person’s age is an objective fact, and consideration of such facts would not unduly burden the reasonable person inquiry.

**Key Terms:**

**Reasonable Person -** A hypothetical person used to establish a standard of care that a sensible, prudent person would exercise under like circumstances and condition.

# \*\*HOWES v. FIELDS\*\*

#### United States Supreme Court 565 U.S. 499 (2012)

#### Rule of Law

***Miranda*warnings are not required to interrogate an incarcerated prisoner who is told he or she is free to end questioning and return to his or her cell.**

#### Facts

Randall Fields (defendant) was in prison when a corrections officer pulled him from his cell. The officer escorted him to a conference room where two sheriff’s deputies interrogated him for five to seven hours. The deputies told Fields several times he was free to leave and return to his cell if he did not want to cooperate but never gave him *Miranda*warnings. Fields eventually confessed to sex acts with a 12-year-old boy. After his conviction, Fields sought federal habeas relief on the ground that his confession was impermissibly obtained during custodial interrogation without *Miranda* warnings. The Sixth Circuit agreed, reasoning that interrogating a prisoner isolated from the general prison population and about events outside prison is always custodial. The United States Supreme Court granted review.

#### Issue

Are *Miranda* warnings required to interrogate an incarcerated prisoner who is told he or she is free to end questioning and return to his or her cell?

#### Holding and Reasoning (Alito, J.)

No. *Miranda* warnings are not required to interrogate an incarcerated prisoner who is told he or she is free to end questioning and return to his or her cell. The case law does not support a categorical rule that questioning a prisoner away from the general prison population about events outside prison is always custodial. Those circumstances alone are not enough to create a custodial interrogation. In *Miranda* case law, the first step in determining if interrogation is custodial is determining whether a reasonable person would have felt free to end the interrogation and leave. Factors considered include location and duration, statements made to the suspect, use of any physical restraints, and the suspect’s release after questioning. Restraining the suspect’s freedom of movement is not necessarily dispositive. Cases show that a break in custody may occur if a sufficient length of time lapses after a suspect invokes the right to counsel and may occur during an uninterrupted prison term. That means imprisonment alone does not make an interrogation custodial for *Miranda*. A person removed from home and isolated for interrogation experiences an abrupt and shocking change that may cause coercive pressure. But a prisoner is accustomed to conditions of imprisonment and unlikely to think that cooperating will result in either prompt release or sentence reduction, making the compulsion to speak in the hopes of more lenient treatment unlikely. Questioning a prisoner away from other inmates does not isolate the prisoner from a supportive atmosphere because other inmates often provide a hostile audience—especially upon hearing about sexual abuse of an adolescent boy. Placement in an interrogation room arguably limits a prisoner’s freedom of movement more than in a cell or the prison yard, but prisoners are accustomed to those limits. Last, questions about events outside prison are no more coercive than questions about events in prison. Both potentially result in additional criminal liability and prison time, and events inside prison may even carry additional administrative penalties. Here, Fields could not leave the conference room and return to his cell unescorted, but that occurred at other times, such as when meeting with his attorney. Police told Fields he could return to his cell if he failed to cooperate and did not threaten any harsher consequences. Fields does not dispute he was told he was free to end the questioning and return to his cell. Therefore, Fields was not under custodial interrogation requiring *Miranda*warnings, making his confession admissible against him.

#### Concurrence/Dissent (Ginsburg, J.)

*Miranda* precludes admission of the confession because Fields was under custodial interrogation. The inquiry turns not on whether there is “custody within custody” but whether the suspect was isolated and interrogated under police-dominated conditions. Bringing Fields to an interrogation room for an overnight interview with gun-bearing police officers was not voluntary. Telling a prisoner that he or she is free to end questioning and go back to his or her cell is not the same as ensuring that the prisoner is aware of his or her *Miranda*rights.

**Key Terms:**

**Custodial Interrogation** - Questioning by law enforcement authorities of a suspect in a criminal investigation under circumstances in which the suspect is not free to terminate the questioning and leave at will or under circumstances that lead the suspect to believe that he is not free to leave at will.

**Miranda Warnings** - The notices of constitutional rights set forth in the opinion of the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436(1966) that law enforcement authorities must provide to a suspect in a criminal investigation prior to initiation of a custodial interrogation. The suspect must be advised that the suspect has the right to remain silent, anything the suspect says may be used against the suspect, and the suspect has the right to an attorney.

# Miranda v. Arizona

#### United States Supreme Court 384 U.S. 436 (1966)

#### Rule of Law

**Without certain hallmark warnings regarding the right to remain silent and the right to counsel, statements made during custodial interrogation are inadmissible at trial.**

**Berkemer v. McCarty**

United States Supreme Court  
468 U.S. 420 (1984)

#### Rule of Law

**Police must issue *Miranda*warnings prior to all custodial interrogations, regardless of the nature or severity of the offense.**

#### Facts

A police officer suspected that McCarty (defendant) was driving while intoxicated and pulled him over. The officer asked McCarty to step out of the car and, when McCarty could not stand up straight, the officer decided he would be charged with a traffic offense. While McCarty was not yet told he would be taken into custody, at that moment he was no longer free to leave. The officer then asked McCarty whether he had been using intoxicants. McCarty answered in the affirmative. McCarty was then arrested and brought to the police station. At the station, McCarty was again questioned. At no point was McCarty read his *Miranda* warnings. McCarty moved to exclude both his statements made during the traffic stop and his statements made at the station house.

#### Issue

Must police issue *Miranda*warnings before questioning a suspect taken into custody during a stop for a minor traffic offense?

#### Holding and Reasoning (Marshall, J.)

Yes. Police must issue *Miranda*warnings prior to all custodial interrogations, regardless of the nature or severity of the offense. However, a motorist is not subject to custodial interrogation for the purpose of *Miranda* when he is questioned on the side of the road during a routine traffic stop. It is undisputed that a traffic stop significantly infringes on a motorist’s freedom, but the concerns that the *Miranda*decision intended to alleviate are not present in a routine traffic stop. Primarily, a routine traffic stop does not create an environment where a person would feel compelled to speak and incriminate himself. First, a roadside stop is generally temporary and brief. In contrast, questioning at a stationhouse can go on for hours. Second, during a routine traffic stop, the police officers’ aura of authority and ability to intimidate is less than would be at the police station. Traffic stops generally take place where others can see, whereas questioning at a stationhouse takes place in private. Also, a motorist is likely to encounter only one or two officers, not a group of officers as is possible when questioned at the police station. In these respects, a traffic stop is akin to a *Terry* stop where no *Miranda* warnings are required either. In this case, McCarty was not in custody when he was questioned on the side of the road, and his statement is therefore admissible. Although the officer knew McCarty was not free to leave once he stepped out of the car, the officer never conveyed this information to McCarty. Therefore, because a reasonable person in McCarty’s situation would believe he was still free to leave at the end of the encounter, McCarty was not yet in custody for the purpose of *Miranda*. However, once the officer brought McCarty to the police station, McCarty knew he was no longer free to leave and the police should have read him his *Miranda*warnings. Therefore, McCarty’s statements while at the police station are inadmissible.

**Key Terms:**

**Miranda Warnings** - The notices of constitutional rights set forth in the opinion of the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436(1966) that law enforcement authorities must provide to a suspect in a criminal investigation prior to initiation of a custodial interrogation. The suspect must be advised that the suspect has the right to remain silent, anything the suspect says may be used against the suspect, and the suspect has the right to an attorney.

**Maryland v. Shatzer**

United States Supreme Court  
130 S. Ct. 1213 (2010)

#### Rule of Law

**A break in custody ends the presumption of involuntariness established in *Edwards v. Arizona*.**

#### Facts

In 2003, a social worker reported allegations that Michael Shatzer (defendant) had abused his three-year-old son. At the time of this allegation, Shatzer was imprisoned for a different child-sexual-abuse conviction. The 2003 allegation was assigned to Detective Shane Blankenship, who went to interview Shatzer in prison. Shatzer initially waived his *Miranda* rights but afterwards demanded an attorney, at which point Blankenship ended the interview. The investigation was closed shortly afterwards. Two and a half years later, further details of the 2003 allegations against Shatzer were reported. Detective Paul Hoover undertook the investigation and on March 2, 2006 went to interview Shatzer in prison. Hoover obtained a written *Miranda* waiver and interviewed Shatzer. Shatzer agreed to take a polygraph five days later. Shatzer was again read his *Miranda* rights. Shatzer signed another written waiver and proceeded to fail the polygraph test. After further questioning, Shatzer confessed. Shatzer then requested an attorney, and Hoover ended the interrogation.

#### Issue

Does a break in custody end the presumption of involuntariness established in *Edwards v. Arizona*?

#### Holding and Reasoning (Scalia, J.)

Yes. Under *Edwards v. Arizona*, 451 U.S. 477 (1981), an accused that has invoked his right to counsel during a custodial interrogation cannot be questioned further without counsel unless he himself initiates further communication with the police. Any evidence resulting from such further interrogation without counsel is presumed to be involuntary under *Edwards*. Since the *Edwards* rule is court-imposed, the rule is only justified if its benefits outweigh its costs. One benefit of the rule is that the accused is protected from coercive interrogation. However, this benefit is diminished where an accused has, in the interim, been released to his normal life before the second attempted interrogation. In such circumstances, it is unlikely that an accused’s willingness to be interrogated without counsel in the second interrogation is the result of the pressures of prolonged custody. Moreover, the cost of the *Edwards*rule, namely that voluntary confessions are excluded and officers are deterred from trying to obtain them, would only be increased. Consequently, this Court declines to extend *Edwards* to cases where an accused requests an attorney at his first interrogation and is re-interrogated after a break in custody without counsel. Because law enforcement will need concrete guidance in determining whether a break in custody is long enough, this Court finds that 14 days is an adequate period of time for the accused to re-enter his normal life, seek advice, and to escape the coercive effects of his first interrogation. Here, Shatzer’s break in custody between his two interrogations was two-and-one-half years. Although Shatzer was released from custody into the general prison population, not back to his normal life, he was nevertheless returned to the same degree of control he had over his life prior to the first interrogation. Since Shatzer’s break in custody was over 14 days, the *Edwards* rule does not require that Shatzer’s 2006 statements be suppressed.

#### Concurrence (Stevens, J.)

Although the Court properly finds that the *Edwards* presumption of involuntariness is not eternal, it improperly declares that it always ends after a 14-day break in custody. A 14-day break does not negate the necessarily compelling nature of a custodial interrogation. Moreover, as in this specific situation, a custodial break that sends an accused back to prison does little to allow the accused to escape the coercive effects of the first interrogation. Nevertheless, Shatzer’s two and a half year break in custody was a sufficient break in custody.

# Edwards v. Arizona

#### United States Supreme Court 451 U.S. 477 (1981)

#### Rule of Law

**Once a suspect has received his *Miranda* warnings and invoked his right to counsel, the police may not further interrogate the suspect until the suspect has been given access to counsel, unless the suspect initiates further communication with the police.**

#### Facts

Edwards (defendant) was arrested for robbery, burglary, and first-degree murder. He was informed of his *Miranda* rights and agreed to answer the officers’ questions. After some questioning, during which Edwards made no incriminating statements, Edwards invoked his right to have a lawyer present. He was then taken to jail. The next day, two officers came to the jail to see Edwards. Edwards said he did not want to see the officers, but the prison guard said he had to talk to them. The officers read Edwards his *Miranda* rights and Edwards agreed to answer their questions, this time incriminating himself. The trial court allowed Edwards’ statement to be admitted at trial, holding that the statement made at the prison was voluntary. Edwards was convicted. On appeal, the state supreme court held that Edwards had invoked his right to remain silent and his right to counsel the first time he was interrogated, but that he had effectively waived both those rights when the police came to the jail, and he voluntarily answered their questions. The United States Supreme Court granted certiorari.

#### Issue

Once a suspect has received his *Miranda* warnings and invoked his right to counsel, may the police further interrogate the suspect if the suspect has not been given access to counsel, and the suspect did not initiate the further communication with the police?

#### Holding and Reasoning (White, J.)

No. Once a suspect has received his *Miranda* warnings and invoked his right to counsel, the police may not further interrogate the suspect until the suspect has been given access to counsel, unless the suspect initiates further communication with the police. *Miranda* held that once a suspect has invoked his right to counsel, interrogation must stop. It is equally impermissible to re-interrogate a suspect who has invoked his right to counsel without counsel being present. If a suspect subject to custodial police interrogation invokes his right to have counsel present, the suspect's responses to further police questioning are not sufficient to constitute a valid waiver of his rights. A valid waiver of the right to counsel must be voluntary, and knowingly and intelligently given considering the totality of the circumstances. However, even if the suspect has invoked his right to have counsel present, the suspect may initiate further conversations or exchanges with the police. In that circumstance, if the suspect initiates the further conversations and provides incriminating information during those conversations, police are not precluded from listening to the suspect's voluntary statements and using them against the suspect at trial. In this case, the state supreme court failed to look at the particular facts and circumstances of the case to determine whether Edwards knowingly and intelligently waived his right to counsel. After Edwards invoked his right to counsel and the police ceased the initial interrogation, the police re-initiated questioning the next day without giving Edwards access to counsel. Edwards' responses to the further questioning were not a valid waiver of his rights. Accordingly, Edwards' incriminating statement was inadmissible, and the state supreme court's judgment is reversed.

#### Concurrence (Burger, C.J.)

The relevant question here is whether the police's re-interrogation of Edwards was the result of Edwards' voluntary waiver of his rights. When the police arrived to re-interrogate Edwards, Edwards said he did not want to speak to anyone, but the officer told Edwards he must. The re-interrogation thus was not the result of a voluntary waiver, and the state supreme court erred in finding that it was.

#### Concurrence (Powell, J.)

Once a suspect has been read his *Miranda* warnings and has invoked his right to counsel, whether the suspect later voluntarily and knowingly decides to talk to the police without counsel present is a question to be determined by the totality of the circumstances. Although the question of who initiated the communication is relevant to this inquiry, it cannot be the sole factor for consideration.

**Key Terms:**

**Miranda Warnings** - The notices of constitutional rights set forth in the opinion of the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436(1966) that law enforcement authorities must provide to a suspect in a criminal investigation prior to initiation of a custodial interrogation. The suspect must be advised that the suspect has the right to remain silent, anything the suspect says may be used against the suspect, and the suspect has the right to an attorney.

**Edwards Rule on Interrogation -** [from *Edwards v. Arizona*, 451 U.S 477 (1981)] Rule prohibiting police from initiating an interrogation of a suspect who has requested an attorney before an attorney has been provided.

**State v. Anderson, 937 S.W.2d 851 (Tenn.1996)**

**State v. Anderson**

#### Rule of Law

**Criminal Law**

**Prior to custodial interrogation, *Miranda* requires that police inform person being questioned that he has right to remain silent, any statement made may be used against him, he has right to presence of attorney, and if he cannot afford attorney, one will be appointed for him prior to questioning, if he so desires.**[**U.S.C.A. Const.Amend. 5**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDV&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Criminal Law**

**Factors relevant to objective assessment of whether suspect is “in custody” for purposes of Miranda include time and location of interrogation, duration and character of questioning, officer's tone of voice and general demeanor, suspect's method of transportation to place of questioning, number of police officers present, any limitation on movement or other form of restraint imposed on suspect during interrogation, any interactions between officer and suspect, extent to which suspect is confronted with law enforcement officer's suspicions of guilt or evidence of guilt, and finally, extent to which suspect is made aware that he or she is free to refrain from answering questions or to end interview at will.**[**U.S.C.A. Const.Amend. 5**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDV&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Criminal Law**

**Evaluating whether individual is “in custody” for purposes of Miranda is fact specific inquiry, and totality of circumstances surrounding each interrogation must be closely examined.**[**U.S.C.A. Const.Amend. 5**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDV&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Criminal Law**

**Appropriate inquiry in determining whether individual is “in custody” and entitled to Miranda warnings is whether, under totality of circumstances, reasonable person in suspect's position would consider himself or herself deprived of freedom of movement to degree associated with formal arrest.**[**U.S.C.A. Const.Amend. 5**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDV&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

**Criminal Law**

**Test to determine whether individual is “in custody” for purposes of Miranda is objective from viewpoint of individual being questioned, and unarticulated, subjective view of law enforcement officials that such individual is or is not a suspect is irrelevant; overruling [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Idd5255c4ec5b11d99439b076ef9ec4de&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=934bdc642ac741aaab5139198b8422a0&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))**[***State*v. Morris, 456 S.W.2d 840.**](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1970138176&pubNum=713&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))[**U.S.C.A. Const.Amend. 5**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDV&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**.**

937 S.W.2d 851

Supreme Court of Tennessee,

at Jackson.

**STATE of Tennessee, Appellant,**

**v.**

**Joe L. ANDERSON, Appellee.**

Sept. 16, 1996.

**Synopsis**

Defendant was indicted for arson. The Decatur Criminal Court, [C. Creed McGinley](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0316936701&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Idd7e0e28e7d011d99439b076ef9ec4de), J., sustained defendant's motion to suppress statements given to arson investigator, and **state** appealed. The Court of Criminal Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I22d436a0eb3411d98ac8f235252e36df&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=934bdc642ac741aaab5139198b8422a0&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[1995 WL 467662,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995163367&pubNum=999&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) Gasaway, J., affirmed trial court. **State** appealed. The Supreme Court, [**Anderson**](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0157496001&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Idd7e0e28e7d011d99439b076ef9ec4de), J., held that test to determine whether individual is in custody for purposes of [*Miranda*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) is objective from viewpoint of individual being questioned, and unarticulated, subjective view of law enforcement officials that such individual is or is not a suspect is irrelevant, overruling *[](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Idd5255c4ec5b11d99439b076ef9ec4de&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=934bdc642ac741aaab5139198b8422a0&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))*[***State****v. Morris*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1970138176&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))*.*

Reversed and remanded.

## **Attorneys and Law Firms**

**\*851** [Charles W. Burson](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0230793701&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Idd7e0e28e7d011d99439b076ef9ec4de), Attorney General and Reporter, [Michael E. Moore](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0184158601&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Idd7e0e28e7d011d99439b076ef9ec4de), Solicitor General, [Gordon W. Smith](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0210965601&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Idd7e0e28e7d011d99439b076ef9ec4de), Associate Solicitor General, Eugene J. Honea, Assistant Attorney General, Nashville, Jerry Wallace, Assistant District Attorney, Decaturville, for Appellant.

[Richard B. Fields](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0282369601&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Idd7e0e28e7d011d99439b076ef9ec4de), Memphis, for Appellee.

**OPINION**

[**ANDERSON**](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0157496001&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Idd7e0e28e7d011d99439b076ef9ec4de), Justice.

We granted this appeal to clarify the standards by which courts determine whether a person being questioned by law enforcement officers is “in custody,” and therefore entitled to the warnings mandated by [Miranda v.***\*852***Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&pubNum=708&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

In this case, the defendant was indicted for arson after being questioned by an arson investigator and having given a statement. The defendant moved to suppress the statement because no [Miranda](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) warnings were given. Emphasizing that the defendant “was a suspect at the time of his interrogation” and that the process had “shifted from the investigatory to the accusatory stage,” the trial court concluded the defendant was “in custody” at the time of his interrogation and granted the defendant's motion to suppress the statement since no [Miranda](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))warnings were given. In a split decision, the Court of Criminal Appeals affirmed the suppression of defendant's statement, with the majority concluding that the “focus” of the investigation is relevant to the determination of whether the suspect was “in custody.”

We have concluded that in determining whether an individual is “in custody” and entitled to [Miranda](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) warnings, the relevant inquiry is whether, under the totality of the circumstances, a reasonable person in the suspect's position would consider himself or herself deprived of freedom of movement to a degree associated with a formal arrest. The test is objective from the viewpoint of the suspect, and the unarticulated, subjective view of law enforcement officials that the individual being questioned is or is not a suspect does not bear upon the question. Accordingly, the Court of Criminal Appeals' judgment is reversed, and the cause is remanded to the trial court for application of this standard to the facts in this case.

***BACKGROUND***

The defendant, Joe **Anderson**, was indicted for arson on February 15, 1993, along with co-defendant, David Hudgens. **Anderson** filed a pretrial motion to suppress a statement he had made to an arson investigator on February 2, 1993. A hearing was held on the motion, and the proof is summarized as follows:

Early in the arson investigation, co-defendant Hudgens gave a statement to Johnny Hayes, the arson investigator from the **State** Fire Marshall's office, which implicated the defendant. Thereafter, the **State** Fire Marshall's office wired Hudgens in an attempt to elicit an incriminating statement from **Anderson**. That attempt failed.

On February 2, 1993, Hayes went to **Anderson's** home and asked **Anderson** to come to the sheriff's office to give a statement. **Anderson** agreed and, accompanied by his wife, he drove himself to the sheriff's office. While his wife waited in the front of the building, **Anderson** was taken into an office and questioned by Hayes. Investigator Pollard of the Fire Marshall's office and John Martin of the Sheriff's office were also present during the questioning. Hayes advised **Anderson** that he was not under arrest and that he could leave at any time, but he did not advise **Anderson** of his [Miranda](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) rights before talking with him. **Anderson** at no time attempted to leave or requested an attorney. He gave a statement which was reduced to writing by Hayes, and signed by **Anderson** after he reviewed it for mistakes. After advising **Anderson** that criminal charges might be brought against him at a later date, Hayes said he told **Anderson** that he and his wife were free to leave.

In response to questioning from the trial court, Hayes **stated** that arson investigators considered **Anderson** a suspect at the time of his interrogation, but they did not inform **Anderson** of their belief. A warrant for **Anderson's**arrest was issued on February 5, 1993, three days after the interview occurred.

Based upon the above evidence, the trial court sustained **Anderson's** motion to suppress, holding that the defendant was clearly “a suspect at the time of his interrogation and the process had shifted from the investigatory to the accusatory stage.”

In a split decision, the Court of Criminal Appeals affirmed. Special Judge Gasaway wrote the lead opinion, which concluded that [Miranda](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) warnings are required when “the fine line of distinction between the investigatory stage and the accusatory stage has been crossed.” Then Judge White concurred in the result suppressing the statement but concluded that the progress of the investigation is not determinative, and is only one of the factors to consider in determining whether,  **\*853** under the totality of the circumstances, a person is “in custody.” Judge Hayes dissented, **stating** that the determination of whether a person is “in custody” does not turn upon whether the person was the “focus” of a criminal investigation, but is to be determined by inquiring whether, under the totality of the circumstances, a reasonable person in the suspect's position would have felt deprived of his or her freedom of movement to a degree associated with a formal arrest. Applying that standard, Judge Hayes concluded that **Anderson** was not in custody when he gave the statement.

We granted the **State's** application for permission to appeal to clarify the standard by which courts determine whether a person being questioned by law enforcement officers is “in custody,” and entitled to [Miranda](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) warnings. For the reasons that follow, we reverse the Court of Criminal Appeals' decision.

***CUSTODY***

In this Court, the **State** argues that the trial court and the Court of Criminal Appeals erred in relying upon the “focus” test to determine whether **Anderson** was in custody. The **State** asserts that the “focus” test has been abandoned by recent United **States** Supreme Court cases, as well as decisions of this Court.

The defendant, **Anderson**, argues that under [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Idd5255c4ec5b11d99439b076ef9ec4de&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=934bdc642ac741aaab5139198b8422a0&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[***State***v. Morris, 224 Tenn. 437, 456 **S.W**.**2d** 840 (1970)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1970138176&pubNum=713&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), a **State**Supreme Court decision which has not been overruled, the progress of the investigation at the time of the interrogation is an appropriate factor to consider when determining whether a person is in custody and entitled to [Miranda](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) warnings.

[1](https://1.next.westlaw.com/Document/Idd7e0e28e7d011d99439b076ef9ec4de/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad73aa50000017789659a9a1d8800cc%3FpcidPrev%3D2aff37a2c46f468cb69a2c14d9886697%26Nav%3DCASE%26fragmentIdentifier%3DIdd7e0e28e7d011d99439b076ef9ec4de%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=25e04fbf9d3b43f1c23d74b2a541320c&list=CASE&rank=1&sessionScopeId=566a283f4841d54705ad34018a96a8dad9d665e0d842a7cfc76e4b738e19678a&originationContext=Smart%20Answer&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F11996209712)We begin our analysis of this issue with [Miranda,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) in which the United **States** Supreme Court held that a defendant's statements made during the course of custodial police interrogation are inadmissible as evidence in a criminal case unless the **State** establishes that the defendant was advised of certain constitutional rights and waived those rights. Prior to custodial interrogation, [Miranda](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) requires that the police inform the person being questioned that (a) he has the right to remain silent; (b) any statement made may be used against him; (c) he has the right to the presence of an attorney; and (d) if he can not afford an attorney, one will be appointed for him prior to questioning, if he so desires. [Id., 384 U.S. at 444, 86 S.Ct. at 1612.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&pubNum=708&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&fi=co_pp_sp_708_1612&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_1612)

“Custodial interrogation” was defined by the [Miranda](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) Court as “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.” [Miranda, 384 U.S. at 444, 86 S.Ct. at 1612.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&pubNum=708&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&fi=co_pp_sp_708_1612&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_1612)

After the [Miranda](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) decision in 1966, many courts had difficulty discerning whether specific factual scenarios fell within those broad general definitions. To facilitate the determination, courts began to enumerate factors to aid in the assessment. For example, this Court in 1970 in [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Idd5255c4ec5b11d99439b076ef9ec4de&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=934bdc642ac741aaab5139198b8422a0&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[Morris](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1970138176&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) **stated** that courts generally must consider the totality of the circumstances in deciding whether a person is subjected to “custodial interrogation,” and listed five factors it considered pertinent to the question:

1. The nature of the interrogator.

2. The nature of the suspect.

3. The time and place of the interrogation.

4. The nature of the interrogation.

5. The progress of the investigation at the time of the interrogation.

[](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Idd5255c4ec5b11d99439b076ef9ec4de&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=934bdc642ac741aaab5139198b8422a0&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[Morris, 456 **S.W**.**2d** at 842.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1970138176&pubNum=713&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&fi=co_pp_sp_713_842&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_842) In deciding to suppress the statements in this case, the trial court and the Court of Criminal Appeals focused on the last factor mentioned in [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Idd5255c4ec5b11d99439b076ef9ec4de&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=934bdc642ac741aaab5139198b8422a0&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[Morris](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1970138176&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))—the progress of the investigation at the time of the interrogation. In recent years, however, that factor has been rejected by both the United **States** Supreme Court and this Court.

For example, the United **States** Supreme Court emphasized that [Miranda](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) implicitly defined “focus,” for its purposes, as “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.” [Miranda, 384 U.S. at 444, 86 S.Ct. at 1612.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&pubNum=708&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&fi=co_pp_sp_708_1612&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_1612) The Supreme Court  **\*854** has refused to accept the notion that a person is “in custody” merely because the person was a suspect when interviewed by law enforcement officials. [Beckwith v. United***States***, 425 U.S. 341, 96 S.Ct. 1612, 48 L.Ed.2d 1 (1976)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1976142360&pubNum=708&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). Instead, in [California v. Beheler, 463 U.S. 1121, 1125, 103 S.Ct. 3517, 3520, 77 L.Ed.2d 1275 (1983)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1983131596&pubNum=708&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&fi=co_pp_sp_708_3520&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_3520), the United **States** Supreme Court articulated a more precise standard by **stating** that a person is in custody for purposes of [Miranda,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) only if there has been “a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.”

Later, in [Berkemer v. McCarty, 468 U.S. 420, 442, 104 S.Ct. 3138, 3151, 82 L.Ed.2d 317 (1984)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984132130&pubNum=708&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&fi=co_pp_sp_708_3151&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_3151), the United **States**Supreme Court **stated** that whether a person is in custody depends upon “how a reasonable man in the suspect's position would have understood his situation.” The reasonable person test is appropriate, since, unlike a subjective test, it “is not solely dependent either on the self-serving declarations of the police officers or the defendant nor does it place upon the police the burden of anticipating the frailties or idiosyncracies of every person whom they question.” [Berkemer, 468 U.S. at 442, n. 35, 104 S.Ct. at 3151, n. 35](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984132130&pubNum=708&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&fi=co_pp_sp_708_3151&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_3151) (quoting [People v. P., 21 N.Y.2d 1, 286 N.Y.S.2d 225, 233, 233 N.E.2d 255, 260 (1967)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1967125848&pubNum=578&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&fi=co_pp_sp_578_260&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_578_260)).

The reasonable person objective test was further explained, and the “focus” factor completely abolished, by the United **States** Supreme Court in the recent case of [Stansbury v. California, 511 U.S. 318, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1994092133&pubNum=708&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

In [Stansbury,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1994092133&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) the Supreme Court reiterated that “the ultimate inquiry is simply whether there was a formal arrest or restraint on freedom of movement of the degree associated with a formal arrest.” In evaluating that inquiry, courts must consider the totality of the objective circumstances surrounding the interrogation, “not the subjective views harbored by either the interrogating officers or the person being questioned.” [Id., 511 U.S. at 322–23, 114 S.Ct. at 1529.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1994092133&pubNum=708&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&fi=co_pp_sp_708_1529&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_1529)

The Court emphasized that “[o]ur cases make clear, in no uncertain terms, that any inquiry into whether the interrogating officers have focused their suspicions upon the individual being questioned (assuming those suspicions remain undisclosed) is not relevant for purposes of [Miranda.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))” The Court explained that

an officer's views concerning the nature of an interrogation, or beliefs concerning the potential culpability of the individual being questioned may be one among many factors that bear upon the assessment whether that individual was in custody, **but only if the officer's views or beliefs were somehow manifested to the individual under interrogation and would have affected how a reasonable person in that position would perceive his or her freedom to leave.**

[Stansbury, 511 U.S. at 325, 114 S.Ct. at 1530](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1994092133&pubNum=708&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&fi=co_pp_sp_708_1530&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_1530) (emphasis added).

Likewise, recent decisions of this Court on the subject, though not explicitly overruling the 1970 [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Idd5255c4ec5b11d99439b076ef9ec4de&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=934bdc642ac741aaab5139198b8422a0&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[Morris](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1970138176&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) case, have recognized that the focus factor has been explicitly repudiated by the United **States** Supreme Court as a basis for determining whether a person is “in custody” and entitled to [Miranda](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) warnings prior to interrogation. See[***State***v. Smith, 868 **S.W**.**2d** 561, 569–571 (Tenn.1993)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1994024175&pubNum=713&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&fi=co_pp_sp_713_569&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_569); [***State***v. Brown, 836 **S.W**.**2d** 530 (Tenn.1992)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992141630&pubNum=713&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); see also[***State***v. Cooper,912 **S.W**.**2d** 756 (Tenn.Crim.App.1995)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995109785&pubNum=713&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). Although lip service has been paid in some past appellate decisions in this **State** to the continuing viability of the focus factor, in reality that factor has not been relevant to the assessment of whether a person is in custody since the United **States** Supreme Court's decision in [Beckwith](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1976142360&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) in 1976. Accordingly, to the extent that [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Idd5255c4ec5b11d99439b076ef9ec4de&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=934bdc642ac741aaab5139198b8422a0&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[Morris](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1970138176&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) or any other decisions hold or indicate that the focus or progress of the investigation factor is relevant to the determination of whether a person is in custody and entitled to [Miranda](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) warnings, they are overruled. See, e.g.,[](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I04211e80e7b011d99439b076ef9ec4de&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=934bdc642ac741aaab5139198b8422a0&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[***State***v. Hartman, 703 **S.W**.**2d** 106, 120 (Tenn.1985)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986103116&pubNum=713&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&fi=co_pp_sp_713_120&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_120).[1](https://1.next.westlaw.com/Document/Idd7e0e28e7d011d99439b076ef9ec4de/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad73aa50000017789659a9a1d8800cc%3FpcidPrev%3D2aff37a2c46f468cb69a2c14d9886697%26Nav%3DCASE%26fragmentIdentifier%3DIdd7e0e28e7d011d99439b076ef9ec4de%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=25e04fbf9d3b43f1c23d74b2a541320c&list=CASE&rank=1&sessionScopeId=566a283f4841d54705ad34018a96a8dad9d665e0d842a7cfc76e4b738e19678a&originationContext=Smart%20Answer&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00111996209712)

**\*855** Having determined that the focus or progress of the investigation is not relevant to determine whether a person is in custody, we deem it necessary to briefly delineate some of the factors that are pertinent to the inquiry. Again, we emphasize that the test is whether, under the totality of the circumstances, a reasonable person in the suspect's position would consider himself or herself deprived of freedom of movement to a degree associated with a formal arrest.

[2](https://1.next.westlaw.com/Document/Idd7e0e28e7d011d99439b076ef9ec4de/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad73aa50000017789659a9a1d8800cc%3FpcidPrev%3D2aff37a2c46f468cb69a2c14d9886697%26Nav%3DCASE%26fragmentIdentifier%3DIdd7e0e28e7d011d99439b076ef9ec4de%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=25e04fbf9d3b43f1c23d74b2a541320c&list=CASE&rank=1&sessionScopeId=566a283f4841d54705ad34018a96a8dad9d665e0d842a7cfc76e4b738e19678a&originationContext=Smart%20Answer&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F21996209712)[3](https://1.next.westlaw.com/Document/Idd7e0e28e7d011d99439b076ef9ec4de/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad73aa50000017789659a9a1d8800cc%3FpcidPrev%3D2aff37a2c46f468cb69a2c14d9886697%26Nav%3DCASE%26fragmentIdentifier%3DIdd7e0e28e7d011d99439b076ef9ec4de%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=25e04fbf9d3b43f1c23d74b2a541320c&list=CASE&rank=1&sessionScopeId=566a283f4841d54705ad34018a96a8dad9d665e0d842a7cfc76e4b738e19678a&originationContext=Smart%20Answer&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F31996209712)Some factors relevant to that objective assessment include the time and location of the interrogation; the duration and character of the questioning; the officer's tone of voice and general demeanor; the suspect's method of transportation to the place of questioning; the number of police officers present; any limitation on movement or other form of restraint imposed on the suspect during the interrogation; any interactions between the officer and the suspect, including the words spoken by the officer to the suspect, and the suspect's verbal or nonverbal responses; the extent to which the suspect is confronted with the law enforcement officer's suspicions of guilt or evidence of guilt; and finally, the extent to which the suspect is made aware that he or she is free to refrain from answering questions or to end the interview at will. See, e.g.,[People v. Dracon, 884 P.2d 712 (Colo.1994)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1994229256&pubNum=661&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); [Landreth v.***State***, 600 So.2d 440 (Ala.Cr.App.1992)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992086850&pubNum=735&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); [People v. Goyer, 265 Ill.App.3d 160, 202 Ill.Dec. 744, 638 N.E.2d 390 (1994)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1994156999&pubNum=578&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); [***State***v. Mortley, 532 N.W.2d 498 (Iowa App.1995)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995125381&pubNum=595&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I72a0e00b92b211d9a707f4371c9c34f0&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=934bdc642ac741aaab5139198b8422a0&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[United***States***v. Fike, 82 F.3d 1315 (5th Cir.1996)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996109834&pubNum=506&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); [United***States***v. Griffin, 7 F.3d 1512 (10th Cir.1993)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1993204782&pubNum=506&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) (citing cases). The listed factors are by no means exclusive. The totality of the circumstances surrounding each interrogation must be closely examined when evaluating whether an individual is in custody for purposes of [Miranda.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) It is a very fact specific inquiry. Application of the appropriate, relevant factors to the facts is a task for which the trial court is especially suited.

In reaching the conclusion that **Anderson** was in custody, both the trial court and the Court of Criminal Appeals' majority emphasized the “focus of the investigation” factor, which is irrelevant in this case since the law enforcement officials never communicated their suspicions to **Anderson**. We, therefore, reverse the Court of Criminal Appeals' judgment.

Because the “in custody” determination is so fact specific and the factual record was not developed with the new standard in mind, we remand to the trial court for reconsideration of **Anderson's** motion to suppress in accordance with the standard discussed herein and the facts to be developed in the trial court.

***CONCLUSION***

[4](https://1.next.westlaw.com/Document/Idd7e0e28e7d011d99439b076ef9ec4de/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad73aa50000017789659a9a1d8800cc%3FpcidPrev%3D2aff37a2c46f468cb69a2c14d9886697%26Nav%3DCASE%26fragmentIdentifier%3DIdd7e0e28e7d011d99439b076ef9ec4de%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=25e04fbf9d3b43f1c23d74b2a541320c&list=CASE&rank=1&sessionScopeId=566a283f4841d54705ad34018a96a8dad9d665e0d842a7cfc76e4b738e19678a&originationContext=Smart%20Answer&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F41996209712)[5](https://1.next.westlaw.com/Document/Idd7e0e28e7d011d99439b076ef9ec4de/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad73aa50000017789659a9a1d8800cc%3FpcidPrev%3D2aff37a2c46f468cb69a2c14d9886697%26Nav%3DCASE%26fragmentIdentifier%3DIdd7e0e28e7d011d99439b076ef9ec4de%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=25e04fbf9d3b43f1c23d74b2a541320c&list=CASE&rank=1&sessionScopeId=566a283f4841d54705ad34018a96a8dad9d665e0d842a7cfc76e4b738e19678a&originationContext=Smart%20Answer&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F51996209712)Accordingly, we hold that the appropriate inquiry in determining whether an individual is “in custody” and entitled to [Miranda](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) warnings is whether, under the totality of the circumstances, a reasonable person in the suspect's position would consider himself or herself deprived of freedom of movement to a degree associated with a formal arrest. The test is objective from the viewpoint of the suspect, and the unarticulated, subjective view of law enforcement officials that the individual being questioned is or is not a suspect does not bear upon the question. Accordingly, the Court of Criminal Appeals' judgment is reversed, and the cause is remanded to the trial court for application of the standard to the facts to be developed in this case. Costs of this appeal are taxed to the defendant, Joe L. **Anderson**, for which execution may issue.

[BIRCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0259809301&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Idd7e0e28e7d011d99439b076ef9ec4de), C.J., and [DROWOTA](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0259789701&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Idd7e0e28e7d011d99439b076ef9ec4de) and [REID](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0259686601&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Idd7e0e28e7d011d99439b076ef9ec4de), JJ., concur.

[WHITE](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0163409201&originatingDoc=Idd7e0e28e7d011d99439b076ef9ec4de&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Idd7e0e28e7d011d99439b076ef9ec4de), J., not participating.

**Part 2 – What is Interrogation; State v. Sawyer, 156 S.W.3d 531 (Tenn. 2005)**

**\*\*RHODE ISLAND v. INNIS\*\***

United States Supreme Court  
446 U.S. 291 (1980)

**Rule of Law**

**Under *Miranda*, “interrogation” refers 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.**

**Facts**

Innis (defendant) was arrested and convicted of kidnapping, robbery and murder. At the time of his arrest, Innis was unarmed, but the police suspected that he had hidden a gun somewhere nearby. When he was arrested, Innis was read his *Miranda* warnings. He said that he understood his rights and he wanted a lawyer. Innis was placed in a police car with three officers for the ride to the police station. Along the way, two of the officers began speaking to each other, expressing their concern that a student from the nearby school for handicapped children would find the weapon and hurt himself. At this point, Innis told the police to turn around and he would show them where the gun was. Before pointing out the gun’s location, Innis was again read his *Miranda* rights. Innis responded that he understood but he did not want any children to come across the gun and get hurt. Innis then pointed out where the gun was. The trial judge ruled that Innis had been properly Mirandized and that it was understandable that the officers in the car would have addressed their concern to each other. The trial judge permitted the gun and Innis’ statements to be introduced at trial. The state supreme court disagreed.

**Issue**

Has a suspect been “interrogated” for the purpose of *Miranda* where he is in a car with police officers who are expressing their concern about public safety?

**Holding and Reasoning (Stewart, J.)**

No. Unless police officers reasonably should know that their comments will elicit an incriminating response from a suspect, comments made between police officers in the presence of a suspect do not constitute interrogation for the purpose of *Miranda*. Under *Miranda*, “interrogation” is not limited to situations where the police actually question a suspect. The *Miranda* opinion was concerned with the entire interaction between police officers and a suspect in custody. This includes direct questioning but also police techniques such as line-ups where a witness is coached by the police, and the various psychological ploys, such as blaming the victim. *Miranda* therefore applies when a suspect is subject to questioning or its functional equivalent. In this case, there is no indication that the two officers knew or should have known that Innis was particularly susceptible to an appeal to his conscience. Furthermore, there is no indication that Innis was disoriented or upset at the time of his arrest. Therefore, Innis was not interrogated for the purpose of *Miranda* because he was not subject to questioning or the functional equivalent. There is nothing in the record to suggest that the officers were trying to elicit a response from him or that they should have known their comments would elicit a response.

**Concurrence (Burger, C.J.)**

The meaning of *Miranda* has become clear and it should not be overruled, extended or discredited.

**Dissent (Marshall, J.)**

The Court’s definition of “interrogation” is appropriate. However, under these facts, the only appropriate conclusion is that Innis was subject to interrogation. Any suspect would feel compelled to speak at the prospect of an innocent, handicapped child getting injured.

**Dissent (Stevens, J.)**

The Court’s rule is not consistent with *Miranda* because it allows police officers to make statements designed to elicit a response from the suspect. The police must simply avoid phrasing their statements as a question and must make sure that a suspect does not appear to be particularly susceptible to a particular type of physiological pressure.

**Key Terms:**

**Miranda Warnings** - The notices of constitutional rights set forth in the opinion of the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436(1966) that law enforcement authorities must provide to a suspect in a criminal investigation prior to initiation of a custodial interrogation. The suspect must be advised that the suspect has the right to remain silent, anything the suspect says may be used against the suspect, and the suspect has the right to an attorney.

# Miranda v. Arizona

#### United States Supreme Court 384 U.S. 436 (1966)

#### Rule of Law

**Without certain hallmark warnings regarding the right to remain silent and the right to counsel, statements made during custodial interrogation are inadmissible at trial.**

**Brewer v. Williams**

United States Supreme Court  
430 U.S. 387 (1977)

**Rule of Law**

**A defendant has not effectively waived his right to counsel if, at the advice of counsel, he continues to invoke his right to remain silent until he has the opportunity to confer with his attorney but then makes a statement after being subject to police interrogation.**

**Facts**

Williams (defendant) had escaped from a mental institution and was suspected of kidnapping a young girl from a YMCA in Des Moines. The Des Moines police issued a warrant for his arrest. Two days after the abduction, and after consulting with a Des Moines attorney who advised him not to talk to the police, Williams turned himself in to the Davenport police where he was arrested pursuant to the outstanding warrant. Williams’ attorney in Des Moines arranged for two officers to go pick Williams up in Davenport, and they agreed not to question Williams during the 160 mile trip back to Des Moines. Williams was arraigned in Davenport and he was able to consult with a Davenport attorney who advised him not to say anything until he arrived back in Des Moines and could talk with his attorney there. Before putting him in the police car for the ride back to Des Moines, the attorney in Davenport again reiterated to the police that they were not to question Williams during the trip. Once in the car, Williams told the police that he would tell them everything that happened once they got back to Des Moines and he could talk with his lawyer. However, one of the officers then delivered the “Christian burial speech.” The officer told Williams that he was not asking him any questions, but he just wanted Williams to think about something on the ride back to Des Moines. He wanted Williams to think about how bad the weather was outside, that it was going to snow, that the snow would cover the girl’s body, and the police may never be able to recover it and give her the chance at a proper Christian burial. The officer knew that Williams had escaped from a mental institution and also that he was very religious. The officer also testified that his statement was intended to get information from Williams. A few hours into the trip, Williams eventually told the police to stop and showed them where the body was hidden. Williams was indicted for first-degree murder. The trial judge denied Williams’ motion to suppress all evidence resulting from his statements made in the police car, holding that the officer’s “Christian burial speech” amounted to interrogation but that Williams had waived his right to have an attorney present when he began speaking to the police in the car. Applying the totality of the circumstances test to hold that Williams had waived his right to counsel, the state supreme court affirmed. The federal district court granted a petition for a writ of habeas corpus holding that as a matter of law the evidence resulting from Williams’ statements made in the car were wrongly admitted at trial. The court of appeals affirmed, holding that the state failed to establish that Williams intentionally waived his right to have counsel present.

**Issue**

Has a defendant effectively waived his right to counsel if, at the advice of counsel, he continues to invoke his right to remain silent until he has the opportunity to confer with his attorney but then makes a statement after being subject to police interrogation?

**Holding and Reasoning (Stewart, J.)**

No. An effective waiver requires actual relinquishment of a right. If a defendant consistently relies on the advice of counsel in dealing with the police, any suggestion that he waived his right to counsel is refuted. Under the Sixth and Fourteenth Amendments, a person has a right to counsel at or after the time that judicial proceedings have been initiated against him. Furthermore, the police may not interrogate a suspect alone after he has invoked his right to counsel. In this case, judicial proceedings had been initiated against Williams at the time of his car trip back to Des Moines. The officer’s “Christian burial speech” amounted to interrogation because the officer himself testified to the fact that his statements were intended to elicit information from Williams. Williams invoked his right to counsel throughout his ordeal. He contacted his attorney before turning himself in, he continued to employ the advice of counsel by remaining silent, and he even told the police he would tell them everything but only after he consulted with his attorney. Despite this, the officer elicited incriminating statements from Williams without first reading him his *Miranda* rights or ascertaining whether Williams wished to waive his right to counsel. Under such facts, no effective waiver took place. Accordingly, the judgment of the federal court of appeals is affirmed.

**Concurrence (Stevens, J.)**

A lawyer often acts as the middleman between the state and an individual. Therefore, a suspect should be able to rely on his lawyer’s advice. In this case, Williams was not able to because the police broke their word to Williams’ attorney that Williams would not be questioned.

**Concurrence (Marshall, J.)**

The officer intentionally and deliberately denied Williams his constitutional right to an attorney. The dissent condemns the Court’s opinion today and applauds the officer’s conduct as good police work. However, good police work does not involve catching a criminal at any cost but demands strict compliance with the law, no matter how heinous the crime may be.

**Concurrence (Powell, J.)**

The dissent is wrong when it criticizes the majority for holding that a defendant is not able to change his mind and choose to talk to the police. However, in this case, the state produced no affirmative evidence that Williams knowingly and intelligently waived his right to counsel.

**Dissent (Blackmun, J.)**

The Court improperly found that the officer deliberately tried to isolate Williams from his counsel to learn incriminating information from him. Williams was separated from his lawyer as a necessary part of being transported to the county where the crime occurred. Additionally, the officer was not attempting solely to learn incriminating information from Williams. At that point, it was not clear that the girl was dead, and the officer was trying to gain information in hopes of finding her. Moreover, not every attempt to learn information is an interrogation, and the officer's statements and comments during the ride here did not amount to an interrogation. If there is no interrogation, a defendant's truly voluntary statements should be admitted. This matter should be remanded for further consideration of the voluntariness of Williams's statements.

**Dissent (Burger, C.J.)**

The Court’s holding suggests that once a suspect has exercised his right to remain silent and his right to a lawyer, he is not able to later waive these rights. In this case, Williams made a valid waiver of his constitutional rights when he showed the police where the body was. He knew he had the right to counsel and that he could remain silent. The Court never even questions Williams’ mental competence. The only reasonable conclusion is that Williams knew that telling the police where the body was would have further legal consequences for himself but chose to talk to them anyway. The Court’s opinion punishes society instead of punishing the police who actually make the mistake.

**Dissent (White, J.)**

Williams’ statement, and the resulting evidence obtained, should be admissible at trial. Williams knew of his right to remain silent and he intentionally relinquished that right. He had been told a number of times that he did not need to speak and demonstrated his understanding when he told the police in the car that he would tell them what happened once he saw his lawyer. He intentionally relinquished his right because the officer’s “Christian burial speech” was not coercive; the officer even told Williams he did not need to respond. Furthermore, the police’s statement was made hours before Williams actually took them to the body. In addition, the Court applies the holding in *Massiah v. United States*, 377 U.S. 201 (1964). According to the Court’s opinion, *Massiah* offers suspects a slightly different right than that set forth in *Miranda v. Arizona*, 384 U.S. 486 (1966). According to the Court, *Massiah* holds that the right of an individual is the right not to be asked any questions without the presence of counsel, rather than a right not to answer any questions without counsel present. Such a thin distinction should not lead to such disparate results.

**Key Terms:**

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

**Miranda Warnings** - The notices of constitutional rights set forth in the opinion of the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436(1966) that law enforcement authorities must provide to a suspect in a criminal investigation prior to initiation of a custodial interrogation. The suspect must be advised that the suspect has the right to remain silent, anything the suspect says may be used against the suspect, and the suspect has the right to an attorney.

# Massiah v. United States

#### United States Supreme Court 377 U.S. 201 (1964)

#### Rule of Law

**A person who has been indicted on criminal charges has as much a constitutional right to have an attorney present during police interrogations as he does during the trial itself.**

**Arizona v. Mauro**

#### Rule of Law

**Criminal Law**

**When accused has expressed desire to deal with police only through counsel, accused is not subject to further interrogation by authorities until counsel has been made available, unless accused initiates further communication, exchanges, or conversations with police.**[**U.S.C.A. Const.Amend. 5**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOAMENDV&originatingDoc=Ic1e396179c1e11d991d0cc6b54f12d4d&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

**Criminal Law**

**Defendant who had asserted right to counsel was not subjected to interrogation or its functional equivalent when police allowed defendant's wife to speak with defendant in presence of officer and tape recorded their conversation, even though officers were aware of possibility that defendant would incriminate himself while talking to wife; officer present asked defendant no questions about the crime or his conduct, and there was no showing that officers sent wife in to see defendant for purpose of eliciting incriminating statements.**[**U.S.C.A. Const.Amend. 5**](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOAMENDV&originatingDoc=Ic1e396179c1e11d991d0cc6b54f12d4d&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))**.**

107 S.Ct. 1931

Supreme Court of the United States

**ARIZONA, Petitioner**

**v.**

**William Carl MAURO.**

No. 85–2121.

Argued March 31, 1987.Decided May 4, 1987.Rehearing Denied June 26, 1987.See [483 U.S. 1034, 107 S.Ct. 3278](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&pubNum=0000708&cite=107SCT3278&originatingDoc=Ic1e396179c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

**Synopsis**

Defendant was convicted of murder and child abuse, and the Arizona Supreme Court reversed, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I3a3bdce5f46b11d983e7e9deff98dc6f&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[149 Ariz. 24, 716 P.2d 393.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986110367&pubNum=661&originatingDoc=Ic1e396179c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) State's petition for certiorari was granted. The Supreme Court, Justice Powell, held that defendant, who had asserted right to counsel, was not subjected to interrogation or its functional equivalent when police allowed defendant's wife to speak with defendant in presence of officer and tape recorded their conversation.

Reversed and remanded.

Justice Stevens filed dissenting opinion in which Justice Brennan, Justice Marshall and Justice Blackmun joined.

Opinion on remand, [159 Ariz. 186, 766 P.2d 59](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988154211&pubNum=0000661&originatingDoc=Ic1e396179c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

# \*\*ILLINOIS v. PERKINS\*\*

#### United States Supreme Court 496 U.S. 292 (1990)

**Rule of Law**

**An undercover officer does not have to provide *Miranda* warnings to an incarcerated person before engaging in questioning that could induce incriminating statements.**

**Facts**

An informant told police that Lloyd Perkins (defendant) confessed to the murder of Richard Stephenson. Police then placed the informant and an undercover officer into the Montgomery County jail where Perkins was being held on unrelated charges. Perkins boasted about the killing to the informant and the undercover officer. Perkins was charged with murder. Before trial, Perkins moved to suppress all statements made to the undercover officer. The trial court granted the motion, and the Appellate Court of Illinois affirmed. The United States Supreme Court granted certiorari.

**Issue**

Must an undercover officer provide *Miranda*warnings to an incarcerated person before engaging in questioning that could induce incriminating statements?

**Holding and Reasoning (Kennedy, J.)**

No. A voluntary statement made by an inmate to an undercover police officer does not require a *Miranda*warning to be admissible in court. *Miranda v. Arizona*, 384 U.S. 436 (1966), was concerned with threat to the Fifth Amendment’s privilege against self-incrimination created by official custodial interrogations. In those situations, a suspect may feel coerced or compelled to answer questions or face harsher punishment and retaliatory behavior by officials. The element of coercion is not present when a suspect speaks freely to an undercover officer that the suspect believes to be a fellow inmate. The fact that the suspect is in custody does not mean that an undercover officer cannot investigate and gather information. Under *Hoffa v. United States*, 385 U.S. 293 (1966), such undercover investigations do not violate the Fifth Amendment. *Miranda*does not prohibit undercover activities that fall short of coercion, and voluntary confessions obtained through those activities are probative and admissible in court. Further, *Miranda* cannot be invoked to prevent the admission of statements made by a suspect bragging to those he believes to be his cellmates. In this case, Perkins believed the undercover officer was his cellmate and his equal. Consequently, from Perkins perspective, there was no reason to fear that the officer could compel Perkins to answer questions or in any way control Perkins’ treatment. Thus, there was no violation of Perkins’ Fifth Amendment rights. The Appellate Court of Illinois is reversed.

**Dissent (Marshall, J.)**

A law enforcement officer conducted a custodial interrogation of Perkins without providing the *Miranda* warnings. Thus, any statements Perkins made are inadmissible in court under the Fifth Amendment. The Court’s ruling today creates an exception to *Miranda* that allows law enforcement officers to exploit suspects’ ignorance of their constitutional rights. Further, this ruling creates a loophole police may use to avoid the necessity of providing *Miranda* warnings through undercover techniques.

**Key Terms:**

**Miranda Warnings** - The notices of constitutional rights set forth in the opinion of the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436(1966) that law enforcement authorities must provide to a suspect in a criminal investigation prior to initiation of a custodial interrogation. The suspect must be advised that the suspect has the right to remain silent, anything the suspect says may be used against the suspect, and the suspect has the right to an attorney.

# Miranda v. Arizona

#### United States Supreme Court 384 U.S. 436 (1966)

#### Rule of Law

**Without certain hallmark warnings regarding the right to remain silent and the right to counsel, statements made during custodial interrogation are inadmissible at trial.**

**Brewer v. Williams**

United States Supreme Court  
430 U.S. 387 (1977)

#### Rule of Law

**A defendant has not effectively waived his right to counsel if, at the advice of counsel, he continues to invoke his right to remain silent until he has the opportunity to confer with his attorney but then makes a statement after being subject to police interrogation.**

# Massiah v. United States

#### United States Supreme Court 377 U.S. 201 (1964)

#### Rule of Law

**A person who has been indicted on criminal charges has as much a constitutional right to have an attorney present during police interrogations as he does during the trial itself.**

# Hoffa v. United States

#### United States Supreme Court 385 U.S. 293 (1966)

#### Rule of Law

**The Fourth Amendment does not protect a wrongdoer’s misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.**

#### Facts

James Hoffa, et al. (defendants) were charged with attempting to bribe members of a federal jury during their trial for violations of a federal labor act (Test Fleet trial). Edward Partin, a coworker of Hoffa’s who was facing many unrelated criminal charges, began serving as a confidential informant for law enforcement to reduce his charges. Throughout the course of the Test Fleet trial, Partin frequented Hoffa’s hotel suite and was with Hoffa often. During this time, Hoffa made many statements indicating that he was attempting to bribe members of the Test Fleet trial jury. At trial, Partin testified to these statements and the prosecution introduced various reports from Partin indicating the same. The defendants argued that because Partin did not tell them that he was a government informant, it voided the consent that Hoffa had given him to enter the hotel suite. In addition, the defendants argued that Partin effectively conducted an illegal search as a government agent by listening to the defendants’ statements under false pretenses. The trial court convicted the defendants. The court of appeals affirmed. The United States Supreme Court granted certiorari.

#### Issue

Does the Fourth Amendment protect a wrongdoer’s misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it?

#### Holding and Reasoning (Stewart, J.)

No. The Fourth Amendment does not protect a wrongdoer’s misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it. In such case, the wrongdoer has no legitimate interest at stake that the Fourth Amendment protects. In the case at bar, Hoffa was not relying on the security of his hotel suite—something that the Fourth Amendment protects from unreasonable search—when he made the incriminating statements. Rather, he was relying on his misplaced belief that Partin would not divulge his incriminating statements to law enforcement. The risk of speaking to a government informant is “the kind of risk we necessarily assume whenever we speak.” As a result, the lower courts properly admitted into evidence statements that the defendants made to Partin, as well as Partin’s testimony. The convictions are affirmed.

#### Dissent (Warren, C.J.)

Given Partin’s background and incentive to cooperate, the Court should not even have to reach the Fourth Amendment question. The convictions are based heavily on Partin’s testimony and Partin’s testimony came about in exchange for significant remuneration. The Court should use its supervisory powers to rectify “the affront to the quality and fairness of federal law enforcement which this case presents.”

**Key Terms:**

**Exclusionary Rule** - A rule that excludes or suppresses evidence in a criminal proceeding where that evidence was obtained in violation of an individual’s constitutional rights.

**Supervisory Power -** Ability of federal courts to administer procedural rules outside of the Constitution and established law.

# United States v. Henry

#### United States Supreme Court 447 U.S. 264 (1980)

#### Rule of Law

**Statements made by an accused in custody to a covert government informant may not be admitted at trial without violating the Sixth Amendment right to counsel.**

#### Facts

Henry (defendant) was arrested for robbing a bank and taken to the Norfolk city jail. Federal Bureau of Investigation (FBI) Agents had a paid informant named Nichols inside the jail working on a contingency fee basis. At trial, the informant testified about conversations with Henry about the robbery. The jury was never told that Nichols was a paid FBI informant. Henry was convicted and sentenced to 25 years in prison. After the appeal, Henry claimed to have learned that Nichols was a paid informant. Henry moved to have his sentence vacated under 28 U.S.C. § 2255 on the grounds that the government had used Nichols to violate Henry’s Sixth Amendment right to counsel. The motion was denied. The court of appeals reversed, holding that the statements Henry made to Nichols should have been suppressed. The United States Supreme Court granted certiorari.

#### Issue

Does the admission at trial of statements made by an accused in custody to a covert government informant violate the accused’s Sixth Amendment right to counsel?

#### Holding and Reasoning (Burger, C.J.)

Yes. The Sixth Amendment prohibits the use of covert government informants to elicit incriminating statements from an accused in custody. Under *Massiah v. United States*, 377 U.S. 201 (1964), the government may not use agents to “deliberately elicit” confessions or other incriminating statements after the Sixth Amendment right to counsel has attached. The fact that the use of undercover agents has been permitted under the Fourth and Fifth Amendment is irrelevant to this case. *Massiah*made clear that the Sixth Amendment right to counsel applies to clandestine interrogations as well as official interrogations. In this case, the government used a paid informant that Henry believed to be another inmate to engage in conversations about the burglary after Henry’s indictment. Nichols had been working for the FBI on a contingency fee basis for over a year, and the agent should have known that there was a high probability that Nichols might attempt to induce Henry to give incriminating statements. Therefore, the lower court properly imputed Nichols’ conduct to the government. Nichols testified he engaged Henry in conversations about the robbery, and it is irrelevant whether Nichols initiated the conversations. Further, the mental strain of imprisonment may have made Henry more vulnerable to Nichols’ deception. The government purposefully attempted to use a covert informant to elicit incriminating information from Henry outside the presence of counsel and, in so doing, violated Henry’s Sixth Amendment rights. The ruling of the court of appeals is affirmed.

#### Dissent (Blackmun, J.)

Under *Massiah*, a defendant’s statements may not be admitted if the statements were “deliberately elicited” by a government agent. This means that the agent must have intentionally induced the defendant to make such statements. Because the agent in this case had no such intent, the Court stretches the ruling in *Massiah*so far that even negligent acts resulting in incriminating statements could result in exclusion. Not only is this not necessary under the Sixth Amendment or prior case law, it is simply bad policy.

**Key Terms:**

**Sixth Amendment Right to Counsel** - Right of a person accused of a crime to have the help of an attorney throughout any criminal prosecution.

# Maine v. Moulton

#### United States Supreme Court 474 U.S. 159 (1985)

#### Rule of Law

**Evidence obtained with the intent to frustrate a criminal defendant’s Sixth Amendment right to counsel is not admissible for purposes of proving the defendant’s guilt in the charges to which the evidence pertains.**

#### Facts

Moulton (defendant) and co-defendant Colson were arrested under suspicion of receiving stolen property. After being released on bail, the two defendants met and Moulton suggested killing a key witness. After the meeting, Colson gave a full confession. The police offered Colson immunity from any further prosecution in exchange for cooperation in the investigation and prosecution of Moulton. Colson agreed and the police installed a recording device on his telephone. Colson had three telephone conversations with Moulton. When Moulton arranged to meet Colson in person, the police asked Colson to wear a hidden recording device. The police told Colson not to actively question Moulton about his involvement in the alleged crimes. During the conversation, Colson brought up Moulton’s previous suggestion about killing witnesses. After Moulton stated that he did not think that killing witnesses would work, the conversation turned to the development of false alibis. The conversation about alibis involved extensive discussion of the defendants’ criminal activities. Colson encouraged Moulton to give details of several criminal acts by pretending not to remember certain details and by instigating the exchange of stories relating to particular crimes. The recording was admitted into evidence during Moulton’s trial. Moulton was convicted and appealed his conviction through the state courts. The state supreme court reversed his conviction on grounds that admission of the recorded statements into evidence violated Moulton’s Sixth Amendment right to the assistance of counsel. The State of Maine appealed to the United States Supreme Court.

#### Issue

Is evidence obtained with the intent to frustrate a criminal defendant’s Sixth Amendment right to counsel admissible for purposes of proving the defendant’s guilt in the charges to which the evidence pertains?

#### Holding and Reasoning (Brennan, J.)

No. Evidence obtained with the intent to frustrate a criminal defendant’s Sixth Amendment right to counsel is not admissible for purposes of proving the defendant’s guilt in the charges to which the evidence pertains. In *Massiah v. United States*, 377 U.S. 201 (1964), this Court reversed the criminal conviction of a defendant who offered incriminating statements to an informant during a meeting arranged by a law enforcement agent. Similarly, in *United States v. Henry*, 447 U.S. 264 (1980) we held that a defendant’s Sixth Amendment rights had been violated by the admission of statements offered to an informant who had been placed by law enforcement in shared confinement with the defendant. In *Henry*, we placed emphasis on the facts that the informant was motivated to elicit incriminating information by the promise of payment, that the defendant had no knowledge of the informant’s affiliation with the government, and that the context of mutual incarceration would tend to deceive a defendant about the nature of his relationship to the informant. We concluded that even though the government agent had instructed the informant not to actively elicit incriminating information, the government must have anticipated that the informant would attempt to do so under the circumstances. As such, we held that the defendant’s Sixth Amendment rights were violated by the deliberate manufacture of a situation that would have the probable effect of encouraging the defendant to make incriminatory statements. The State of Maine attempts to distinguish the present case from *Massiah*and *Henry* by virtue of the fact that the meeting between Colson and Moulton was arranged by the defendant rather than by law enforcement. The fact that law enforcement officials arranged circumstances leading to incriminating conversations was not germane to our decisions in *Massiah*and *Henry*. To the contrary, in *Beatty v. United States* 389 U.S. 45 (1967) we reversed a conviction founded upon statements obtained during a meeting arranged by the defendant. Once formal charges have been filed, the Sixth Amendment guarantees the right to the intervention of legal counsel in any interactions between the defendant and the state. That guarantee prohibits the state from acting in a fashion that frustrates the constitutional protections afforded by the right to representation. The Sixth Amendment does not bar the state from taking advantage of statements voluntarily made by a represented defendant in the absence of counsel, but it does prohibit active and intentional efforts to defeat a defendant’s exercise of the right to representation. In this case, the police knew that the purpose of the meeting between Colson and Moulton was to strategize about a mutual defense to the pending charges. The police employed Colson as their agent with full knowledge that Moulton was likely to make incriminating statements absent the protections of legal counsel. This denial of Moulton’s right to counsel violated the guarantees of the Sixth Amendment. The state further argues that Moulton’s statements should be admissible because garnering evidence in support of the pending charges was not the state’s only purpose. The state asserts that it was justified in listening in to conversations between the defendants in order to ensure Colson’s safety and further investigate Moulton’s plans to kill witnesses. The government presented the same argument in *Massiah*. We opined that continued investigation relating to other acts or potential future crimes did not violate the defendant’s constitutional rights, but self-incriminating statements made in violation of the defendant’s Sixth Amendment rights could not be used as evidence supporting a conviction in the pending criminal case. The state and the public have an interest in facilitating the investigation of suspected criminal activity, but allowing the admission of self-incriminating statements under circumstances in which a defendant is denied the assistance of counsel, even when those statements serve a purpose beyond the prosecution of pending charges, would render the Sixth Amendment meaningless. We hold that the State of Maine knowingly violated Moulton’s Sixth Amendment rights and that the existence of any other lawful purpose for obtaining Moulton’s statements in the absence of counsel is immaterial. The state supreme court decision is affirmed.

#### Dissent (Burger, C.J.)

The majority opinion omits several relevant factual considerations. The police were aware that Moulton had threatened to kill witnesses. The police also knew that several witnesses had received threats. Colson himself had been the target of threats. The police knew that Colson expected a call from Moulton after Moulton had formulated his plans for killing witnesses. In the three recorded telephone conversations, Moulton made incriminating statements and alluded to having finalized a plan. The fact that the police knew that Colson had received threats supports their testimony that the hidden recording device was employed, at least in part, to protect Colson’s safety during the meeting. Colson testified that his understanding of the reasons he was asked to wear the device was for the dual purpose of safety and the acquisition of information relating to any plans to kill witnesses. The trial court allowed the admission of portions of the recording during which Moulton discussed the crimes for which he was under prosecution. The court concluded that the state had legitimate purposes for surreptitiously obtaining the recording. The state supreme court agreed that the evidence supported the trial court’s findings of fact as to the legitimacy of the state’s purpose. The majority opinion establishes a framework that presumes a violation of the Sixth Amendment and then inquires whether a legitimate ancillary purpose justifies the violation. In my opinion, no Sixth Amendment violation has occurred in the first place when the acquisition of information is motivated by legitimate purposes unrelated to the prosecution of pending charges. The majority holds that information relevant to the prosecution of pending charges must be excluded even though the same information would be admissible for the prosecution of crimes not yet charged. The majority presumes that the police initiated surveillance with anticipation that they would acquire information relevant to the pending prosecution. The appropriate inquiry should be whether the primary purpose was to acquire inculpatory evidence pertaining to pending charges. If the state did not intend to acquire inculpatory evidence about pending charges, then it cannot be deemed to have intentionally infringed upon the defendant’s right to counsel. In this case, the defendant was being investigated in relation to alleged plans to obstruct justice by killing witnesses. There is no right to counsel in planning for the commission of a crime. This is not a case like *Massiah* where the right to counsel implicated the fairness of a trial. The rules proscribing the admission of evidence obtained in bad faith are intended to deter police conduct that violates the rights of the accused. Inculpatory evidence obtained in good faith should not be excluded from admission at a trial on pending charges. Nothing in the evidence suggests any improper motive on the part of the police. To the contrary, the actions of the police may have saved the lives of several witnesses and should be commended.

**Key Terms:**

**Sixth Amendment Right to Counsel** - Right of a person accused of a crime to have the help of an attorney throughout any criminal prosecution.

**Inculpatory Evidence** - Evidence tending to prove a defendant’s guilt of a crime.

**State v. Sawyer, 156 S.W.3d 531 (Tenn. 2005)**

**State v. Sawyer**

#### Rule of Law

**Criminal Law**

**The findings of fact made by the trial court at a hearing on a motion to suppress are binding upon an appellate court unless the evidence contained in the record preponderates against those findings.**

**Criminal Law**

**As trier of fact, the trial court has the ability to assess the credibility of the witnesses, determine the weight and value to be afforded the evidence, and resolve any conflicts in the evidence.**

**Criminal Law**

**Police officers reading affidavit of complaint to defendant was functional equivalent of interrogation, and thus, without**[**Miranda**](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**warning, statement was not voluntary; officers informed defendant of charge, arrested him, and statedthey would go to jail to discuss, defendant was transported to office at sheriff's department and placed in chair in front of desk, and officer sat directly across from him, approximately 30 minutes following arrest, officer read arrest warrant, officer had not advised defendant of his**[**Miranda**](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**rights prior to reading affidavit, and defendant made statement only after hearing detailed allegations contained in affidavit.**

**Criminal Law**

**Police are required to advise a defendant being questioned while in custody 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.**

**Criminal Law**

**An officer must provide**[**Miranda**](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))**warnings to an accused when the accused is in custody and is subjected to interrogation or its functional equivalent.**

**Criminal Law**

**“Interrogation” refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.**

**Criminal Law**

**“Interrogation” includes any practice that the police should know is likely to evoke an incriminating response from a suspect.**

**Criminal Law**

**The definition of interrogation focuses primarily upon the accused's perception rather than on the police officer's intent; however, the officer's intent may be relevant to determine whether the officer should have known his or her words or actions were reasonably likely to invoke an incriminating response.**

156 S.W.3d 531

Supreme Court of **Tennessee**,

at Nashville.

**STATE of Tennessee**

**v.**

**Charles SAWYER.**

No. M2002–01062–SC–R11–CO.

Oct. 6, 2004 Session.Feb. 25, **2005**.

**Synopsis**

**Background:** Defendant charged with aggravated sexual battery moved to suppress oral statement to police officer. The Circuit Court, Marshall County, [William C. Lee](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153496601&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I7eeea8bce7e411d9b386b232635db992), J., granted motion. The **State** filed an interlocutory appeal. The Court of Criminal Appeals affirmed trial court's judgment suppressing the defendant's statement.

[**Holding:**](https://1.next.westlaw.com/Document/I7eeea8bce7e411d9b386b232635db992/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad73aa500000177896d0ff71d8806b1%3FpcidPrev%3D10e8c417f9b341189bf2d347c0c5641b%26Nav%3DCASE%26fragmentIdentifier%3DI7eeea8bce7e411d9b386b232635db992%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=7ac4e15277268fb8eab064b3b945f803&list=CASE&rank=1&sessionScopeId=566a283f4841d54705ad34018a96a8dad9d665e0d842a7cfc76e4b738e19678a&originationContext=Smart%20Answer&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F32006272628) On grant of review, the Supreme Court, [Janice M. Holder](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0184016001&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I7eeea8bce7e411d9b386b232635db992), J., held that as a matter of first impression, officers reading affidavit of complaint to defendant was functional equivalent of interrogation.

Affirmed and remanded.

## **Attorneys and Law Firms**

**\*532** [Paul G. Summers](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0172047301&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I7eeea8bce7e411d9b386b232635db992), Attorney General and Reporter; Michael E. Moore, Solicitor General; [Elizabeth T. Ryan](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0255789301&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I7eeea8bce7e411d9b386b232635db992), Senior Counsel; Mike McCowen, District Attorney General; and [Weakley E. Barnard](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0426786501&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I7eeea8bce7e411d9b386b232635db992), Assistant District Attorney General, for the appellant, **State** of **Tennessee**.

[F. Shayne Brasfield](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0392134401&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I7eeea8bce7e411d9b386b232635db992), Franklin, **Tennessee**, and [Michael Eugene Gilmer](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301259601&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I7eeea8bce7e411d9b386b232635db992), Columbia, **Tennessee**, for the appellee, Charles **Sawyer**.

**OPINION**

[JANICE M. HOLDER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0184016001&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I7eeea8bce7e411d9b386b232635db992), J., delivered the opinion of the court, in which [FRANK F. DROWOTA, III](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0259789701&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I7eeea8bce7e411d9b386b232635db992), C.J., and [E. RILEY ANDERSON](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0157496001&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I7eeea8bce7e411d9b386b232635db992) and [WILLIAM M. BARKER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0151945901&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I7eeea8bce7e411d9b386b232635db992), JJ., and [ALLEN W. WALLACE](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0203435301&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I7eeea8bce7e411d9b386b232635db992), Sp.J. joined.

## Opinion

[JANICE M. HOLDER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0184016001&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I7eeea8bce7e411d9b386b232635db992), J.

The defendant, Charles **Sawyer**, was arrested by the police for aggravated sexual battery. Following his arrest, **Sawyer** made an oral statement to the police after an officer read to **Sawyer** an affidavit supporting the arrest warrant but before the officer advised **Sawyer** of his Fifth Amendment rights pursuant to [Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&pubNum=708&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). **Sawyer** filed a motion to suppress his oral statement. Based upon the nature of the facts contained in the affidavit supporting the issuance of the arrest warrant and the circumstances surrounding his arrest and detention, we conclude the statement resulted from an unconstitutional custodial interrogation and therefore should be suppressed. Accordingly, we affirm the judgment of the Court of Criminal Appeals and remand the case to the trial court for further proceedings consistent with this opinion.

**BACKGROUND**

On October 25, 2001, Detective Kevin Clark and Chief Deputy Billy Lamb of the Marshall County Sheriff's Department obtained an arrest warrant for the defendant, Charles **Sawyer**, for aggravated sexual battery. The two Marshall County officers and a Maury County officer traveled to **Sawyer's** residence in Maury County, **Tennessee**. Detective Clark informed **Sawyer** of the charge and arrested him. Detective Clark told **Sawyer** that they “would go down to the jail, and [they] would discuss what was going on.”

Detective Clark and Chief Deputy Lamb handcuffed **Sawyer**, placed him in the back seat of a patrol car, and transported him to the Marshall County jail. Other than merely informing **Sawyer** of the charge, the officers did not discuss the charge with **Sawyer**, nor did they advise him of his Fifth Amendment rights pursuant to [Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&pubNum=708&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

Immediately upon arriving at the jail, **Sawyer** was escorted to Detective Clark's office where Detective Clark intended to conduct an interview. The officers removed **Sawyer's** handcuffs and seated him facing Detective Clark, who sat behind a desk. Detective Clark read the arrest warrant and the affidavit of complaint to **Sawyer**.[1](https://1.next.westlaw.com/Document/I7eeea8bce7e411d9b386b232635db992/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad73aa500000177896d0ff71d8806b1%3FpcidPrev%3D10e8c417f9b341189bf2d347c0c5641b%26Nav%3DCASE%26fragmentIdentifier%3DI7eeea8bce7e411d9b386b232635db992%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=7ac4e15277268fb8eab064b3b945f803&list=CASE&rank=1&sessionScopeId=566a283f4841d54705ad34018a96a8dad9d665e0d842a7cfc76e4b738e19678a&originationContext=Smart%20Answer&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00112006272628) The arrest warrant **stated** only  **\*533** that **Sawyer** was charged with aggravated sexual battery. The affidavit of complaint **stated** that “on or about July 27th 2001 Charles **Sawyer** did rub the leg and vaginal area of [the alleged victim], who is 12 years of age. This incident occurred at 1489 Bridle [L]ane in Chapel Hill. This did occur in Marshall County **Tennessee**.”

Detective Clark testified that after he read the affidavit but before he advised **Sawyer** of his rights, **Sawyer** **stated**, “I admit to rubbing her leg, but I didn't do the other. And I admit to rubbing the other girl's hair.” **Sawyer** made the statement approximately thirty minutes after his arrest.[2](https://1.next.westlaw.com/Document/I7eeea8bce7e411d9b386b232635db992/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad73aa500000177896d0ff71d8806b1%3FpcidPrev%3D10e8c417f9b341189bf2d347c0c5641b%26Nav%3DCASE%26fragmentIdentifier%3DI7eeea8bce7e411d9b386b232635db992%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=7ac4e15277268fb8eab064b3b945f803&list=CASE&rank=1&sessionScopeId=566a283f4841d54705ad34018a96a8dad9d665e0d842a7cfc76e4b738e19678a&originationContext=Smart%20Answer&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00222006272628) Detective Clark then advised **Sawyer** of his Fifth Amendment rights, and **Sawyer** requested counsel. Detective Clark escorted **Sawyer** to be booked.

Detective Clark testified that he read the warrant and affidavit to **Sawyer** pursuant to standard procedure “[t]o let [**Sawyer**] know exactly what the charges were and [the identity of] the victim.” The detective denied reading the affidavit of complaint for purposes of eliciting a statement from **Sawyer**. **Sawyer** testified he had been arrested approximately four years prior to the present case and was aware of his rights, including his right to remain silent.

The trial court granted **Sawyer's** motion to suppress, finding that **Sawyer's** statement resulted from an impermissible custodial interrogation. The trial court found that: 1) **Sawyer** made the statement while in custody at the jail thirty minutes following his arrest and that the statement was not a “spontaneous” response to his arrest; 2) **Sawyer** made the statement after being advised of the details of the allegations contained in the affidavit, not after he was read the general charge; and 3) the officer's actions in reading the affidavit were “the functional equivalent of interrogation” as “it would be reasonable to expect a response” under these circumstances even though the officers did not deliberately seek to elicit a response from **Sawyer**.

The **State** filed an interlocutory appeal to the Court of Criminal Appeals pursuant to [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=NC495783035A711E78795AC032837B7FD&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=388b89f3b76e439ebed8dc56099e7f66&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[**Tennessee** Rule of Appellate Procedure 9](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1006373&cite=TNRRAPR9&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). The Court of Criminal Appeals granted the appeal and affirmed the trial court's judgment suppressing the defendant's statement. We granted review.

**ANALYSIS**

[1](https://1.next.westlaw.com/Document/I7eeea8bce7e411d9b386b232635db992/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad73aa500000177896d0ff71d8806b1%3FpcidPrev%3D10e8c417f9b341189bf2d347c0c5641b%26Nav%3DCASE%26fragmentIdentifier%3DI7eeea8bce7e411d9b386b232635db992%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=7ac4e15277268fb8eab064b3b945f803&list=CASE&rank=1&sessionScopeId=566a283f4841d54705ad34018a96a8dad9d665e0d842a7cfc76e4b738e19678a&originationContext=Smart%20Answer&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F12006272628)[2](https://1.next.westlaw.com/Document/I7eeea8bce7e411d9b386b232635db992/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad73aa500000177896d0ff71d8806b1%3FpcidPrev%3D10e8c417f9b341189bf2d347c0c5641b%26Nav%3DCASE%26fragmentIdentifier%3DI7eeea8bce7e411d9b386b232635db992%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=7ac4e15277268fb8eab064b3b945f803&list=CASE&rank=1&sessionScopeId=566a283f4841d54705ad34018a96a8dad9d665e0d842a7cfc76e4b738e19678a&originationContext=Smart%20Answer&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F22006272628)The findings of fact made by the trial court at a hearing on a motion to suppress are binding upon an appellate court unless the evidence contained in the record preponderates against those findings. [***State***v. Saylor,117 **S.W**.**3d** 239, 244 (**Tenn**.2003)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2003662459&pubNum=4644&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&fi=co_pp_sp_4644_244&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_4644_244). As trier of fact, the trial court has the ability to assess the credibility of the witnesses, determine the weight and value to be afforded the evidence, and resolve any conflicts in the evidence. [***State***v. Odom, 928 S.W.2d 18, 23 (**Tenn**.1996)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996170724&pubNum=713&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&fi=co_pp_sp_713_23&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_23). As the prevailing party, the defendant is entitled to the strongest legitimate view of the evidence as well as to all reasonable inferences drawn from that evidence. [***State***v. Damron,151 **S.W**.**3d** 510, 515 (**Tenn**.2004)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2005580512&pubNum=4644&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&fi=co_pp_sp_4644_515&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_4644_515); [***State***v. Hicks, 55 **S.W**.**3d** 515, 521 (**Tenn**.2001)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001767070&pubNum=4644&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&fi=co_pp_sp_4644_521&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_4644_521). However, we review the trial court's conclusions of law de novo. [***State***v. Daniel, 12 **S.W**.**3d** 420, 423 (**Tenn**.2000)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000043382&pubNum=4644&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&fi=co_pp_sp_4644_423&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_4644_423).

**\*534** [3](https://1.next.westlaw.com/Document/I7eeea8bce7e411d9b386b232635db992/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad73aa500000177896d0ff71d8806b1%3FpcidPrev%3D10e8c417f9b341189bf2d347c0c5641b%26Nav%3DCASE%26fragmentIdentifier%3DI7eeea8bce7e411d9b386b232635db992%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=7ac4e15277268fb8eab064b3b945f803&list=CASE&rank=1&sessionScopeId=566a283f4841d54705ad34018a96a8dad9d665e0d842a7cfc76e4b738e19678a&originationContext=Smart%20Answer&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F32006272628)The issues in this case concern the federal and **state** constitutional protections against compelled self-incrimination. See[***State***v. Walton, 41 **S.W**.**3d** 75, 81 (**Tenn**.2001)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001225346&pubNum=4644&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&fi=co_pp_sp_4644_81&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_4644_81). The Self–Incrimination Clause of the Fifth Amendment to the United **States** Constitution provides that “[n]o person ... shall be compelled in any criminal case to be a witness against himself.” See[Malloy v. Hogan, 378 U.S. 1, 6, 84 S.Ct. 1489, 12 L.Ed.2d 653 (1964)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1964124849&pubNum=708&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))(concluding that the Self–Incrimination Clause is applicable to the **states**). Article I, section nine of the **Tennessee**Constitution provides that “in all criminal prosecutions, the accused ... shall not be compelled to give evidence against himself.” We have held that “the test of voluntariness for confessions under Article I, [section] 9 is broader and more protective of individual rights than the test of voluntariness under the Fifth Amendment.” [Walton, 41 **S.W**.**3d** at 82](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001225346&pubNum=4644&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&fi=co_pp_sp_4644_82&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_4644_82) (citation omitted).

[4](https://1.next.westlaw.com/Document/I7eeea8bce7e411d9b386b232635db992/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad73aa500000177896d0ff71d8806b1%3FpcidPrev%3D10e8c417f9b341189bf2d347c0c5641b%26Nav%3DCASE%26fragmentIdentifier%3DI7eeea8bce7e411d9b386b232635db992%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=7ac4e15277268fb8eab064b3b945f803&list=CASE&rank=1&sessionScopeId=566a283f4841d54705ad34018a96a8dad9d665e0d842a7cfc76e4b738e19678a&originationContext=Smart%20Answer&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F42006272628)In [Miranda,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) the United **States** Supreme 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.” [Miranda, 384 U.S. at 444, 86 S.Ct. 1602.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&pubNum=708&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) These procedural safeguards require that the police advise a defendant being questioned while in custody

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.

[Id. at 479, 86 S.Ct. 1602;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&pubNum=708&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) see[***State***v. Bush, 942 S.W.2d 489, 499 (**Tenn**.1997)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997084560&pubNum=713&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&fi=co_pp_sp_713_499&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_499).

[5](https://1.next.westlaw.com/Document/I7eeea8bce7e411d9b386b232635db992/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad73aa500000177896d0ff71d8806b1%3FpcidPrev%3D10e8c417f9b341189bf2d347c0c5641b%26Nav%3DCASE%26fragmentIdentifier%3DI7eeea8bce7e411d9b386b232635db992%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=7ac4e15277268fb8eab064b3b945f803&list=CASE&rank=1&sessionScopeId=566a283f4841d54705ad34018a96a8dad9d665e0d842a7cfc76e4b738e19678a&originationContext=Smart%20Answer&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F52006272628)An officer must provide [Miranda](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) warnings to an accused when the accused is in custody and is subjected to interrogation or its functional equivalent. See[Rhode Island v. Innis, 446 U.S. 291, 298, 100 S.Ct. 1682, 64 L.Ed.2d 297 (1980)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980317083&pubNum=708&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). In the present case, **Sawyer** was in custody when the officers placed him under formal arrest. See[Stansbury v. California, 511 U.S. 318, 322, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1994092133&pubNum=708&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); [***State***v. Anderson, 937 S.W.2d 851, 855 (**Tenn**.1996)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996209712&pubNum=713&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&fi=co_pp_sp_713_855&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_855). We must therefore determine whether the police officers subjected **Sawyer** to interrogation or its functional equivalent by reading the affidavit of complaint to him.

[6](https://1.next.westlaw.com/Document/I7eeea8bce7e411d9b386b232635db992/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad73aa500000177896d0ff71d8806b1%3FpcidPrev%3D10e8c417f9b341189bf2d347c0c5641b%26Nav%3DCASE%26fragmentIdentifier%3DI7eeea8bce7e411d9b386b232635db992%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=7ac4e15277268fb8eab064b3b945f803&list=CASE&rank=1&sessionScopeId=566a283f4841d54705ad34018a96a8dad9d665e0d842a7cfc76e4b738e19678a&originationContext=Smart%20Answer&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F62006272628)[7](https://1.next.westlaw.com/Document/I7eeea8bce7e411d9b386b232635db992/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad73aa500000177896d0ff71d8806b1%3FpcidPrev%3D10e8c417f9b341189bf2d347c0c5641b%26Nav%3DCASE%26fragmentIdentifier%3DI7eeea8bce7e411d9b386b232635db992%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=7ac4e15277268fb8eab064b3b945f803&list=CASE&rank=1&sessionScopeId=566a283f4841d54705ad34018a96a8dad9d665e0d842a7cfc76e4b738e19678a&originationContext=Smart%20Answer&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F72006272628)[8](https://1.next.westlaw.com/Document/I7eeea8bce7e411d9b386b232635db992/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad73aa500000177896d0ff71d8806b1%3FpcidPrev%3D10e8c417f9b341189bf2d347c0c5641b%26Nav%3DCASE%26fragmentIdentifier%3DI7eeea8bce7e411d9b386b232635db992%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=7ac4e15277268fb8eab064b3b945f803&list=CASE&rank=1&sessionScopeId=566a283f4841d54705ad34018a96a8dad9d665e0d842a7cfc76e4b738e19678a&originationContext=Smart%20Answer&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F82006272628)Interrogation “refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.” [Innis, 446 U.S. at 301, 100 S.Ct. 1682.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980317083&pubNum=708&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) Interrogation also includes any “practice that the police should know is likely to evoke an incriminating response from a suspect.” [Id.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980317083&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))The definition of interrogation focuses primarily upon the accused's perception rather than on the police officer's intent. [Id. at 301, 100 S.Ct. 1682.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980317083&pubNum=708&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) However, the officer's intent may be relevant to determine whether the officer should have known his or her words or actions were reasonably likely to invoke an incriminating response. [Id. at 301 n. 7, 100 S.Ct. 1682.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980317083&pubNum=708&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))

Whether the reading of the affidavit of complaint to an accused is the functional equivalent of interrogation is an issue of first impression in this Court. Some jurisdictions have held that an officer's statement advising an accused of the specific charges is not the functional equivalent of interrogation. See e.g.,[Enoch v. Gramley, 70 F.3d 1490, 1499–1500 (7th Cir.1995)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995229283&pubNum=506&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&fi=co_pp_sp_506_1499&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_506_1499) (officer advised the defendant that he was  **\*535** charged with murder and identified the victim); [People v. Celestine, 9 Cal.App.4th 1370, 12 Cal.Rptr.2d 179, 181 (1992)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992169397&pubNum=3484&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&fi=co_pp_sp_3484_181&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_3484_181) (officer informed the defendant that he was under arrest for “possession of rock cocaine for sale”); [United***States***v. Brown, 737 A.2d 1016, 1021 (D.C.1999)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999189755&pubNum=162&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&fi=co_pp_sp_162_1021&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_162_1021) (officer told the defendant that he was charged with murder and identified the victim); [People v. Parker,344 Ill.App.3d 728, 279 Ill.Dec. 870, 801 N.E.2d 162, 167 (2003)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2003904901&pubNum=578&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&fi=co_pp_sp_578_167&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_578_167) (officer read arrest warrant to the defendant); [Commonwealth v. Lark, 505 Pa. 126, 477 A.2d 857, 861 (1984)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984128243&pubNum=162&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&fi=co_pp_sp_162_861&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_162_861) (officer advised the defendant of his rights and the charges); [Gates v. Commonwealth, 30 Va.App. 352, 516 S.E.2d 731, 733 (1999)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999175254&pubNum=711&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&fi=co_pp_sp_711_733&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_711_733) (officer read arrest warrant to the defendant). Had the officers in this case read only the warrant to the defendant, we would agree.

However, the facts and circumstances in this case go beyond merely reading the arrest warrant or otherwise informing the defendant of the charge. See[](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ib58e31ea32d811d98b61a35269fc5f88&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=388b89f3b76e439ebed8dc56099e7f66&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[Commonwealth v. DeJesus, 567 Pa. 415, 787 A.2d 394, 403 (2001)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002034053&pubNum=162&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&fi=co_pp_sp_162_403&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_162_403)(holding that although informing a defendant of the basis of the charge and the statements of the witnesses was “informational,” the officer's actions amounted to the functional equivalent of interrogation). While at **Sawyer's**residence, Detective Clark informed **Sawyer** of the charge, arrested him, and **stated** they “would go down to the jail, and [they] would discuss what was going on.” The officers transported **Sawyer** from his residence directly to Detective Clark's office inside the Marshall County Sheriff's Department. **Sawyer** was placed in a chair in front of a desk, and Detective Clark sat directly across from **Sawyer**. Approximately thirty minutes following the arrest, Detective Clark read **Sawyer** the arrest warrant charging him with aggravated sexual battery and the affidavit of complaint alleging that he had rubbed the leg and vaginal area of the twelve-year-old victim. Detective Clark had not advised **Sawyer** of his [Miranda](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) rights prior to reading the affidavit. **Sawyer** made the statement only after hearing the detailed allegations contained in the affidavit.

The detective's actions placed **Sawyer** in an environment in which he could reasonably believe that he was to be interrogated. See[Hill v. United***States***, 858 A.2d 435, 443–47 (D.C.2004)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2005074569&pubNum=162&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&fi=co_pp_sp_162_443&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_162_443) (informing a defendant who is handcuffed in an interview room that he is charged with second degree murder and that his accomplice has given a statement is the functional equivalent of interrogation). Moreover, although **Sawyer** had been arrested and advised of his rights on a prior occasion, the detective's actions under the facts and circumstances of this case were “likely to evoke an incriminating response.” [Innis, 446 U.S. at 301, 100 S.Ct. 1682;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980317083&pubNum=708&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) see also[United***States***v. Wiseman, 158 F.Supp.2d 1242, 1252–53 (D.Kan.2001)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001730509&pubNum=4637&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&fi=co_pp_sp_4637_1252&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_4637_1252) (holding that the defendant's statements resulted from custodial interrogation even though the defendant had been advised of his rights on prior occasions); [Jones v.***State***, 119 **S.W**.**3d** 766, 774 n. 13 (Tex.Crim.App.2003)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2003754069&pubNum=4644&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&fi=co_pp_sp_4644_774&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_4644_774). **Sawyer** could have reasonably believed that the detective had begun interrogating him and that the detective's reading of the affidavit was a statement requiring a response.

 Although Detective Clark testified he did not read the affidavit for purposes of eliciting a statement from **Sawyer**, the detective **stated** he escorted **Sawyer** to his office, intending to conduct an interview. “The disclosure of incriminating evidence to a suspect ... does not necessarily constitute interrogation within the meaning of [Innis.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980317083&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))” [***State***v. Maraschiello, 88 **S.W**.**3d** 586, 603 (Tenn.Crim.App.2000)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000470747&pubNum=4644&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&fi=co_pp_sp_4644_603&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_4644_603) (holding that the defendant voluntarily confessed to murder upon being advised of his [Miranda](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&originatingDoc=I7eeea8bce7e411d9b386b232635db992&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) rights on two occasions and observing officers as they investigated his  **\*536** case and gathered evidence). However, we conclude that under the facts and circumstances of the present case, the detective's action in reading the affidavit to **Sawyer** was the functional equivalent of interrogation.

**CONCLUSION**

We hold that under the facts and circumstances of this case, **Sawyer's** statement was made as the result of the detective's reading of the arrest warrant and the affidavit to **Sawyer**, which was the functional equivalent of interrogation. Therefore, we conclude that **Sawyer's** statement to the detective should be suppressed. Accordingly, we affirm the Court of Criminal Appeals' judgment suppressing the statement and remand to the trial court for further proceedings consistent with this opinion.

Costs of appeal are taxed to the appellant, **State** of **Tennessee**.

**Part 3 – Waiver of Right to Remain Silent**

# \*\*BERGHUIS v. THOMPKINS\*\*

#### United States Supreme Court 130 S. Ct. 2250 (2010)

#### Rule of Law

**Where a defendant does not invoke his right to remain silent after fully understanding his *Miranda* rights, he implicitly waives his *Miranda* rights by making a voluntary statement to police.**

#### Facts

Thompkins (defendant) was interrogated about his involvement in a murder. Before questioning Thompkins, the police had him read aloud a portion of a written form with the *Miranda* warnings printed on it. The rest of the form was read aloud to Thompkins and police asked that he sign the form to show he understood his rights. Thompkins refused. Thompkins was then interrogated for about three hours. He never stated that he wanted an attorney or to remain silent. Thompkins gave only a few one word responses. When asked if he prayed that God forgive him for shooting the victim, Thompkins said yes. Thompkins was charged with murder. The court denied Thompkins’ motion to suppress the statements he made during interrogation and he was convicted. His conviction was affirmed on appeal. The state supreme court declined review of his case. Thompkins petitioned a federal court for a writ of habeas corpus. The court denied his petition, holding that Thompkins did not invoke his right to silence and that his confession was not coerced. The district court also held that the appellate court’s decision that Thompkins had waived his right to silence was reasonable. The Court of Appeals for the Sixth Circuit reversed and held that the state appellate court’s decision that Thompkins had waived his right to silence was unreasonable. The Supreme Court granted certiorari.

#### Issue

Where a defendant does not invoke his right to remain silent, does he implicitly waive his *Miranda* rights by making a voluntary statement to police?

#### Holding and Reasoning (Kennedy, J.)

Yes. A defendant may implicitly waive his *Miranda* rights by failing to invoke his rights after fully understanding them and embarking on a course of conduct that indicates waiver. Thompkins argues that his statements are inadmissible because he invoked his right to remain silent by staying silent for a long period of time. This argument fails because a defendant must invoke his *Miranda* rights unambiguously. Here, Thompkins failed to unambiguously indicate that he wanted to remain silent. Thus, he failed to invoke his right to silence. Even where a defendant waives his right to silence, the prosecution must still establish that the defendant knowingly and voluntarily waived his right to remain silent before the statement can come in at trial. Waiver need not be express; an implicit waiver is enough. In *North Carolina v. Butler*, 441 U.S. 369 (1979), the Court established that waiver may implied by a defendant’s silence where there is proof that the defendant understood his rights after being given the *Miranda* warnings and where his course of conduct indicates waiver. Here, Thompkins’ understanding of his rights is unquestioned because he received a written form with the Miranda warnings and read part of the form aloud before the rest of the warnings were read aloud to him. Thompkins then embarked on a course of conduct indicating waiver by responding “yes” when asked if he prayed to God for forgiveness for shooting the victim. No evidence indicates that Thompkins’ statement was coerced by police. Thus, Thompkins’ waiver of his right to remain silent is established by the fact that he understood his rights and embarked on a course of conduct indicating waiver. Lastly, Thompkins argues that even if he waived his right to remain silent, the police were required to obtain a waiver prior to questioning. This is incorrect. Police may interrogate a suspect who has not yet chosen to waive or invoke his *Miranda* rights. Since Thompkins did not invoke his right to remain silent, but waived that right after fully understanding the *Miranda* warnings, the state court’s decision to deny Thompkins’ motion to suppress his statement was correct. The Sixth Circuit’s judgment is reversed and the case is remanded with instructions to deny Thompkins’ petition for habeas corpus.

#### Dissent (Sotomayor, J.)

Thompkins did not waive his right to remain silent. Unless the prosecution can meet its burden of showing that waiver occurred, the court must presume that the defendant did not waive his rights. Here, the government did not meet that burden. Thompkins’ minimal responses to questioning prior to the incriminating statement do not amount to a course of conduct indicating waiver. The Court’s holding that police may interrogate a suspect until he unambiguously invokes his right to silence by speaking is an unwarranted extension of prior case law and provides the wrong standard. A more appropriate rule would be that police should scrupulously honor the suspect’s rights.

**Key Terms:**

**Implicit Waiver -** A person’s relinquishment of his right(s) that is inferred from his conduct showing an intention to give up his right(s).

# Miranda v. Arizona

#### United States Supreme Court 384 U.S. 436 (1966)

#### Rule of Law

**Without certain hallmark warnings regarding the right to remain silent and the right to counsel, statements made during custodial interrogation are inadmissible at trial.**

# Davis v. United States

#### United States Supreme Court 512 U.S. 452 (1994)

#### Rule of Law

**Under *Edwards v. Arizona*, 451 U.S 477 (1981), police are only required to stop a custodial interrogation if the suspect has unambiguously requested an attorney.**

#### Facts

Davis (defendant) was suspected of murder. Naval Investigative Service (NIS) agents conducting the interview advised Davis of his rights. Davis waived his rights in writing. During the interview, Davis indicated he might want to consult an attorney. The agents asked Davis if he was requesting a lawyer, and Davis said he was not. Later, Davis unequivocally invoked his right to counsel and questioning was stopped. At general court-martial, Davis moved to suppress his statements. The motion was denied. Davis was convicted of murder and sentenced to life imprisonment and other military punishment. On appeal, the Navy-Marine Corps Court of Military Review upheld the conviction. The United States Supreme Court granted certiorari.

#### Issue

Under *Edwards*, must police stop a custodial interrogation if a suspect makes an ambiguous reference to consulting an attorney?

#### Holding and Reasoning (O’Connor, J.)

No. Police are not required to terminate a custodial interrogation if a suspect makes an ambiguous reference to consulting an attorney. Police in such situations should ask clarifying questions to determine whether the suspect is requesting an attorney, but this is not a formal requirement. The Sixth Amendment only guarantees a right to an attorney once criminal proceedings are initiated. *Miranda* *v. Arizona*, 384 U.S. 436 (1966), however, extends the right to counsel to a suspect involved in custodial interrogation by police. Further, *Miranda*requires police to stop questioning a suspect who has requested an attorney. Subsequent case law makes clear that police may not attempt to interrogate a suspect who has requested an attorney until the attorney is present. These are bright line rules easily applied by police officers. Nevertheless, police are not required to stop questioning a suspect who has made only an ambiguous reference to consulting an attorney. Extending the rule to cover such cases would needlessly burden law enforcement in situations where the suspect did not actually want to consult an attorney. This may be a hardship for some suspects who, for a variety of reasons, will not unequivocally invoke their right to counsel, but it does not deny the protections of *Miranda*and *Edwards v. Arizona*, 451 U.S 477 (1981). Therefore, a suspect must clearly indicate that he wants to consult an attorney in such a way that a reasonable police officer in the situation would believe the suspect was invoking his right to counsel. Police may continue to interrogate a suspect who has voluntarily waived his rights until the suspect clearly invokes his right to counsel. In this case, Davis made an ambiguous statement regarding consulting an attorney, and the NIS agents asked questions to clarify that Davis did not want an attorney. The ruling of the lower court is affirmed.

#### Concurrence (Souter, J.)

When Davis made an ambiguous reference to consulting an attorney, the agents properly stopped all questioning about the murder and began asking questions to determine whether Davis was invoking his right to counsel. The Court’s rule would allow police to ignore an ambiguous request for counsel and continue with the interrogation. This is inconsistent with the prior holdings of this Court and a majority of lower courts. If a suspect makes an unclear reference to consulting with an attorney, the officer should terminate the interrogation and ask the suspect for clarification.

**Key Terms:**

**Edwards Rule on Interrogation -** [from *Edwards v. Arizona*, 451 U.S 477 (1981)] Rule prohibiting police from initiating an interrogation of a suspect who has requested an attorney before an attorney has been provided.

**Dickerson v. United States**

United States Supreme Court  
530 U.S. 428 (2000)

**Rule of Law**

**Congress cannot legislatively supersede a decision by the United States Supreme Court that interprets and applies the Constitution.**

**Facts**

Dickerson (defendant) was indicted for bank robbery. Dickerson moved to have statements he made during an FBI interrogation suppressed, claiming he never received proper *Miranda* warnings. The trial court found that Dickerson had not in fact received proper *Miranda* warnings. However, two years after *Miranda  
v. Arizona,*384 U.S. 436 (1966) was decided, Congress passed 18 U.S.C. § 3501, which permits statements made by a suspect during a custodial police interrogation to be admitted at trial as long as they were made voluntarily. The trial court held that *Miranda* was not a constitutional holding, and Congress therefore had the authority to effectively overrule *Miranda* with a statute. The court of appeals agreed, holding that the protections put forth in *Miranda* are not constitutionally required.

**Issue**

Does the holding in *Miranda* establish a constitutional rule that cannot be superseded by an act of Congress?

**Holding and Reasoning (Rehnquist, C.J.)**

Yes. *Miranda v. Arizona,*384 U.S. 436 (1966), is a constitutional decision, and Congress cannot supersede it by passing legislation. A number of factors support the position that *Miranda* was a constitutional decision. First, *Miranda*, and two of its companion cases, applied the new rule to state cases and, since then, *Miranda* has been applied to cases arising out of state courts. Second, the *Miranda* decision acknowledged that it was establishing “constitutional guidelines for law enforcement agencies and courts to follow.” Third, the *Miranda* opinion recognized that Congress had the authority to create new guidelines, but any subsequent legislation had to be at least as effective in informing suspects of the right against self-incrimination. Finally, the doctrine of*stare decisis* forbids the overruling of *Miranda*. The *Miranda* warnings have become routine, have proven effective, and subsequent cases have all supported their doctrinal underpinnings. Prior to *Miranda*, to satisfy the requirements of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment, a confession had to be voluntary. This was determined by looking at the totality of the circumstances. However, this standard proved unworkable in light of modern interrogation tactics that are themselves inherently coercive. Therefore, *Miranda* established four warnings to ensure that a suspect’s constitutional rights are protected. 18 U.S.C. § 3501 reinstalls the totality of the circumstances test that was held unconstitutional in *Miranda* and therefore it cannot stand.

**Dissent (Scalia, J.)**

While the Court refuses to acknowledge it, the Court here recognizes that a *Miranda* violation does not necessarily amount to a Fifth Amendment violation. The Court never holds that *Miranda* is a constitutional requirement, but merely that it has a constitutional basis. Likewise, it never holds that § 3501 violates the Constitution. Post-*Miranda* cases in which the Court allowed evidence to be admitted without proper *Miranda*warnings support the position that *Miranda* does not establish a constitutional law. The Court here is effectively adopting a new principle of constitutional law, that statutes passed by Congress may be disregarded if they contradict a decision that produces a “constitutional rule.” *Marbury v. Madison*, 5 U.S. (Cranch 1) 137 (1803), established the power of Congress to pass legislation as long as the law is not unconstitutional. *Miranda*should be overruled, and the federal statute should stand.

**Key Terms:**

**Miranda Warnings** - The notices of constitutional rights set forth in the opinion of the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436(1966) that law enforcement authorities must provide to a suspect in a criminal investigation prior to initiation of a custodial interrogation. The suspect must be advised that the suspect has the right to remain silent, anything the suspect says may be used against the suspect, and the suspect has the right to an attorney.

**Fourteenth Amendment Due Process** **Clause** - The provision set forth at Amendment XIV, Section 1 of the United States Constitution prohibiting states from depriving any person of life, liberty, or property by means that are arbitrary or fundamentally unfair.

**Fifth Amendment** - An amendment added to the U.S. Constitution as part of the Bill of Rights that provides important protections from government actions, including a guarantee that no person will be required to answer for a capital crime unless first indicted by a grand jury; no one will suffer double jeopardy; no one must testify against himself or herself; no one will be deprived of life, liberty, or property without due process of law; and no property will be taken for public use without just compensation.

# North Carolina v. Butler

#### United States Supreme Court 441 U.S. 369 (1979)

**Rule of Law**

**A suspect need not make an express statement waiving his right to counsel.**

**Facts**

Butler (defendant) was arrested and convicted of kidnapping, armed robbery, and felonious assault. After his arrest, Butler was given his *Miranda* warnings. He was also given a form to read outlining his rights. When asked, Butler said that he understood his rights. He refused to sign the form indicating that he waived his rights, but agreed to talk to the agents and made self-incriminating statements. Butler never requested an attorney or tried to stop the agent’s questions. Butler sought to have his statements excluded from evidence, arguing that he had not waived his right to counsel at the time the statements were made. The trial court denied the motion, holding that Butler effectively waived his right when he agreed to answer the agents’ questions. The state supreme court reversed the conviction and ordered a new trial, holding that Butler never waived his rights because he never made an express statement that that was his intent.

**Issue**

During a custodial interrogation, may a suspect implicitly waive his right to counsel?

**Holding and Reasoning (Stewart, J.)**

Yes. During a custodial interrogation, a suspect need not specifically waive his right to counsel but may do so implicitly through his actions and words. Whether or not a suspect has effectively waived his right to counsel is not an issue of form, but about asking whether the suspect knowingly and voluntarily waived his rights under *Miranda*. Therefore, a per se rule is not appropriate. Instead, a court must look at the particular facts and circumstances surrounding a case and the suspect’s waiver to determine if it was knowingly and voluntarily made. In this case, Butler was fully informed of his rights and his waiver was therefore knowing and voluntary. The judgment of the state supreme court cannot stand.

**Dissent (Brennan, J.)**

The purpose of *Miranda* is to protect the rights of people subject to custodial police interrogation from the compulsion inherent in such questioning. In such a situation, only an express waiver can be truly knowing and voluntary. Therefore, a per se rule such as that adopted by the state supreme court is appropriate.

**Key Terms:**

**Miranda Warnings** - The notices of constitutional rights set forth in the opinion of the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436(1966) that law enforcement authorities must provide to a suspect in a criminal investigation prior to initiation of a custodial interrogation. The suspect must be advised that the suspect has the right to remain silent, anything the suspect says may be used against the suspect, and the suspect has the right to an attorney.

**Per Se Rule/Exception** - A rule that is applied uniformly without consideration of the specific situation or circumstance.

# Colorado v. Connelly

#### United States Supreme Court 479 U.S. 157 (1986)

**Rule of Law**

**Under the Due Process Clause, a statement may only be deemed involuntary and therefore inadmissible if there was coercion by police.**

**Facts**

On August 18, 1983, Francis Connelly (defendant) stopped a police officer and spontaneously confessed to the murder of a young girl. Connelly had a history of mental illness and had gone off his medication six months before. The officer gave Connelly the *Miranda* warnings, and Connelly continued the confession and led police to the crime scene. Connelly appeared competent to the officers. During a meeting with an attorney the next day, Connelly was confused and claimed voices told him to confess. Doctors found Connelly incompetent to aid his defense, but Connelly later regained competence to stand trial. Connelly moved to suppress his confession, and a psychiatrist testified that Connelly suffered from chronic schizophrenia and psychotic states that impeded his free will. The trial court suppressed the confession as involuntary. The Colorado Supreme Court affirmed. The United States Supreme Court granted certiorari.

**Issue**

Under the Due Process Clause, is a statement made by a mentally ill person involuntary and therefore inadmissible even if there was no coercion by police?

**Holding and Reasoning (Rehnquist, C.J.)**

No. A statement made by a mentally ill person is not involuntary for purposes of the Due Process Clause if there is no coercive behavior by police. The Due Process Clause forbids the government from “depriv[ing] any person of life, liberty, or property, without due process of law.” Coercive interrogation techniques have been held to violate the Due Process Clause in *Brown v. Mississippi*, 297 U.S. 278 (1936), and other cases. Nevertheless, case law makes clear that there must be coercion and overreaching by police for a violation to occur. While courts have considered the mental state of a suspect in determining whether some form of psychological coercion has occurred, the suspect’s mental state alone does not render a statement involuntary for purposes of the Due Process Clause. Suppressing such statements would have no deterrent effect on constitutional violations by police and would force courts to assess a suspect’s subjective mental state even where there has been no police misconduct whatsoever. Thus, a confession may not be found involuntary in violation of the Due Process clause without some element of police coercion. In this case, Connelly’s statements might be unreliable and therefore inadmissible under the state rules of evidence, but there was no violation of the Due Process Clause. The ruling of the lower court is reversed.

**Dissent (Brennan, J.)**

Admission of an involuntary confession by a mentally ill individual violates the Due Process Clause. Free will is central to the concept of due process. The Court’s ruling today denies that and makes involuntary confessions obtained from mentally ill people or through coercion by someone other than police “voluntary” under the Due Process Clause. Such confessions are likely to be highly unreliable, which is dangerous considering the prejudice created by confessions. Connelly had a long history of severe mental illness and had been off his medication for some time when he confessed. The lower courts found his confession involuntary by a preponderance of the evidence. If confessions by mentally ill people are now considered voluntary, at the very least due process requires that trial courts find “substantial indicia of reliability” through corroborating evidence before admitting such confessions.

**Key Terms:**

**Due Process -** A constitutional guarantee that a law shall not be unreasonable, arbitrary, or capricious and that individuals will be given notice of legal proceedings conducted fairly with an opportunity for an individual to be heard before the government may impose sanctions on one’s life, liberty, or property.

# Johnson v. Zerbst

#### United States Supreme Court 304 U.S. 458 (1938)

#### Rule of Law

**The Sixth Amendment guarantees the right of a criminal defendant to a lawyer's assistance, unless the defendant knowingly and intelligently waives that right.**

#### Facts

The federal government prosecuted Johnson (plaintiff) for counterfeiting. Trial in the United States District Court for the Eastern District of South Carolina commenced after Johnson told the judge he was willing to proceed without a lawyer. Johnson was convicted and sent to prison, where he was deprived of legal representation to help in filing an appeal; consequently, he missed the appeal deadline. Johnson then petitioned the district court to issue a writ of habeas corpus to Zerbst (defendant), the prison warden, on the grounds Johnson was tried without the assistance of counsel guaranteed him by the Sixth Amendment to the United States Constitution. The district court did not determine whether Johnson waived his right to counsel. The court dismissed Johnson's petition, ruling that Johnson's failure to file a timely appeal, whether from ignorance or negligence, was insufficient to give the court habeas corpus jurisdiction to reopen Johnson's case. Johnson appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed the district court's ruling. The United States Supreme Court granted certiorari to hear Johnson's appeal.

#### Issue

Does the Sixth Amendment guarantee the right of a criminal defendant to a lawyer's assistance, unless the defendant knowingly and intelligently waives that right?

#### Holding and Reasoning (Black, J.)

Yes. The Sixth Amendment guarantees the right of a criminal defendant to a lawyer's assistance, unless the defendant knowingly and intelligently waives that right. The Sixth Amendment recognizes that a lay defendant may lack the professional skills needed to conduct an effective legal defense. Without a lawyer to represent the defendant, the court loses its jurisdiction to try the defendant, unless the defendant waives representation. It is up to the trial judge to determine whether the defendant's waiver is knowing and intelligent, given all the facts and circumstances surrounding the case, including the defendant's background, experience, and conduct. On appeal, if the trial record does not show that the trial judge made this determination, the appellate court itself must hear evidence as to whether the defendant's waiver of counsel was competent. Here, Johnson should have challenged his conviction by filing a timely appeal. Having missed the filing deadline, Johnson petitioned for habeas corpus. Ordinarily, habeas corpus is an inappropriate procedure for challenging a trial court's errors. However, if Johnson had no lawyer and did not waive his right to counsel, the trial court had no jurisdiction to try him. If Johnson's failure to file a timely appeal was due to his lack of access to a lawyer, then habeas corpus proceedings are the only remaining and effective way to protect Johnson's Sixth Amendment right. Under these circumstances, the district court erred in ruling it had no habeas corpus jurisdiction. The court of appeals judgment affirming that ruling is reversed. The case is remanded for the district court to determine, from the trial record or its own inquiry, whether Johnson knowingly and intelligently waived his right to counsel.

#### Dissent (Butler, J.)

The record shows that Johnson waived his right to counsel. Therefore, the trial court had jurisdiction to try Johnson, and the court of appeals judgment upholding the district court's dismissal of Johnson's petition for a writ of habeas corpus should be affirmed.

#### Dissent (McReynolds, J.)

The court of appeals ruling upholding the district court's dismissal of Johnson's petition for a writ of habeas corpus should be affirmed.

**Key Terms:**

**Sixth Amendment Right to Counsel** - Right of a person accused of a crime to have the help of an attorney throughout any criminal prosecution.

**Remand** - Returning a case back to the previous court, such as the trial court or the state court, for some additional action.

# Michigan v. Mosley

#### United States Supreme Court 423 U.S. 96 (1975)

**Rule of Law**

***Miranda v. Arizona*. 384 U.S. 436 (1966) does not bar police from subsequently questioning a suspect who previously invoked his right to remain silent, as long as the suspect’s right to end questioning has been scrupulously honored.**

**Facts**

Richard Bert Mosley (defendant) was arrested for robbery. Before questioning, Mosley was given the *Miranda* warnings and invoked his right to remain silent. The officer stopped the interrogation, and Mosley was taken to a cell. Later, a detective attempted to question Mosley about an unrelated murder. Mosley was again given the *Miranda* warnings, but did not invoke his right to remain silent. Mosley made incriminating statements and was charged with first-degree murder. Mosley moved to suppress his statements because the detective’s questioning took place after Mosley invoked his right to remain silent. The trial court denied Mosley’s motion. Mosley was convicted by a jury and received a mandatory life sentence. The United States Supreme Court granted certiorari.

**Issue**

Does *Miranda* forbid subsequent questioning of a suspect who previously invoked his right to remain silent?

**Holding and Reasoning (Stewart, J.)**

No. *Miranda* does not prohibit all subsequent questioning by police once a suspect has invoked his right to remain silent. *Miranda* requires police to immediately stop questioning a suspect in custody once the suspect indicates he does not wish to speak. However, *Miranda* provides no guidance as to when and if a suspect who has invoked the right may be interrogated later. Construing *Miranda* to require an infinite bar to any future custodial interrogations of any suspect who has exercised his right to remain silent would produce absurd results. This construction would unduly impede legitimate law enforcement and prevent suspects from making informed decisions about when and if they should invoke the right. Likewise, allowing police to repeatedly resume questioning after a suspect has exercised the right after only momentary breaks until the suspect’s will breaks would be clearly contrary to the purposes of *Miranda*. *Miranda*requires police to advise a suspect of his right to silence and “scrupulously honor” the exercise of that right by immediately ending questioning once the right is invoked. Therefore, statements will be admissible so long as the right to end questioning is “scrupulously honored.” In this case, the officer ended the interrogation as soon as Mosley exercised his right to remain silent. Mosley was not interrogated about the unrelated crime until sufficient time had passed and the *Miranda* warnings were repeated. Therefore, Mosley’s statements were admissible under *Miranda*, and the ruling of the lower court is affirmed.

**Dissent (Brennan, J.)**

Repeated interrogations can overcome the will of a suspect who has exercised his right to remain silent. This is why *Miranda* requires that police end an interrogation immediately once a suspect invokes the right. Scrupulously honoring a suspect’s exercise of the right to cut off questioning is irrelevant if police are permitted to engage in tactics aimed at overcoming the suspect’s will. *Miranda* requires assuming that Mosley’s submission to the second interrogation was the result of his incarceration and repeated questioning. The Court should set out meaningful guidelines for dealing with these types of cases in the future.

**Key Terms:**

**Miranda Warnings** - The notices of constitutional rights set forth in the opinion of the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436(1966) that law enforcement authorities must provide to a suspect in a criminal investigation prior to initiation of a custodial interrogation. The suspect must be advised that the suspect has the right to remain silent, anything the suspect says may be used against the suspect, and the suspect has the right to an attorney.

# Edwards v. Arizona

#### United States Supreme Court 451 U.S. 477 (1981)

#### Rule of Law

**Once a suspect has received his *Miranda* warnings and invoked his right to counsel, the police may not further interrogate the suspect until the suspect has been given access to counsel, unless the suspect initiates further communication with the police.**

**Part 4 – Wavier of Right to Counsel**

# \*\*SALINAS v. TEXAS\*\*

#### United States Supreme Court 570 U.S. 178 (2013)

#### Rule of Law

**A witness’s silence in response to a law enforcement official’s question is not sufficient to invoke the witness’s right against self-incrimination, even when the official believes the answer may incriminate the witness.**

#### Facts

Salinas (defendant) agreed to go to the police station to answer questions about a murder. Salinas was not in custody and thus was not given *Miranda*warnings. Salinas answered a number of questions, but was then asked if his shotgun would match the shells at the scene of the murder. Salinas did not answer, but rather “looked down at the floor, shuffled his feet, bit his bottom lip, and clenched his hands in his lap.” Salinas was charged with the murder, and at trial the prosecution used Salinas’s reaction to the question as evidence that he was guilty. Salinas objected to the prosecutor’s use of his silence, arguing that it violated his Fifth Amendment right against self-incrimination. [After Salinas was convicted and unable to obtain relief at state level], the United States Supreme Court granted certiorari.

#### Issue

Is a witness’s silence in response to a law enforcement official’s question sufficient to invoke the witness’s right against self-incrimination when the official believes the answer may incriminate the witness?

#### Holding and Reasoning (Alito, J.)

No. The Fifth Amendment privilege against self-incrimination is generally not invoked by silence. Indeed, the “right to remain silent” is a bit of a misnomer, as some sort of invocation of the right against compelled testimony is required. Additionally, even when a law enforcement official suspects that a question will lead to an incriminating answer, an express invocation of the right is required. In this case, Salinas requests that the Court adopt an exception “for cases at [the] intersection” of these rules regarding an official’s suspicions and a silent witness. The express invocation requirement does not change, however, if a witness is silent in response to a question the law enforcement official believes may lead to an incriminating response. Salinas’s position cannot be reconciled with any Court precedent; silence is simply not sufficient to invoke the privilege against self-incrimination. The prosecution was thus permitted in this case to use Salinas’s reaction to the question about his shotgun against him in court.

#### Concurrence (Thomas, J.)

Salinas’s silence in this case does not come within the scope of the Fifth Amendment, because it was during a non-custodial interrogation.

#### Dissent (Breyer, J.)

The circumstances of police questioning, not a suspect’s response to the questioning, tie a suspect’s silence to invocation of the right against self-incrimination. In this case, law enforcement’s questioning took a sharp turn when the officer asked Salinas about his shotgun. It was clear at that point that the officer was insinuating that Salinas was guilty. This turn combined with Salinas’s silence leads to a clear inference that Salinas wished to invoke his right against self-incrimination. The proper question in cases like these should be: “Can one fairly infer from an individual’s silence and surrounding circumstances an exercise of the Fifth Amendment’s privilege?”

**Key Terms:**

**Custodial Interrogation** - Questioning by law enforcement authorities of a suspect in a criminal investigation under circumstances in which the suspect is not free to terminate the questioning and leave at will or under circumstances that lead the suspect to believe that he is not free to leave at will.

**Miranda Warnings** - The notices of constitutional rights set forth in the opinion of the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436(1966) that law enforcement authorities must provide to a suspect in a criminal investigation prior to initiation of a custodial interrogation. The suspect must be advised that the suspect has the right to remain silent, anything the suspect says may be used against the suspect, and the suspect has the right to an attorney.

**Fifth Amendment Privilege Against Self-Incrimination** - Constitutional protection that prevents the government from compelling a person to give testimony against himself.

# Miranda v. Arizona

#### United States Supreme Court 384 U.S. 436 (1966)

#### Rule of Law

**Without certain hallmark warnings regarding the right to remain silent and the right to counsel, statements made during custodial interrogation are inadmissible at trial.**

**Minnesota v. Murphy**

104 S.Ct. 1136

Supreme Court of the United States

**MINNESOTA, Petitioner**

**v.**

**Marshall Donald MURPHY.**

No. 82–827.

Argued Oct. 12, 1983.Decided Feb. 22, 1984.

**Synopsis**

Defendant was convicted in state court of first-degree murder, but conviction was reversed and remanded by the [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I9ae5a655fea911d9bf60c1d57ebc853e&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[Minnesota Supreme Court, 324 N.W.2d 340.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1982140492&pubNum=595&originatingDoc=Id8db7a709c1c11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) The Supreme Court granted certiorari to resolve conflict. The Supreme Court, Justice White, held that: (1) on record, probationer was not deterred from claiming self-incrimination privilege by any reasonably perceived threat of revocation of probation; and (2) state may not impose substantial penalties because witness elects to exercise his Fifth Amendment right not to give incriminating testimony against himself, but state may require probationer to appear and discuss matters that affect his probationer's status, and such requirement, without more, does not give rise to self-executing privilege against self-incrimination; and (3) because probationer revealed incriminating information instead of timely asserting his Fifth Amendment privilege, his disclosures to his probation officer were not compelled incriminations, and same was true though the probation officer consciously sought incriminating evidence.

Reversed.

Justice Marshall dissented and filed opinion in which Justice Stevens joined, and in which Justice Brennan joined in part.

# Griffin v. California

#### United States Supreme Court 380 U.S. 609 (1965)

#### Rule of Law

**It is a violation of the Fifth Amendment for the prosecution to comment on the defendant’s silence or for the trial judge to instruct the jury that the defendant’s silence can be evidence of guilt.**

#### Facts

Griffin (defendant) was convicted of first degree murder. He did not testify at his trial. During its closing, the prosecution repeatedly referred to Griffin’s failure to testify, implying that it indicated guilt. The judge instructed the jury that Griffin had a constitutional right not to testify. However, pursuant to a California statute, the judge told the jury that it could infer as true any evidence or facts that Griffin could have reasonably been expected to deny or explain. The state supreme court affirmed the conviction. The United States Supreme Court granted certiorari.

#### Issue

Is the Fifth Amendment violated where a prosecutor indicates to the jury that the defendant’s failure to testify is an indication of his guilt and where a trial judge tells the jury that it may take a defendant’s failure to deny or explain a piece of evidence as tending to indicate the truth of that evidence?

#### Holding and Reasoning (Douglas, J.)

Yes. The Fifth Amendment, incorporated to the states through the Fourteenth Amendment, forbids the prosecution from commenting on a defendant’s failure to testify and forbids a judge from instructing the jury that such silence is evidence of guilt. A defendant has the right not to testify and to rely on the presumption of innocence. Furthermore, a defendant may decide not to testify for a number of reasons, from nervousness to embarrassment, or the desire to keep prior convictions out of evidence. Commenting on the defendant’s failure to testify imposes an unconstitutional penalty on the defendant for exercising his Fifth Amendment right.

#### Concurrence (Harlan, J.)

In light of current jurisprudence, the Court’s decision today is correct. However, hopefully the Court will soon overrule the decision in *Malloy v. Hogan*, 378 U.S. 1 (1964), that the Fifth Amendment is incorporated to the states through the Fourteenth Amendment.

#### Dissent (Stewart, J.)

The Constitution demands that a defendant not be compelled to testify against himself. The California statute allowing the judge to instruct the jury on the defendant’s failure to testify does not act as an unconstitutional compulsion and actually protects the defendant. The jury will notice that the defendant has not testified and it will naturally draw conclusions about what this means. Without a limiting instruction, the jury may draw inferences that are far too broad.

**Key Terms:**

**Fifth Amendment** - An amendment added to the U.S. Constitution as part of the Bill of Rights that provides important protections from government actions, including a guarantee that no person will be required to answer for a capital crime unless first indicted by a grand jury; no one will suffer double jeopardy; no one must testify against himself or herself; no one will be deprived of life, liberty, or property without due process of law; and no property will be taken for public use without just compensation.

# Berghuis v. Thompkins

#### United States Supreme Court 130 S. Ct. 2250 (2010)

#### Rule of Law

**Where a defendant does not invoke his right to remain silent after fully understanding his *Miranda* rights, he implicitly waives his *Miranda* rights by making a voluntary statement to police.**

# Doyle v. Ohio

#### United States Supreme Court 426 U.S. 610 (1976)

**Rule of Law**

**A criminal defendant’s due-process rights are violated if the trial court allows the prosecution to cross-examine the defendant about an exculpatory version of events that the defendant did not reveal to police after receiving *Miranda*warnings.**

**Facts**

Doyle (defendant) was charged with selling marijuana to an informant for the narcotics bureau of the State of Ohio (plaintiff). At trial, Doyle presented a version of events that contradicted the prosecution’s version of events. The prosecution cross-examined Doyle and asked why he had not explained his version of events to the agent who arrested him. Doyle objected to the prosecutor’s questions, and the trial court overruled his objections. Doyle was convicted, and his conviction was upheld in the state courts. The United States Supreme Court granted certiorari to consider the question of whether it violates a criminal defendant's constitutional rights for a prosecutor to use the defendant's post-arrest silence in an attempt to impeach the defendant's credibility.

**Issue**

Are a criminal defendant’s due-process rights violated if the trial court allows the prosecution to cross-examine the defendant about an exculpatory version of events that the defendant did not reveal to police after receiving *Miranda*warnings?

**Holding and Reasoning (Powell, J.)**

Yes. A criminal defendant’s due-process rights are violated if the trial court allows the prosecution to cross-examine the defendant about an exculpatory version of events that the defendant did not reveal to police after receiving *Miranda*warnings. The *Miranda*warnings are intended to protect the Fifth Amendment rights of the accused by informing the accused of his right to remain silent, his right to the assistance of counsel, and the fact that any statements he offers may be used against him. The *Miranda*warnings carry an implicit assurance that no penalty will attach to the exercise of the right to remain silent. Indeed, in this case, Doyle may have relied upon that implicit assurance as the basis for his decision to remain silent. Use of a defendant’s silence for impeachment purposes, when the government has given the defendant reason to believe that his silence will not be used against him, violates the defendant’s rights under the Due Process Clause of the Fourteenth Amendment. Accordingly, the judgment of conviction is reversed.

**Dissent (Stevens, J.)**

The *Miranda*warnings offer no guarantee that the accused’s silence will not be used against him. The majority bases its opinion on a presumption that Doyle was deceived by the *Miranda*warnings into believing that the state is under an obligation not to use his silence against him. Silence has probative value, and the fact that a defendant has been advised of his *Miranda*rights does not render cross-examination about his silence unfair. If Doyle had been framed, as he claimed at trial, his initial silence is equivalent to a prior inconsistent statement which would be admissible for impeachment purposes. Doyle did not testify that he had maintained silence in reliance upon his understanding of the *Miranda*warnings. If he had been deceived by the warnings, he could have explained his silence on that basis. The majority opinion does not suggest that Doyle’s silence would not have been admissible if he had not received *Miranda*warnings. There is no logic to the proposition that admission of his silence after he had received *Miranda*warnings deprived Doyle of any due-process rights. Doyle also argues that the jury was allowed to draw an inference of guilt from his silence in violation of his Fifth Amendment privilege against self-incrimination. Doyle failed to inform the police that he had been framed at a time when he would have been likely to do so if the story were true. That failure is inconsistent with his trial testimony. The inference of guilt arises not from Doyle’s silence, but from the inconsistency of prior silence with his subsequent trial testimony. Although Doyle’s failure to spontaneously raise his claim of having been framed is inconsistent with his trial testimony, the same inconsistency is not present in his decision not to take the stand during his preliminary hearing. The decision not to reveal his defense prior to trial may be attributable to a strategic decision by Doyle’s defense attorney. Nonetheless, once a defendant takes the stand, the state is free to regard that decision as a waiver of any objection against the use of the defendant’s prior silence for impeachment purposes.

**Key Terms:**

**Miranda Warnings** - The notices of constitutional rights set forth in the opinion of the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436(1966) that law enforcement authorities must provide to a suspect in a criminal investigation prior to initiation of a custodial interrogation. The suspect must be advised that the suspect has the right to remain silent, anything the suspect says may be used against the suspect, and the suspect has the right to an attorney.

**Fifth Amendment** - An amendment added to the U.S. Constitution as part of the Bill of Rights that provides important protections from government actions, including a guarantee that no person will be required to answer for a capital crime unless first indicted by a grand jury; no one will suffer double jeopardy; no one must testify against himself or herself; no one will be deprived of life, liberty, or property without due process of law; and no property will be taken for public use without just compensation.

# Jenkins v. Anderson

#### United States Supreme Court 447 U.S. 231 (1980)

#### Rule of Law

**Use for impeachment purposes of a defendant’s silence prior to arrest does not violate the defendant’s Fifth and Fourteenth Amendment rights.**

#### Facts

Jenkins (defendant) killed a man in a stabbing incident. Jenkins reported the incident to his probation officer two weeks after the stabbing. Jenkins asserted the affirmative defense of self-defense. At trial, the prosecution questioned Jenkins about the delay between the stabbing and his decision to report the incident. The prosecution referred to Jenkins’ prearrest silence again during closing arguments. Jenkins was convicted and his conviction was upheld through the appeals process. Jenkins petitioned the United States Supreme Court for review.

#### Issue

Does the use for impeachment purposes of a defendant’s silence prior to arrest violate the defendant’s Fifth and Fourteenth Amendment rights?

#### Holding and Reasoning (Powell, J.)

No. The use for impeachment purposes of a defendant’s silence prior to arrest does not violate the defendant’s Fifth and Fourteenth Amendment rights. In *Raffel v. United States*, 271 U.S. 494 (1926), we recognized that the use of a defendant’s prior silence for impeachment purposes when the defendant chooses to take the stand does not violate the Fifth Amendment. In *Harris v. New York*, 401 U.S. 222 (1971), we held that the use for impeachment purposes of a statement taken in violation of a defendant’s *Miranda*rights did not violate the defendant’s Fifth Amendment rights. Impeachment enables the prosecution to probe a defendant’s explanation for prior inconsistent statements and thereby enhances the reliability of the trial process. A defendant cannot be impeached if he chooses to exercise his right not to testify. When a defendant chooses to testify, impeachment necessarily follows in the interest of promoting an accurate assessment of guilt or innocence. As such, the use of a defendant’s prearrest silence for impeachment purposes does not run afoul of the Fifth Amendment. Likewise, the use of prearrest silence for impeachment purposes does not violate a defendant’s Fourteenth Amendment right to a fair trial. Witnesses have traditionally been subject to impeachment for failure to state a fact under circumstances that would normally tend to induce such a statement. Our only exception to the rule stems from *Doyle v. Ohio*, 462 U.S. 610 (1976), in which we concluded that the defendant’s silence may have been induced by his misunderstanding of the *Miranda* warnings. Jenkins’ failure to speak occurred before he was arrested and given *Miranda*warnings, so this is not a case like *Doyle* in which governmental intervention induced the defendant’s silence. Impeachment by the use of prearrest silence does not present the fundamental unfairness we found in *Doyle* and does not violate the defendant’s Fourteenth Amendment rights. This decision does not require every state to allow the use of prearrest silence for impeachment purposes. This decision only concludes that impeachment by the introduction of prearrest silence does not violate a defendant’s constitutional rights. The states are at liberty to formulate rules of evidence accordingly. The judgment of conviction is affirmed.

#### Dissent (Marshall, J.)

The fact that a defendant remained silent prior to arrest bears so little relationship to the veracity of his testimony at trial that its use for impeachment purposes violates the Due Process Clause of the Fourteenth Amendment. In addition, the privilege against self-incrimination is impermissibly impinged upon by allowing the finder of fact to draw an adverse inference from a defendant’s silence. Finally, a defendant’s decision about whether or not to exercise the constitutional right to testify in his own defense is impermissibly burdened by the fact that an adverse inference may be drawn from prior silence. Evidence of prior silence is irrelevant if it is not inconsistent with trial testimony. We cannot presume that Jenkins did not act in reliance on the implied assurance that his silence could not be held against him, especially since he has prior convictions and has most likely been given the *Miranda*warnings in the past. As such, the inference that his prearrest silence was inconsistent with his trial testimony cannot be indulged. Jenkins’ failure to report the stabbing prior to arrest bears no relation to the truthfulness of his trial testimony. Allowing the jury to infer falsity from his prior silence deprived Jenkins of the due process of a fundamentally fair trial. Further, Jenkins was required to forego his privilege against self-incrimination and admit to stabbing the victim as a necessary element of his claim of self-defense. Normally, the privilege applies to prevent the government from imposing any duty upon citizens to report their own unlawful conduct. The majority opinion effectively imposes a duty of self-incrimination that undermines the purposes of the Fifth Amendment privilege. Under this decision, the defendant must take into account the potential that the jury may view prior silence as an indicator of present falsehood when deciding whether to take the stand and testify in his own defense. The only way to avoid that consequence is for a person who thinks he may have broken the law to immediately turn himself in to law enforcement, despite the fact that he may incriminate himself by the very act of doing so. This decision forces a person to choose between two fundamental rights and imposes an unconstitutional burden on the privilege against self-incrimination.

**Key Terms:**

**Miranda Warnings** - The notices of constitutional rights set forth in the opinion of the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436(1966) that law enforcement authorities must provide to a suspect in a criminal investigation prior to initiation of a custodial interrogation. The suspect must be advised that the suspect has the right to remain silent, anything the suspect says may be used against the suspect, and the suspect has the right to an attorney.

**Due Process -** A constitutional guarantee that a law shall not be unreasonable, arbitrary, or capricious and that individuals will be given notice of legal proceedings conducted fairly with an opportunity for an individual to be heard before the government may impose sanctions on one’s life, liberty, or property.

**Impeachment of a Witness -** The questioning or discrediting of a witness's veracity or reliability. Any party may impeach any witness, including a witness the party has called.

**Garner v. United States**

96 S.Ct. 1178

Supreme Court of the **United** **States**

**Roy D. GARNER, Petitioner,**

**v.**

**UNITED STATES.**

No. 74-100.

Argued Nov. 4, 1975.Decided March 23, **1976**.

**Synopsis**

Defendant was found guilty before the **United** **States** District Court for the Central District of California, of conspiring to violate various federal gambling statutes, and he appealed. The Court of Appeals, sitting en banc, [501 F.2d 228,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1974111590&pubNum=350&originatingDoc=Ic1d6ebea9c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed, and defendant's petition for writ of certiorari was granted. The Supreme Court, Mr. Justice Powell, held that where defendant made incriminating disclosures on his tax returns instead of claiming privilege against compulsory self-incrimination as he had the right to do, his disclosures were not compelled incriminations and thus defendant was foreclosed from invoking privilege when such information was later introduced as evidence against him in a criminal prosecution.

Affirmed.

Mr. Justice Marshall filed concurring opinion in which Mr. Justice Brennan joined.

# Garrity v. New Jersey

#### Supreme Court of the United States 385 U.S. 493 (1967)

#### Rule of Law

**The Fourteenth Amendment prohibits the use in criminal proceedings of incriminating statements made by public employees under threat of termination.**

#### Facts

Garrity (defendant) was one of a group of public employees who were questioned by the state Attorney General in an investigation related to manipulation of traffic tickets. Prior to questioning, the employees were told that they could refuse to answer questions if the answers would be self-incriminating, but they were also told that refusal to answer would result in termination of their employment. The state supreme court concluded that the threat of termination did not violate the employees’ constitutional privilege against self-incrimination. The employees petitioned the United States Supreme Court for review.

#### Issue

Does the Fourteenth Amendment prohibit the use in criminal proceedings of incriminating statements made by public employees under threat of termination?

#### Holding and Reasoning (Douglas, J.)

Yes. The Fourteenth Amendment prohibits the use in criminal proceedings of incriminating statements made by public employees under threat of termination. In *Boyd v. United States*, 116 U.S. 616(1886), this Court held that a statute requiring an individual to provide self-incriminating evidence on penalty of forfeiting property violated the protections of the Fourth Amendment and Fifth Amendment. In this case, the employees were given a choice between self-incrimination and loss of employment. The employees cannot be said to have been free to choose silence and their confessions cannot be regarded as voluntary. The government may impose certain restrictions against constitutional rights as a condition of public employment, but there are certain rights upon which the government may not impose limitations. We hold that the Fourteenth Amendment protects holders of public office against compelled self-incrimination under threat of termination and prohibits the use of compelled statements in criminal proceedings. The state court judgment is reversed.

#### Dissent (Harlan, J.)

The majority effectively holds that the statements of the employees are involuntary as a matter of law. This decision departs from the standards historically employed to ascertain the voluntariness of statements. The measure of voluntariness has been to ascertain whether conditions of duress overcame the will of the offeror. The factual indicators of duress have included lack of access to counsel, extreme interrogation techniques, lack of notice of constitutional rights, individual vulnerabilities, and actual threats. In this case, none of the employees were in custody at the time of the interrogations. They all apparently returned to their jobs after the interrogations. The interrogations were brief and conducted in comfortable surroundings. Considering the record as a whole, there is no evidence that the will of any employee was overcome by coercion or duress. If the employees’ statements are to be deemed involuntary as a matter of law, then it must be because either the warning provided or the consequence of silence violated constitutional protections. If both the warning and the consequence pass constitutional muster, the burden falls to the person claiming involuntariness to prove the existence of conditions meeting the standards of involuntariness. In my opinion, the state may permissibly attach consequences to the exercise of the privilege against self-incrimination. The constitutionality of the consequence should be determined by weighing the severity of its infringement upon the privilege against the interests of the public it purports to uphold. I would affirm the state court judgment.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Fifth Amendment** - An amendment added to the U.S. Constitution as part of the Bill of Rights that provides important protections from government actions, including a guarantee that no person will be required to answer for a capital crime unless first indicted by a grand jury; no one will suffer double jeopardy; no one must testify against himself or herself; no one will be deprived of life, liberty, or property without due process of law; and no property will be taken for public use without just compensation.

**Fourteenth Amendment –** Provides that all persons born or naturalized in the United States are U.S. citizens. Also provides that no state shall: (1) abridge the privileges or immunities of a U.S. citizen; (2) deprive any person of life, liberty, or property, without due process of law; or (3) deny equal protection of the laws to anyone within its jurisdiction.

**Lefkowitz v. Turley**

United States Supreme Court  
414 U.S. 70 (1973)

**Rule of Law**

**A state may not compel an employee to waive his constitutional right of immunity under the Fifth Amendment by threatening him with loss of employment.**

**Facts**

New York statutes required public contracts to state that if a contractor refuses to waive immunity or refuses to testify concerning state contracts, current contracts could be cancelled and future contracts denied for five years. Contractors refused to answer questions that could incriminate themselves and were denied the right to future contracts.

**Issue**

Can a state compel an employee to waive his constitutional right of immunity under the Fifth Amendment by threatening him with loss of employment?

**Holding and Reasoning (White, J.)**

No. A state may not compel an employee to waive his constitutional right of immunity under the Fifth Amendment by threatening him with loss of employment. In *Garrity v. New Jersey*, 385 U.S. 493 (1967), as well as other cases, we held that employees of the state do not lose their constitutional privileges, and they can be compelled to answer only those questions that cannot be used against them in future criminal proceedings. *Garrity*concerned police officers who were forced to testify concerning possible wrongdoing by the threat of removal from their positions. We held then that “protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic.” The ruling in *Garrity* thus extends to all public employees, and it governs this case as well. We do not mean to dismiss the interest of the state in maintaining the integrity of its civil service, but we also recognize the function of immunity in the constitutional framework. Immunity represents a “rational accommodation” between two important imperatives: the need to protect an individual against self-incrimination and the state and federal government’s legitimate need to obtain information about employees. By forcing an employee to waive immunity, it seems, the state tries to do what we said in *Garrity* that it cannot do, namely, compel testimony that might incriminate an employee. The state, by asking the employee to waive his rights not to give information, compels him no less than if it asked him directly to give testimony, without mentioning the waiver. Threatened with dismissal, an employee who waives his rights cannot be said to have acted voluntarily. Since the Fifth and Fourteenth Amendments protect the voluntariness of possibly incriminating statements, we hold that the New York statutes in question are unlawful.

**Key Terms:**

**Fifth Amendment** - An amendment added to the U.S. Constitution as part of the Bill of Rights that provides important protections from government actions, including a guarantee that no person will be required to answer for a capital crime unless first indicted by a grand jury; no one will suffer double jeopardy; no one must testify against himself or herself; no one will be deprived of life, liberty, or property without due process of law; and no property will be taken for public use without just compensation.

**Fourteenth Amendment –** Provides that all persons born or naturalized in the United States are U.S. citizens. Also provides that no state shall: (1) abridge the privileges or immunities of a U.S. citizen; (2) deprive any person of life, liberty, or property, without due process of law; or (3) deny equal protection of the laws to anyone within its jurisdiction.

**Lefkowitz v. Cunningham**

97 S.Ct. 2132

Supreme Court of the United States

**Louis J. LEFKOWITZ, Attorney General of the State of New York, Appellant,**

**v.**

**Patrick J. CUNNINGHAM et al.**

No. 76-260.

Argued Feb. 28-March 1, 1977.Decided June 13, 1977.

**Synopsis**

Pursuant to a New York statute, attorney was divested of his state political party offices when, in response to a subpoena, he appeared before a special grand jury and refused to waive his constitutional immunity. He then brought suit seeking declaratory and injunctive relief against enforcement of the statute on the ground that it violated his Fifth and Fourteenth Amendment rights. A three-judge District Court for the Southern District of New York granted relief, [420 F.Supp. 1004,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1976127470&pubNum=345&originatingDoc=Id4bef7e89c1d11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) and defendant appealed. The Supreme Court, Mr. Chief Justice Burger, held that the statute was violative of plaintiff's Fifth Amendment right to be free of compelled self-incrimination.

Affirmed.

Mr. Justice Brennan filed an opinion concurring in part, in which Mr. Justice Marshall joined.

Mr. Justice Stevens filed a dissenting opinion.

**Procedural Posture(s):** On Appeal.

# Dickerson v. United States

#### United States Supreme Court 530 U.S. 428 (2000)

#### Rule of Law

**Congress cannot legislatively supersede a decision by the United States Supreme Court that interprets and applies the Constitution.**

**Part 5 – Break in Miranda Custody and the Right to Counsel**

# \*\*MARYLAND v. SHATZER\*\*

#### United States Supreme Court 130 S. Ct. 1213 (2010)

#### Rule of Law

**A break in custody ends the presumption of involuntariness established in *Edwards v. Arizona*.**

#### Facts

In 2003, a social worker reported allegations that Michael Shatzer (defendant) had abused his three-year-old son. At the time of this allegation, Shatzer was imprisoned for a different child-sexual-abuse conviction. The 2003 allegation was assigned to Detective Shane Blankenship, who went to interview Shatzer in prison. Shatzer initially waived his *Miranda* rights but afterwards demanded an attorney, at which point Blankenship ended the interview. The investigation was closed shortly afterwards. Two and a half years later, further details of the 2003 allegations against Shatzer were reported. Detective Paul Hoover undertook the investigation and on March 2, 2006 went to interview Shatzer in prison. Hoover obtained a written *Miranda* waiver and interviewed Shatzer. Shatzer agreed to take a polygraph five days later. Shatzer was again read his *Miranda* rights. Shatzer signed another written waiver and proceeded to fail the polygraph test. After further questioning, Shatzer confessed. Shatzer then requested an attorney, and Hoover ended the interrogation.

#### Issue

Does a break in custody end the presumption of involuntariness established in *Edwards v. Arizona*?

#### Holding and Reasoning (Scalia, J.)

Yes. Under *Edwards v. Arizona*, 451 U.S. 477 (1981), an accused that has invoked his right to counsel during a custodial interrogation cannot be questioned further without counsel unless he himself initiates further communication with the police. Any evidence resulting from such further interrogation without counsel is presumed to be involuntary under *Edwards*. Since the *Edwards* rule is court-imposed, the rule is only justified if its benefits outweigh its costs. One benefit of the rule is that the accused is protected from coercive interrogation. However, this benefit is diminished where an accused has, in the interim, been released to his normal life before the second attempted interrogation. In such circumstances, it is unlikely that an accused’s willingness to be interrogated without counsel in the second interrogation is the result of the pressures of prolonged custody. Moreover, the cost of the *Edwards*rule, namely that voluntary confessions are excluded and officers are deterred from trying to obtain them, would only be increased. Consequently, this Court declines to extend *Edwards* to cases where an accused requests an attorney at his first interrogation and is re-interrogated after a break in custody without counsel. Because law enforcement will need concrete guidance in determining whether a break in custody is long enough, this Court finds that 14 days is an adequate period of time for the accused to re-enter his normal life, seek advice, and to escape the coercive effects of his first interrogation. Here, Shatzer’s break in custody between his two interrogations was two-and-one-half years. Although Shatzer was released from custody into the general prison population, not back to his normal life, he was nevertheless returned to the same degree of control he had over his life prior to the first interrogation. Since Shatzer’s break in custody was over 14 days, the *Edwards* rule does not require that Shatzer’s 2006 statements be suppressed.

#### Concurrence (Stevens, J.)

Although the Court properly finds that the *Edwards* presumption of involuntariness is not eternal, it improperly declares that it always ends after a 14-day break in custody. A 14-day break does not negate the necessarily compelling nature of a custodial interrogation. Moreover, as in this specific situation, a custodial break that sends an accused back to prison does little to allow the accused to escape the coercive effects of the first interrogation. Nevertheless, Shatzer’s two and a half year break in custody was a sufficient break in custody.

# Edwards v. Arizona

#### United States Supreme Court 451 U.S. 477 (1981)

#### Rule of Law

**Once a suspect has received his *Miranda* warnings and invoked his right to counsel, the police may not further interrogate the suspect until the suspect has been given access to counsel, unless the suspect initiates further communication with the police.**

# Miranda v. Arizona

#### United States Supreme Court 384 U.S. 436 (1966)

#### Rule of Law

**Without certain hallmark warnings regarding the right to remain silent and the right to counsel, statements made during custodial interrogation are inadmissible at trial.**

# Minnick v. Mississippi

#### United States Supreme Court 498 U.S. 146 (1990)

#### Rule of Law

**Once a suspect has requested an attorney, police may not conduct an interrogation without counsel present.**

#### Facts

Robert Minnick (defendant) and another man escaped from a Mississippi jail and killed two people. Minnick was arrested in California. Minnick claims he was forced to meet with Federal Bureau of Investigation (FBI) agents. After being given the *Miranda* warnings, Minnick refused to sign a waiver of his rights. Minnick answered some questions, but told the agents to return after Minnick obtained an attorney. Minnick consulted with an attorney two or three times. Minnick claims he was forced to meet with a deputy sheriff from Mississippi. Minnick again refused to sign a rights waiver but told the deputy about the murders. Minnick was charged with murder. Before trial, Minnick moved to suppress his statements. The trial court suppressed the statements made to the FBI agents, but admitted the statements Minnick made to the deputy sheriff after consulting with an attorney. Minnick was found guilty of capital murder and given a death sentence. The United States Supreme Court granted certiorari.

#### Issue

If a suspect who invoked his Fifth Amendment right to counsel has been given an opportunity to consult an attorney, may police conduct a custodial interrogation of that suspect without an attorney present?

#### Holding and Reasoning (Kennedy, J.)

No. Once a suspect has requested counsel, police must suspend the interrogation and may not interrogate the suspect again without counsel present. Under *Miranda v. Arizona*, 384 U.S. 436 (1966), police must cut off a custodial interrogation the moment the suspect requests an attorney. Under *Edwards v. Arizona*, 451 U.S 477 (1981), police may not resume interrogating a suspect who has requested an attorney until an attorney has been provided. The goal of *Edwards* is to ensure that police do not pressure suspects to waive already invoked rights. When the clear and easily applied rule set forth in *Edwards* is followed, judges need not attempt to determine whether a statement was voluntary or coerced. The presence of an attorney ensures that the Fifth Amendment privilege against self-incrimination is protected. The objectives of *Edwards*are not met if police are allowed to resume interrogating a suspect who has merely had the opportunity to consult with an attorney some time before the interrogation. Once a suspect has asserted his right to counsel, police must stop questioning and may not resume interrogating the suspect without an attorney present. In this case, Minnick was forced to submit to questioning by police and may have been unclear as to the effect of his refusal to sign a rights waiver. If the attorney Minnick requested had been present, Minnick would have been counseled as to the effect of his refusal to sign the waiver and reminded of his right to remain silent. This rule does not mean that a suspect who has requested an attorney cannot later waive that right and contact authorities, but in this case police initiated the contact. Minnick’s statements should have been suppressed. The ruling of the trial court is reversed.

#### Dissent (Scalia, J.)

The Court creates an irrebuttable presumption that a suspect who has requested an attorney can never waive his rights in any future meeting requested by police. The presumption created by *Edwards* should not be extended to cases in which the suspect has consulted with a lawyer. The coercive pressures created by a custodial interview are lessened when an attorney has advised a suspect of his rights. Neither this rule nor the rule in *Edwards* is authorized by the Constitution or necessary for the protection of the Fifth Amendment. Smart criminals do not confess, and this rule is apparently aimed at protecting less intelligent criminals from making the mistake of voluntarily confessing. An honest confession benefits society and the suspect.

**Key Terms:**

**Edwards Rule on Interrogation -** [from *Edwards v. Arizona*, 451 U.S 477 (1981)] Rule prohibiting police from initiating an interrogation of a suspect who has requested an attorney before an attorney has been provided.

**Arizona v. Roberson**

108 S.Ct. 2093

Supreme Court of the United States

**ARIZONA, Petitioner**

**v.**

**Ronald William ROBERSON.**

No. 87–354.

Argued March 29, 1988.Decided June 15, 1988.

**Synopsis**

After defendant was arrested for burglary, and requested counsel, he was interrogated a second time concerning an unrelated burglary. During the second interrogation, he made an incriminating statement concerning the charged burglary. An Arizona trial court suppressed the statement under the rule of *Edwards v. Arizona*. The Arizona Court of Appeals affirmed the suppression. After granting certiorari, the Supreme Court, Justice Stevens, held that: (1) *Edwards* rule that a suspect who has invoked his right to counsel is not subject to further interrogation until counsel has been made available to him applies when a police-initiated interrogation following suspect's request for counsel occurs in context of a separate investigation, and (2) fact that officer who conducted defendant's second interrogation did not know he had requested counsel when he was arrested could not justify failure to honor request.

Affirmed.

Justice Kennedy filed a dissenting opinion in which Chief Justice Rehnquist joined.

Justice O'Connor took no part in the consideration or decision of the case.

# County of Riverside v. McLaughlin

#### United States Supreme Court 500 U.S. 44 (1991)

#### Rule of Law

**A judicial determination of probable cause made within 48 hours of arrest is generally sufficiently prompt.**

# Gerstein v. Pugh

#### United States Supreme Court 420 U.S. 103 (1975)

#### Rule of Law

**A defendant charged with a crime by information may not be detained for an extended period of time without a judicial determination of probable cause.**

# United States v. Patane

#### United States Supreme Court 542 U.S. 630 (2004)

#### Rule of Law

**Because the introduction of physical evidence at trial does not implicate the Self-Incrimination Clause, suppression of physical evidence found as a result of a suspect’s voluntary but unwarned statements is not required.**

# Michigan v. Mosley

#### United States Supreme Court 423 U.S. 96 (1975)

#### Rule of Law

***Miranda v. Arizona*. 384 U.S. 436 (1966) does not bar police from subsequently questioning a suspect who previously invoked his right to remain silent, as long as the suspect’s right to end questioning has been scrupulously honored.**

# Montejo v. Louisiana

#### United States Supreme Court 556 U.S. 778 (2009)

#### Rule of Law

**Police may seek a knowing and voluntary waiver of a defendant's right to have counsel present during interactions with the police, even after the defendant's Sixth Amendment rights have attached and become operative.**

#### Facts

While investigating the murder of Lewis Ferrari, police wanted to question Jesse Montejo (defendant). Police arrested Montejo, and Montejo waived his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). Montejo was interrogated by police for several hours at the sheriff’s office; he changed his story many times and finally admitted that he had killed Ferrari. Montejo was brought before a judge, and a lawyer was appointed for him even though he had not expressly asked for one. That same day, two detectives visited Montejo and requested that he accompany them to find the murder weapon. He was read his *Miranda* rights again, and he agreed to go with the officers. During the trip, he wrote an inculpatory apology letter to Ferrari's widow. On returning to prison, Montejo met with his court-appointed lawyer. At trial, Montejo's apology letter was admitted into evidence over the defense’s objection. Montejo was convicted of first-degree murder and sentenced to death. The Louisiana Supreme Court affirmed the conviction. The court held that rule articulated in *Michigan v. Jackson*, 475 U.S. 625 (1986), which forbids police to initiate an interrogation of a criminal defendant after the defendant has requested counsel at an arraignment or other similar proceeding, was inapplicable because Montejo never expressly asked for an attorney. The court further held that Montejo’s waiver of his right to have counsel present with him during his interactions with the police was knowing and voluntary. The United States Supreme Court granted certiorari.

#### Issue

May police seek a knowing and voluntary waiver of a defendant's right to have counsel present during interactions with the police, even after the defendant's Sixth Amendment rights have attached and become operative?

#### Holding and Reasoning (Scalia, J.)

Yes. Under the rule articulated in *Michigan v. Jackson*, a defendant's request for counsel at an arraignment is treated as the defendant's invocation of the Sixth Amendment right to have counsel present "at every critical stage of the prosecution." Even if a defendant subsequently purports to waive his rights, the waiver is presumed involuntary and is not enough to justify further police interrogation. The *Jackson* rule imports into the Sixth Amendment context the protections announced in *Edwards v. Arizona*, 451 U.S. 477 (1981), which shield a defendant's Fifth Amendment right to have counsel present during custodial interrogation. *Edwards* and *Jackson* were intended to prevent the police from badgering a witness to give up his rights, but if a suspect never expressly invokes his rights in the first place, there is no fear of abuse. However, the *Jackson* rule, as interpreted by the Louisiana Supreme Court, is unworkable. In over half the states, suspects do not have to invoke their *Jackson* rights because lawyers are automatically appointed by the court. Among other concerns, conditioning a defendant's rights on whether the defendant formally invoked the right to counsel would lead to arbitrarily different treatment of defendants between the states. Besides *Jackson*'s sheer unworkability, the *Jackson*rule provides only a marginal benefit to society (*i.e.*, the suppression of coerced confessions) at a significant cost (*i.e.*, hampering the ability to find, convict, and punish people who break the law). Moreover, the *Jackson* rule is unnecessary, because *Miranda* and other cases provide enough protection in cases in which a defendant does not want to speak to the police. Because its costs far outweigh its benefits, *Jackson* is overruled. In this case, the Louisiana Supreme Court rejected Montejo's claim based on the *Jackson*rule, and this was the appropriate outcome. However, Montejo can still contend that the letter he wrote should be suppressed under *Edwards*. For that reason, the court's judgment is vacated, and the case is remanded for further proceedings.

#### Dissent (Stevens, J.)

The Court misinterprets *Jackson* and the constitutional rights it was intended to protect. *Jackson* and the cases supporting it rely on Sixth Amendment doctrine, which is different analytically from that of the Fifth Amendment. The Court mentions anti-badgering considerations, but that rationale was not even mentioned in *Jackson* and *Edwards*, for custodial anti-badgering belongs more to Fifth Amendment analysis. In short, the Court conflates the two amendments and ignores the specific rights protected by the Sixth Amendment: “to protect the unaided layman at critical confrontations with his adversary” by giving him “the right to rely on counsel as a ‘medium’ between himself and the state.” Furthermore, even in the absence of the *Jackson* decision, it is clear that the conduct of the police in this matter violated Montejo's Sixth Amendment rights. Although Montejo was given *Miranda* warnings before he agreed to accompany the police, those warnings were insufficient to warn Montejo of his Sixth Amendment right to have a lawyer present with him and the consequences of waiving that right.

**Key Terms:**

**Miranda Warnings** - The notices of constitutional rights set forth in the opinion of the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436(1966) that law enforcement authorities must provide to a suspect in a criminal investigation prior to initiation of a custodial interrogation. The suspect must be advised that the suspect has the right to remain silent, anything the suspect says may be used against the suspect, and the suspect has the right to an attorney.

**Michigan v. Jackson**

United States Supreme Court  
475 U.S. 625 (1986)

**Rule of Law**

**Under the Sixth Amendment, police may not initiate questioning outside the presence of counsel of a defendant who requested an attorney at arraignment.**

**Facts**

Jackson (defendant) was suspected of murder. Jackson was arrested and interrogated. At arraignment, Jackson requested an attorney. Police were present at the arraignment. After arraignment but before Jackson consulted with an attorney, police met with Jackson. Jackson was given the *Miranda*warnings, waived his right to counsel, and gave a statement confirming that he had committed the murder. Jackson was convicted of second-degree murder and conspiracy. The Michigan Court of Appeals held that Jackson’s statement was admissible. The Michigan Supreme Court reversed on the grounds that the statement was taken in violation of Jackson’s Sixth Amendment right to counsel. The Supreme Court agreed to hear this and another case that presented the same question.

**Issue**

Under the Sixth Amendment, may police initiate questioning outside the presence of counsel of a defendant who requested an attorney at arraignment?

**Holding and Reasoning (Stevens, J.)**

No. Police may not initiate questioning of a defendant who has invoked his Sixth Amendment right to counsel outside the presence of an attorney. The Fifth Amendment gives a suspect the right to an attorney during a custodial interrogation. The Sixth Amendment guarantees an accused person the right to counsel at any interrogation after arraignment. Arraignment is significant as it is the beginning of criminal proceedings and activates the Sixth Amendment. Under *Edwards v. Arizona*, 451 U.S 477 (1981), police may not resume questioning a suspect who has requested an attorney during a custodial interview on the basis of the Fifth Amendment’s privilege against self-incrimination. The rationale underlying that prohibition is even stronger in cases where a suspect has been formally charged and proceedings have begun. Arraignment is the official beginning of governmental prosecution of an individual and the individual’s dealings with the law. The right to have counsel present for any interview after that point is as great or greater than the right to an attorney during any previous custodial interrogation. In this case, the State argues that police may not be aware of a defendant invoking his right to counsel at arraignment. The argument is moot here because police were present at arraignment, but even if they were not the Sixth Amendment demands that knowledge of the fact by one state actor be imputed to all other state actors. Further, while a defendant may waive his constitutional rights, the holding of *Edwards* that such a waiver may not be found in cases where the police make contact extends to this case. Once a defendant has invoked his Sixth Amendment right to counsel at arraignment, there can be no waiver of the right during any subsequent police-initiated contact. The ruling of the Michigan Supreme Court is affirmed.

**Dissent (Rehnquist, J.)**

The Court’s extension of the *Edwards*rule appears logical on its face but does not make sense in the context of the Sixth Amendment. The purpose *Edwards*and *Miranda* *v. Arizona*, 384 U.S. 436 (1966), is to provide additional protection for suspects’ privilege against self-incrimination against the coercive atmosphere of custodial interrogation. Not only is that type of protection not needed for the Sixth Amendment right to counsel, there has been no assertion that the right is often violated. Further, the language used by the Court limits the ruling to cases where the defendant requests counsel at arraignment or some other proceeding, but the Sixth Amendment right does not require invocation by the defendant like the Fifth Amendment right does. The Court makes no justification for extending the protections of *Edwards* only for those defendants who ask for an attorney, even though the Sixth Amendment does not require such a request.

**Key Terms:**

**Edwards Rule on Interrogation -** [from *Edwards v. Arizona*, 451 U.S 477 (1981)] Rule prohibiting police from initiating an interrogation of a suspect who has requested an attorney before an attorney has been provided.

**Arraignment -** The first stage of criminal trial procedure, also known as initial appearance, in which the defendant is informed of the charges set forth in the criminal complaint and the factual basis for a finding of probable cause and during which the defendant enters an initial plea to the charges.

**Sixth Amendment Right to Counsel** - Right of a person accused of a crime to have the help of an attorney throughout any criminal prosecution.

**Part 6 – Police Initiated Interrogation After Appointment of Counsel**

# \*\*MONTEJO v. LOUISIANA\*\*

#### United States Supreme Court 556 U.S. 778 (2009)

#### Rule of Law

**Police may seek a knowing and voluntary waiver of a defendant's right to have counsel present during interactions with the police, even after the defendant's Sixth Amendment rights have attached and become operative.**

#### Facts

While investigating the murder of Lewis Ferrari, police wanted to question Jesse Montejo (defendant). Police arrested Montejo, and Montejo waived his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966). Montejo was interrogated by police for several hours at the sheriff’s office; he changed his story many times and finally admitted that he had killed Ferrari. Montejo was brought before a judge, and a lawyer was appointed for him even though he had not expressly asked for one. That same day, two detectives visited Montejo and requested that he accompany them to find the murder weapon. He was read his *Miranda* rights again, and he agreed to go with the officers. During the trip, he wrote an inculpatory apology letter to Ferrari's widow. On returning to prison, Montejo met with his court-appointed lawyer. At trial, Montejo's apology letter was admitted into evidence over the defense’s objection. Montejo was convicted of first-degree murder and sentenced to death. The Louisiana Supreme Court affirmed the conviction. The court held that rule articulated in *Michigan v. Jackson*, 475 U.S. 625 (1986), which forbids police to initiate an interrogation of a criminal defendant after the defendant has requested counsel at an arraignment or other similar proceeding, was inapplicable because Montejo never expressly asked for an attorney. The court further held that Montejo’s waiver of his right to have counsel present with him during his interactions with the police was knowing and voluntary. The United States Supreme Court granted certiorari.

#### Issue

May police seek a knowing and voluntary waiver of a defendant's right to have counsel present during interactions with the police, even after the defendant's Sixth Amendment rights have attached and become operative?

#### Holding and Reasoning (Scalia, J.)

Yes. Under the rule articulated in *Michigan v. Jackson*, a defendant's request for counsel at an arraignment is treated as the defendant's invocation of the Sixth Amendment right to have counsel present "at every critical stage of the prosecution." Even if a defendant subsequently purports to waive his rights, the waiver is presumed involuntary and is not enough to justify further police interrogation. The *Jackson* rule imports into the Sixth Amendment context the protections announced in *Edwards v. Arizona*, 451 U.S. 477 (1981), which shield a defendant's Fifth Amendment right to have counsel present during custodial interrogation. *Edwards* and *Jackson* were intended to prevent the police from badgering a witness to give up his rights, but if a suspect never expressly invokes his rights in the first place, there is no fear of abuse. However, the *Jackson* rule, as interpreted by the Louisiana Supreme Court, is unworkable. In over half the states, suspects do not have to invoke their *Jackson* rights because lawyers are automatically appointed by the court. Among other concerns, conditioning a defendant's rights on whether the defendant formally invoked the right to counsel would lead to arbitrarily different treatment of defendants between the states. Besides *Jackson*'s sheer unworkability, the *Jackson*rule provides only a marginal benefit to society (*i.e.*, the suppression of coerced confessions) at a significant cost (*i.e.*, hampering the ability to find, convict, and punish people who break the law). Moreover, the *Jackson* rule is unnecessary, because *Miranda* and other cases provide enough protection in cases in which a defendant does not want to speak to the police. Because its costs far outweigh its benefits, *Jackson* is overruled. In this case, the Louisiana Supreme Court rejected Montejo's claim based on the *Jackson*rule, and this was the appropriate outcome. However, Montejo can still contend that the letter he wrote should be suppressed under *Edwards*. For that reason, the court's judgment is vacated, and the case is remanded for further proceedings.

#### Dissent (Stevens, J.)

The Court misinterprets *Jackson* and the constitutional rights it was intended to protect. *Jackson* and the cases supporting it rely on Sixth Amendment doctrine, which is different analytically from that of the Fifth Amendment. The Court mentions anti-badgering considerations, but that rationale was not even mentioned in *Jackson* and *Edwards*, for custodial anti-badgering belongs more to Fifth Amendment analysis. In short, the Court conflates the two amendments and ignores the specific rights protected by the Sixth Amendment: “to protect the unaided layman at critical confrontations with his adversary” by giving him “the right to rely on counsel as a ‘medium’ between himself and the state.” Furthermore, even in the absence of the *Jackson* decision, it is clear that the conduct of the police in this matter violated Montejo's Sixth Amendment rights. Although Montejo was given *Miranda* warnings before he agreed to accompany the police, those warnings were insufficient to warn Montejo of his Sixth Amendment right to have a lawyer present with him and the consequences of waiving that right.

**Key Terms:**

**Miranda Warnings** - The notices of constitutional rights set forth in the opinion of the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436(1966) that law enforcement authorities must provide to a suspect in a criminal investigation prior to initiation of a custodial interrogation. The suspect must be advised that the suspect has the right to remain silent, anything the suspect says may be used against the suspect, and the suspect has the right to an attorney.

**Michigan v. Jackson**

United States Supreme Court  
475 U.S. 625 (1986)

**Rule of Law**

**Under the Sixth Amendment, police may not initiate questioning outside the presence of counsel of a defendant who requested an attorney at arraignment.**

# Miranda v. Arizona

#### United States Supreme Court 384 U.S. 436 (1966)

#### Rule of Law

**Without certain hallmark warnings regarding the right to remain silent and the right to counsel, statements made during custodial interrogation are inadmissible at trial.**

# Edwards v. Arizona

#### United States Supreme Court 451 U.S. 477 (1981)

#### Rule of Law

**Once a suspect has received his *Miranda* warnings and invoked his right to counsel, the police may not further interrogate the suspect until the suspect has been given access to counsel, unless the suspect initiates further communication with the police.**

# Minnick v. Mississippi

#### United States Supreme Court 498 U.S. 146 (1990)

#### Rule of Law

**Once a suspect has requested an attorney, police may not conduct an interrogation without counsel present.**

# United States v. Leon

#### United States Supreme Court 468 U.S. 897 (1984)

#### Rule of Law

**Evidence obtained in reasonable, good-faith reliance on a facially valid search warrant is not subject to the Fourth Amendment's exclusionary rule, even if the warrant is later deemed defective.**

**Facts**

The police received an anonymous tip that two individuals were selling drugs out of their apartment. Based on the information from the informant, the police started an investigation and eventually submitted an affidavit requesting a warrant to search three residences and automobiles. A facially valid search warrant was issued and pursuant to the warrant the police conducted their search. Leon (defendant) and the other defendants filed motions to suppress the evidence obtained pursuant to the search and the district court granted the motions, holding that the affidavit did not establish probable cause. The United States Supreme Court granted certiorari.

**Issue**

Is evidence obtained in reasonable, good-faith reliance on a facially valid search warrant subject to the Fourth Amendment's exclusionary rule if the warrant is later deemed defective?

**Holding and Reasoning (White, J.)**

No. Evidence obtained in reasonable, good-faith reliance on a facially valid search warrant is not subject to the Fourth Amendment's exclusionary rule, even if the warrant is later deemed defective. The exclusionary rule is not itself a constitutional right but is a judicial remedy intended to deter police from infringing on this constitutionally protected right by prohibiting the introduction of evidence that is obtained in violation of the Fourth Amendment. The rule developed because an individual’s constitutional rights are prioritized over efficient law enforcement. However, when the police reasonably rely on a facially valid search warrant, there is no improper police conduct to deter and therefore no Fourth Amendment interests are advanced by excluding the evidence. Therefore, the social cost of excluding the evidence outweighs any Fourth Amendment violation and the evidence must remain admissible at trial. Furthermore, while magistrates are given much deference in their probable cause determinations, their decisions are reviewable, as is the information the police provide them with. The exclusionary rule is not intended to deter judges from unconstitutional actions, but instead acts as a deterrence to the police. Finally, where an officer knows or should know that the magistrate issuing a warrant has been mislead, or where an affidavit is so lacking in probable cause that no reasonable officer could reasonably rely on it, or where a warrant is so vague that no reasonable officer could assume it to be valid, the evidence obtained must be excluded. In this case, the officers reasonably relied on a facially valid warrant and the evidence obtained pursuant to the warrant is admissible even though the warrant was later held to be invalid.

**Concurrence (Blackmun, J.)**

If the good-faith exception to the exclusionary rule that the Court here adopts leads police to contravene the Fourth Amendment, the Court’s decision will need to be reconsidered.

**Dissent (Brennan, J.)**

The Court’s decision today all but destroys the Fourth Amendment protections against unreasonable searches and seizures. The exclusionary rule is not simply a judicial remedy and deterrent against unlawful police conduct, but the Fourth Amendment itself prohibits the use of illegally obtained evidence at trial. When the Court talks about the “cost” of the exclusionary rule, it is in fact complaining that the Fourth Amendment makes it harder to catch and try criminals. Furthermore, even assuming that the exclusionary rule was intended simply to deter abusive police conduct, evidence obtained in reasonable reliance on a warrant that is later found to be invalid should still be excluded or else the institutional incentive—to carefully provide probable cause in an affidavit and to review the warrant when it is issued—will be lost.

**Dissent (Stevens, J.)**

The Fourth Amendment was created to protect people from the unreasonable issuance of warrants not grounded in probable cause. Therefore, the Court’s holding that the police’s reliance on a facially valid warrant is automatically appropriate, is unconstitutional.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Patterson v. Illinois**

United States Supreme Court  
487 U.S. 285 (1988)

**Rule of Law**

**Provided a defendant is made aware of the dangers and disadvantages of representing himself, by use of the *Miranda* warnings, his waiver of his Sixth Amendment right to counsel during post-indictment questioning is knowing and intelligent.**

**Facts**

Patterson (defendant) was one of three gang members who were indicted for the murder of a rival gang member. Before being transferred to the county jail, Patterson asked one of the police officers who else had been indicted for the murder. Upon hearing that one of his fellow gang members had not been charged, Patterson voiced his surprise, stating that the man omitted had planned everything and that there was a witness who could prove it. At this point, the officer stopped Patterson and handed him a *Miranda* waiver form to inform him of his right to counsel and his right to remain silent. Patterson signed the form and then told the officer about killing the rival gang member, making incriminating statements about himself. Later, Patterson was interviewed by the Assistant State’s Attorney. The attorney went over the *Miranda* form Patterson had signed earlier and Patterson said he understood his rights. Patterson then made more incriminating statements. Before trial, Patterson moved to have his statements suppressed. The trial court denied Patterson’s motion and the jury convicted him. The state supreme court then rejected Patterson’s theory that he knowingly and intelligently waived his Fifth Amendment right to counsel but not his Sixth Amendment right. The United States Supreme Court granted certiorari.

**Issue**

Has a defendant who has been indicted and has been read his *Miranda*warnings, knowingly and intelligently waived his Sixth Amendment right to counsel if he chooses to speak to the police and incriminates himself?

**Holding and Reasoning (White, J.)**

Yes. *Miranda* warnings sufficiently inform a defendant of the dangers and disadvantages of representing himself during post-indictment questioning and therefore a defendant knowingly and intelligently waives his Sixth Amendment right to counsel when he waives his *Miranda* rights and chooses to speak to the police. The *Miranda* warnings told Patterson what his rights were under the Sixth Amendment: he had the right to have an attorney present during questioning. In addition, *Miranda* conveyed to him the consequences of waiving his right to counsel during post-indictment questioning: anything he said could be introduced against him at trial. Finally, the *Miranda* warnings let Patterson know what a lawyer could do for him: advise him from making any incriminating statements. The Sixth Amendment right to counsel is not superior to the Fifth Amendment right to counsel. Therefore, during post-indictment questioning, when one is waived knowingly and intelligently, so is the other. Moreover, in *Edwards v. Arizona*, 451 U.S. 477 (1981), the defendant’s statements were held to be inadmissible because the police interrogated Edwards after he had invoked his right to counsel. However, in this case, Patterson’s initial decision was to talk to the police. Accordingly, the judgment is affirmed.

**Dissent (Blackmun, J.)**

After formal adversary proceedings have begun, the Sixth Amendment prohibits a suspect from further interrogation until counsel has been made available to him, unless the suspect is the one to initiate communication with the police.

**Dissent (Stevens, J.)**

Once formal proceedings have begun, the Sixth Amendment right to counsel cannot be waived without counsel being present. There is a strong presumption against waiver of Sixth Amendment protections, and waiver can only be accepted if the suspect has a full understanding of the dangers and disadvantages of self-representation. *Miranda* warnings do not provide the necessary understanding. For example, *Miranda* warnings do not include the nature of the charges pending, they do not inform a suspect that a lawyer can examine the indictment for legal sufficiency, and they do not tell a suspect that a lawyer is better able to negotiate a plea bargain. In addition, once official proceedings have begun against a defendant, the adversarial relationship between the state and the suspect is solidified. Therefore, after an indictment, it is unethical for a prosecutor to give a suspect legal advice and inform him of his rights. A suspect may misinterpret the offering of legal advice and not fully understand the adversary relationship with the prosecution. Also, the prosecution could unintentionally color its warnings and advice with its law enforcement authority and bias. Therefore, once an indictment has been handed down, the prosecution and its investigators cannot talk to a suspect without the presence of counsel until the suspect’s Sixth Amendment rights have been fully waived in the presence of counsel.

**Key Terms:**

**Miranda Warnings** - The notices of constitutional rights set forth in the opinion of the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436(1966) that law enforcement authorities must provide to a suspect in a criminal investigation prior to initiation of a custodial interrogation. The suspect must be advised that the suspect has the right to remain silent, anything the suspect says may be used against the suspect, and the suspect has the right to an attorney.

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

# New York v. Belton

#### United States Supreme Court 453 U.S. 454 (1981)

#### Rule of Law

**Incident to a lawful arrest, the police may search the area within the arrestee’s immediate control.**

#### Facts

Belton (defendant) was in a car that was pulled over for speeding. When the officer smelled marijuana, he ordered Belton and the three other occupants out of the car and placed them under arrest. The officer then searched the passenger area of the car and, upon finding Belton’s jacket, searched the pocket and found cocaine. At trial, and over Belton’s objections, the cocaine was entered into evidence and Belton was convicted of possession of controlled substances. On appeal, the court disagreed with the trial judge and suppressed the evidence of the cocaine.

#### Issue

Where an officer has instructed the occupant of a car to step out of the automobile and has placed the occupant under arrest, is the passenger compartment of the car part of the area in the arrestee’s immediate control and therefore subject to search?

#### Holding and Reasoning (Stewart, J.)

Yes. The passenger area of the car is under the immediate control of a recent occupant now under arrest, and is subject to lawful search by the arresting officer. Furthermore, if the passenger area can be reached by the arrestee then so can those containers in the area and therefore, containers in the passenger area are subject to search as well. The Court comes to this bright-line rule because it recognizes the inconsistency of recent lower court decisions regarding this issue, and it emphasizes the importance of the police knowing the extent of their authority and of people knowing the extent of their rights. The officer’s search of Belton’s jacket was lawful and the cocaine evidence was properly admitted at trial. Accordingly, the judgment is reversed.

#### Dissent (White, J.)

The Court holds that luggage, briefcases and other containers in a car may be searched without probable cause or any sort of suspicion. Such a holding is dangerous and far too sweeping.

#### Dissent (Brennan, J.)

The Court here claims to follow *Chimel v. California*, 395 U.S. 752 (1969), where it held that officers may search the area in the immediate control of the person being arrested. However, the Court’s desire to create a bright-line rule is not at all consistent with the Fourth Amendment or with *Chimel*. The Court’s holding that the passenger area of a car will always be within the immediate control of the arrestee, ignores the case-by-case determination of what is in an arrestee’s area of control that was central to the *Chimel* holding. As a result, the Court’s holding is not consistent with the Fourth Amendment or the Court’s own jurisprudence.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Arizona v. Gant**

United States Supreme Court  
129 S.Ct. 1710 (2009)

#### Rule of Law

**Police may search a vehicle after a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe that crime-related evidence is located in the vehicle.**

#### Facts

Gant (defendant) was arrested for driving with a suspended license shortly after getting out of his car. He was handcuffed and then put in the back of a police car. With Gant secured in the police car, officers proceeded to search the passenger compartment of his vehicle and found a gun and cocaine. Gant was charged with possession of a narcotic drug and drug paraphernalia. At a preliminary hearing, Gant moved to suppress the drug evidence because he felt that the decision in *New York v. Belton*, 453 U.S. 454 (1981), did not allow police to search his vehicle after he was secured in the police car, since he posed no threat to the officers and he was arrested for an offense for which no evidence could be found in his car. At trial, his motion to suppress was denied and he was convicted. The Supreme Court of Arizona, however, upheld the motion, claiming the search violated the Fourth Amendment. The United States Supreme Court granted certiorari.

#### Issue

May police undertake a search of an individual’s vehicle when the arrestee is not within reaching distance of the passenger compartment at the time of the search?

#### Holding and Reasoning (Stevens, J.)

No. Police may search a vehicle after a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe that crime-related evidence is located in the vehicle. In *Chimel v. California*, 395 U.S. 752 (1969), we stated the basic rule that applies in these cases: the search incident to an arrest includes the areas of the arrestee’s person and the area within his immediate control. In *New York v. Belton*, 453 U.S. 454 (1981), we considered the case of an arrestee in his automobile and held that after a lawful arrest the police can search the arrestee’s person and conduct a contemporaneous search of the passenger compartment of the car, including containers in it. Despite others’ interpretation of *Belton*, our decision in *Belton* does not authorize a vehicle search after a recent arrest, for to do so would undermine the logic of *Chimel*. Considering *Chimel* and *Belton* together, we hold that police can search a vehicle after the occupant’s recent arrest only when arrestee is unrestrained and within reach of the passenger compartment, and objects within it. Following *Thornton v. United States*, 541 U.S. 615 (2004), we also affirm that police, having stopped a vehicle, can search for evidence only when it is “reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.” In this case, Gant was arrested for driving with a suspended license, and he was securely handcuffed and placed in a squad car before officers undertook a search of his car. Thus the arrestee was securely restrained, deprived of the ability to reach for a weapon, and police could not reasonably believe that it was possible to find evidence related to the crime of arrest in his car. Both reasons make the subsequent search of Gant’s car unreasonable. Reading *Belton* broadly, the state wants a bright-line rule that would allow automobile searches regardless of whether the arrestee is restrained or not. We feel, however, that the state in so doing seriously undermines the privacy interests that the Fourth Amendment is designed to protect. Although our jurisprudence recognizes a lesser privacy interest in one’s vehicle, as opposed to one’s residence, we do not think it is reasonable to give the police unbridled discretion to search a car in all circumstances. Despite the fact that the state’s reading of *Belton*, allowing expansive vehicle searches for offenses as minor as a traffic infraction, has been relied on by police for 28 years, we do not believe that such a reliance interest, even if it exists, trumps the constitutional rights that all individuals possess. Nor does *stare decisis*require us to read *Belton* as broadly as the state would suggest.

#### Concurrence (Scalia, J.)

History obviously cannot tell us what the Framers thought of reasonableness in the vehicle-stop context, so we must apply traditional notions of reasonableness. *Belton* and *Thornton* do not adequately protect police officers, since searching a vehicle is not the best way to prevent an occupant from injuring an officer. Despite today’s holding, *Chimel* provides little guidance and can be manipulated by officers. It would be better to overrule *Belton* and *Thornton* and adopt the rule that it is reasonable to search a vehicle only when the object of the search is evidence of the crime for which the arrest was made, or another crime for which there is probable cause.

#### Dissent (Breyer, J.)

I agree with Justice Alito that we should read *Belton* as recommending a bright-line rule that would allow a warrantless search of the passenger compartment of a vehicle regardless of the threat that the individual poses. But I also agree with Justice Stevens that such a rule potentially runs afoul of the Fourth Amendment. *Stare decisis* requires that we follow the traditional interpretation of *Belton*, which has been relied on by other courts.

#### Dissent (Alito, J.)

Although the majority might deny it, the Court today is overruling its decision in *Belton*, which has proved a workable and clear-cut solution to vehicle searches at the same time that it has protected law enforcement officers. *Belton* provides a test that is easier to apply than that provided by today’s decision. The police can search the passenger compartment of a vehicle after a lawful custodial arrest, whether or not the arrestee is within reaching distance of the compartment. *Belton* represents a small extension of *Chimel*, and if we overrule the former, as it seems we are doing today, we should also reexamine the latter. The problem is that *Chimel* does not say whether the rule applies at the time of the arrest or the time of the search. The Court today reads *Chimel* as applying at the time of the search, but it makes more sense to think that the *Chimel* ruling was intended to use the time of arrest. The majority prefers its confused reading of *Chimel* and an unworkable two-part test. Also, in the second part of the test the Court inexplicably uses “reason to believe” instead of probable cause as the standard for this type of evidence-gathering search.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Stare Decisis -** A legal principle under which legal precedents are adhered to and predictability is garnered.

# Rothgery v. Gillespie County, Texas

#### United States Supreme Court 554 U.S. 191 (2008)

#### Rule of Law

**The right to counsel attaches at a criminal defendant’s initial appearance before a judicial officer where he is told the charges against him and his liberty is subject to restriction.**

#### Facts

Rothgery (plaintiff) was arrested as a felon in possession of a weapon when police relied on an erroneous record showing Rothgery had previously been convicted of a felony. Rothgery was brought before a magistrate judge. The judge determined that there was probable cause for Rothgery’s arrest, told Rothgery the charges, set his bail, and sentenced him to jail. Rothgery was released on bond and made several requests for a lawyer but was not appointed one. He was later indicted and rearrested. Six months after his initial appearance before the magistrate judge, a lawyer was appointed for Rothgery. Rothgery’s lawyer gave the paperwork showing Rothgery was never convicted of a felony to the district attorney. The indictment against Rothgery was dismissed. Rothgery then brought a federal civil rights suit against Gillespie County, Texas (defendant), alleging that the county’s policy of denying appointed counsel to indigent defendants prior to indictment violated his right to counsel. The district court held that the right to counsel had not attached at the initial hearing because no prosecutor was assigned to Rothgery’s case and granted summary judgment for the county. The appellate court affirmed and the Supreme Court granted certiorari.

#### Issue

Does a criminal defendant have the right to counsel when he first appears before a judicial officer, learns of the charges, and has his freedom restricted even if no prosecutor has yet been assigned to his case?

#### Holding and Reasoning (Souter, J.)

Yes. The Sixth Amendment provides that a criminal defendant has the right to counsel when adversarial proceedings are brought against him. Counsel mistakenly argues that the right to counsel does not attach until a critical stage of the proceedings against the defendant occurs. The right to counsel attaches when the defendant is brought before a judicial officer, told the charges against him, and has his liberty restricted. Once the right to counsel has attached, counsel must be present at each critical stage of the proceedings against the defendant. The occurrence of a critical stage is irrelevant to when, exactly, the right to counsel attaches. Thus, the county’s argument is incorrect. When Rothgery initially appeared before the magistrate judge, was informed of the charges, and was subject to imprisonment, he had the right to counsel. The county violated his Sixth Amendment right by denying him counsel at that point in time. The judgment of the appellate court is vacated and the case is remanded for further proceedings.

#### Concurrence (Alito, J.)

The “attachment” of the defendant’s Sixth Amendment right does not mean that he is entitled to appointed counsel at that moment. Attachment signifies the moment that the defendant’s prosecution begins. The Court’s decision does not state that once attachment occurs, the defendant must be appointed counsel within a certain time period.

**Key Terms:**

**Adversarial Proceeding -** Any action whereby a party is put on notice of charges against him and that relief and/or the imposition of a sentence will be pursued.

# New York v. Belton

#### United States Supreme Court 453 U.S. 454 (1981)

#### Rule of Law

**Incident to a lawful arrest, the police may search the area within the arrestee’s immediate control.**

**Miranda v. Arizona**

United States Supreme Court  
384 U.S. 436 (1966)

#### Rule of Law

**Without certain hallmark warnings regarding the right to remain silent and the right to counsel, statements made during custodial interrogation are inadmissible at trial.**

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**February 18, 2021**

**Chapter 6 – Section 4 – Applying and Explaining *Miranda***

**Part 7 – Public Safety Exception**

**Part 8 – Physical Evidence Obtained in Violation of *Miranda***

**Part 9 – Failure of Police to Inform Suspect that Lawyer is Present after Valid *Miranda* Waiver**

**Chapter 6, Section 5 – The Court Reaffirms *Miranda***

**Chapter 6, Section 6 – When is *Miranda* Violated?**

**Chapter 6, Section 7 – *Massiah* Revisited**

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**Chapter 6 – Section 4 – Applying and Explaining *Miranda***

**Part 7 – Public Safety Exception**

**\*\*NEW YORK V. QUARLES\*\***

United States Supreme Court  
467 U.S. 649 (1984)

#### Rule of Law

**There is a public-safety exception to the requirement that *Miranda* warnings be given before a suspect’s statements may be admitted into evidence at trial.**

#### Facts

A woman approached two police officers and told them she had just been raped. She provided the officers with a detailed description of her attacker, said that he had just entered a supermarket nearby, and said that he was carrying a gun. The police arrived at the supermarket and saw Quarles (defendant) inside. Quarles fit the description of the assailant, and when he saw the police, he ran to the back of the store. The police chased him and kept him in sight for all but a few seconds until he was caught. One officer frisked him and found an empty gun holster. After handcuffing him, the officer asked Quarles where the gun was, and Quarles gestured with his head saying, “the gun is over there.” The officer found the gun and read Quarles his *Miranda* warnings. The officers then asked Quarles about his ownership of the gun and where he got it. Quarles answered these questions. The trial court held that the statement “the gun is over there,” must be excluded because it was elicited before the police read Quarles his *Miranda* warnings. Furthermore, the court held that his answers to the subsequent questions had to be excluded as evidence tainted by the *Miranda* violation. The court also excluded the gun. The New York Appellate Division and Court of Appeals affirmed, and the United States Supreme Court granted certiorari.

#### Issue

Is there a public-safety exception to the requirement that *Miranda*warnings be given before a suspect’s statements may be admitted into evidence at trial?

#### Holding and Reasoning (Rehnquist, J.)

Yes. If public safety demands it, a suspect in police custody may be questioned without first being read his *Miranda* warnings. *Miranda v. Arizona*, 384 U.S. 436 (1966), held that if an individual is subject to custodial police interrogation, the Fifth Amendment demands that he be specifically informed that he has the right to remain silent, that anything he says may be used against him at trial, that he has the right to an attorney, and that if he cannot afford an attorney, one will be provided for him. The Fifth Amendment does not prohibit the admission of all incriminating statements. It merely prohibits the admission of coerced statements. The holding in *Miranda* assumed that custodial interrogations are inherently coercive and established a necessary safeguard. However, although *Miranda* prioritized a suspect’s Fifth Amendment privilege against self-incrimination over the potential for greater numbers of convictions, if public safety is a concern, the social cost outweighs a suspect’s constitutional safeguards. Furthermore, the *Miranda* decision was based in large part on the coercive nature of the station house and police tactics that occur there. Therefore, a public-safety exception is not inconsistent with *Miranda*, and police may question a suspect in custody without first reading him his *Miranda* warnings if public safety so requires. Furthermore, an officer’s motive for questioning the suspect is not relevant if the questions could reasonably be motivated by the desire to ensure public safety because, again, the coercive environment *Miranda*was concerned with is absent. In this case, the state courts improperly excluded Quarles's statements. Although Quarles was in police custody when he indicated the gun's location, the environment that was so central to the *Miranda* holding was absent. The officers were motivated by concern for public safety when they asked him where the gun was. They knew the gun must be somewhere in the store, they did not know if Quarles had an accomplice who could access the gun, and a customer or employee of the store could come across the gun and accidentally harm themselves or others. Accordingly, the judgment is reversed and remanded.

#### Concurrence/Dissent (O’Connor, J.)

The public-safety exception that the Court adopts here will blur the clear lines established by the *Miranda* rule. As a result, Fifth Amendment jurisprudence will soon become as confusing and arbitrary as the rules governing the Fourth Amendment. Any custodial interrogation can be coercive, and *Miranda* should apply here, making Quarles’s initial statement inadmissible. However, the *Miranda* violation does not require suppression of the gun itself. Only testimonial evidence is protected by the Fifth Amendment privilege against self-incrimination. Nontestimonial evidence, such as real or physical evidence, may still be admissible. Here, the gun falls under the category of real or physical evidence. Although the police essentially compelled Quarles to incriminate himself by asking the location of the gun, as his answer would reveal both that the gun was his and that he knew its location, this Court's precedent allows for a bifurcated approach that excludes the testimonial evidence, while allowing the admission of the nontestimonial evidence. Some of this Court's decisions suggest that the Fifth Amendment requires suppression of both the compelled statement and all evidence derived from that statement. However, these cases concerned people asserting the Fifth Amendment privilege in connection with a proceeding before a court or other tribunal with contempt power. The threat to the accused in these types of cases is different from the situation present here, where a suspect is subject only to informal police interrogation. Moreover, procedural rules adopted in other countries, including the same countries this Court looked to in *Miranda*, allow for the admission of nontestimonial evidence derived from confessions that are not "blatantly coerced." This Court should apply these same principles.

#### Dissent (Marshall, J.)

The lower court’s judgment should stand. First, the Court’s opinion is based upon the false belief that the public was in danger after Quarles was handcuffed but before the gun was found. However, the New York Court of Appeals found that there was in fact no danger. Second, the Court interprets *Miranda* to have been simply a case about balancing state and individual interests. However, *Miranda* was about coerced confessions. The Court fails to address the issue of whether police questioning about issues concerning public safety is inherently less coercive than other types of questioning.

**Key Terms:**

**Miranda Warnings** - The notices of constitutional rights set forth in the opinion of the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436(1966) that law enforcement authorities must provide to a suspect in a criminal investigation prior to initiation of a custodial interrogation. The suspect must be advised that the suspect has the right to remain silent, anything the suspect says may be used against the suspect, and the suspect has the right to an attorney.

**Fifth Amendment** - An amendment added to the U.S. Constitution as part of the Bill of Rights that provides important protections from government actions, including a guarantee that no person will be required to answer for a capital crime unless first indicted by a grand jury; no one will suffer double jeopardy; no one must testify against himself or herself; no one will be deprived of life, liberty, or property without due process of law; and no property will be taken for public use without just compensation.

**Miranda v. Arizona**

United States Supreme Court  
384 U.S. 436 (1966)

#### Rule of Law

**Without certain hallmark warnings regarding the right to remain silent and the right to counsel, statements made during custodial interrogation are inadmissible at trial.**

**Arizona v. Gant**

United States Supreme Court  
129 S.Ct. 1710 (2009)

#### Rule of Law

**Police may search a vehicle after a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe that crime-related evidence is located in the vehicle.**

**United States v. Washington**

United States Court of Appeals for the Fourth Circuit  
41 F.3d 917 (1994)

**Rule of Law**

**The concept of intent to distribute illegal drugs includes sharing drugs with a third party.**

**Facts**

The federal government (plaintiff) prosecuted Raymond L. Washington (defendant) for the use of a gun in the commission of a drug-trafficking crime, in violation of 18 U.S.C. § 924, and for possession with intent to distribute more than five ounces of cocaine, in violation of 21 U.S.C. § 841(a)(1). The trial evidence established that, after making a routine traffic stop of Washington's car, police officers found a pistol in the car's trunk and 12.1 grams of cocaine, a pager, and $20 on Washington's person. The officers found no drug paraphernalia or other evidence that Washington planned to sell the cocaine. However, Washington admitted that friends gave him money with which he bought cocaine that he intended to share with the friends. The jury acquitted Washington of the gun crime but found him guilty of possession with intent to distribute. On appeal to the Fourth Circuit Court of Appeals, Washington argued that the government should have charged him only with simple possession, in violation of 21 U.S.C. § 844(a).

**Issue**

Does the concept of intent to distribute illegal drugs include sharing drugs with a third party?

**Holding and Reasoning (Russell, J.)**

Yes. The concept of intent to distribute illegal drugs includes sharing drugs with a third party. Prior to 1970, federal law proscribed only facilitating the sale of illegal drugs, but with the 1970 enactment of § 841, it became a crime to distribute illegal drugs in any way. In 21 U.S.C. § 802, the 1970 law defined distribution as the delivery of an illegal drug by actual, constructive, or attempted transfer, whether or not there exists an agency relationship between the distributor and distributee. Distribution includes transfer or delivery either directly or by means of another person. The transfer may be the result of a joint venture, in which the distributee engages the distributor to obtain the drugs for their mutual use. The trial evidence established that Washington and his friends engaged in such a joint venture. There was no evidence that Washington intended to sell the cocaine. However, Washington's testimony that he intended to share the cocaine with his friends was, in itself, sufficient evidence for the jury to find him guilty of intent to distribute. The government did not need to demonstrate intent based on any other circumstances of the case, such as the quantity of cocaine found on Washington's person. Washington's conviction is affirmed.

**Key Terms:**

**Agency** - A contractually or legally created fiduciary relationship, where an agent has the authority to act on behalf of a principal.

**Constructive -** A legal fiction; something that is not actually true, but considered true in the eyes of the law.

**Possession with Intent to Distribute -** The crime of possessing illegal substances with the intention of giving or selling those substances to others.

**Michigan v. Tucker**

94 S.Ct. 2357

Supreme Court of the United States

**State of MICHIGAN, Petitioner,**

**v.**

**Thomas W. TUCKER.**

No. 73—482.

Argued March 20, 1974.Decided June 10, 1974.

**Synopsis**

A state court prisoner's petition for writ of habeas corpus was granted by the United States District Court for the Eastern District of Michigan, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I806d7ac1550b11d9a99c85a9e6023ffa&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[352 F.Supp. 266,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972107225&pubNum=345&originatingDoc=Id8dc64c89c1c11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) and the Court of Appeals for the Sixth Circuit affirmed, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I5db41b81902311d9bc61beebb95be672&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[480 F.2d 927.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1973201166&pubNum=350&originatingDoc=Id8dc64c89c1c11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) On certiorari, the Supreme Court, Mr. Justice Rehnquist, held that where police before interrogating a suspect warned the suspect fully except that they failed to advise that he had a right to free counsel if he could not afford to hire counsel, and where at the time of interrogation it had not yet been held that police were obliged to advise a suspect as to his right to free counsel, and where the statements made by the suspect were not admitted at his trial, the trial transpiring after the Supreme Court had upheld the suspect's right to such advice, recourse to the suspect's statements only by use, at his trial, of a witness discovered as a result of the statements was not violative of the Fifth, Sixth or Fourteenth Amendment.

Reversed.

Mr. Justice Stewart filed a concurring opinion.

Mr. Justice Brennan filed a concurring opinion in which Mr. Justice Marshall joined.

Mr. Justice White filed a concurring opinion.

Mr. Justice Douglas dissented and filed opinion.

# Nix v. Williams

#### United States Supreme Court 467 U.S. 431 (1984)

#### Rule of Law

**Evidence obtained in violation of the Sixth Amendment may be admitted if police would have inevitably discovered it.**

#### Facts

In 1968, a 10-year-old girl was abducted from an Iowa YMCA by Robert Williams (defendant). Two hundred people divided into search teams to search the area where police believed the girl could be; the searchers were instructed to search all roads, ditches, and abandoned buildings where the girl's body could possibly be hidden. Williams hired an attorney and surrendered to police. After his arraignment, Williams was transported to Des Moines. Police told Williams’s attorney that he would not be questioned. During transport, one of the officers urged Williams to lead them to the body. Specifically, the officer told Williams to think about how the girl's parents deserved the right to give their daughter a "Christian burial." Williams then agreed to lead officers to the body, and they found the girl's body in a ditch within the search area, just over two miles from the nearest search team. Williams was charged with first-degree murder. At his first trial, Williams moved to suppress the evidence of the body as fruit of an unlawful interrogation. The trial court denied the motion, and a jury convicted Williams. The Iowa Supreme Court affirmed. Williams petitioned the United States District Court for the Southern District of Iowa for a writ of habeas corpus. The court held that the evidence should have been suppressed, and the United States Court of Appeals for the Eighth Circuit affirmed. The United States Supreme Court granted certiorari and affirmed. During Williams’s second trial, the prosecution did not offer evidence of the interrogation but did present evidence of the condition of the body. The trial court admitted the evidence, finding that the prosecution had shown by a preponderance of the evidence that the body would have been discovered without Williams’s help. Williams was convicted by a jury and sentenced to life in prison. The Iowa Supreme Court affirmed. Williams again sought a writ of habeas corpus in federal district court. The district court denied Williams's petition, but the Eighth Circuit reversed. The United States Supreme Court granted certiorari.

#### Issue

May evidence obtained in violation of the Sixth Amendment be admitted if police would have inevitably discovered it?

#### Holding and Reasoning (Burger, C.J.)

Yes. Evidence may properly be admitted at trial, even if discovered in violation of the Sixth Amendment, if police would have inevitably discovered it. Under *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), the exclusionary rule prohibits admission of illegally discovered evidence and any evidenced derived from it. This harsh rule discourages police from engaging in misconduct by ensuring that the prosecution does not benefit from constitutional violations. Society must bear the burden that probative evidence will not be heard and guilty people will go free in order to safeguard the Constitution. The goal of the exclusionary rule is to leave the prosecution in the position it would have been had the constitutional violation not occurred. Thus, the independent-source exception allows illegally obtained evidence to be admitted if the evidence has been found legally unconnected to any misconduct. In this case, Williams argues that the evidence of the body should be suppressed because it is the fruit of an illegal interrogation, *i.e.*, the officer's request that Williams think about allowing the girl's parents the opportunity to give their daughter a Christian burial. Although the independent-source doctrine is inapplicable here, its underlying principles warrant the adoption of the inevitable-discovery doctrine. The prosecution must show discovery would have inevitably occurred by a preponderance of the evidence. Requiring the prosecution to prove an absence of bad faith as part of the exception would do little to deter police misconduct and would be overly punitive. Three courts have already determined that the body in this case would have inevitably been discovered by the searchers, and these courts' conclusions are supported by the evidence of the search teams' location and the thoroughness of their search. Accordingly, the evidence was properly admitted. The appellate court's judgment is reversed.

#### Concurrence (Stevens, J.)

The constitutional violations by police in this case were particularly egregious. Thus, the proper question is whether Williams received a fair trial through the adversarial process, as guaranteed by the Sixth Amendment. If the body would have been inevitably discovered, then the Sixth Amendment is satisfied. The majority is properly concerned with ensuring that the deterrent effect of the exclusionary rule is not eroded. Therefore, the risk of a mistake in the decision to admit illegally obtained evidence must be borne by the prosecution. In this case, the prosecution met its burden and proved that the search would inevitably have recovered the body. Consequently, the rule in this case does not place law enforcement in a better position than it would have been without the constitutional violation.

#### Dissent (Brennan, J.)

The inevitable-discovery exception is constitutional. Unlike the independent-source exception, this exception involves evidence that has not been legally obtained by means unrelated to the constitutional violation. Accordingly, the prosecution should have to prove inevitable discovery by clear and convincing evidence.

**Key Terms:**

**Exclusionary Rule** - A rule that excludes or suppresses evidence in a criminal proceeding where that evidence was obtained in violation of an individual’s constitutional rights.

**Independent Source Doctrine** - Evidence can be admitted at trial when it was initially obtained illegally but later obtained lawfully and independently. Evidence that is discovered legally, pursuant to a valid warrant, can be admitted at trial even when the police initially entered the premises unlawfully.

**Inevitable Discovery Doctrine** - Exception to the exclusionary rule allowing illegally obtained evidence to be admitted at trial if the evidence would certainly have been found without any constitutional or statutory violation.

# United States v. Patane

#### United States Supreme Court 542 U.S. 630 (2004)

#### Rule of Law

**Because the introduction of physical evidence at trial does not implicate the Self-Incrimination Clause, suppression of physical evidence found as a result of a suspect’s voluntary but unwarned statements is not required.**

# Missouri v. Seibert

#### United States Supreme Court 542 U.S. 600 (2004)

#### Rule of Law

**A second confession after a *Miranda* waiver is admissible only if there was a long enough break following the initial confession without a *Miranda*waiver to give a reasonable suspect the belief that he or she had a right not to speak to officers.**

#### Facts

Patrice Seibert (defendant) had a 12-year-old son with cerebral palsy, Jonathan, who died of natural causes in the family’s trailer home. Because Jonathan had bed sores, Seibert feared that she would be charged with child abuse if the sores were discovered during an autopsy. She devised a scheme to burn down the trailer with Jonathan’s body inside to destroy his corpse. She also left Donald Rector, a mentally ill teenager living with the family, inside the trailer to avoid the appearance that Jonathan had been left unattended. Seibert directed her other son, Darian, to set the fire. Donald perished in the fire. Police officers arrested Seibert and took her to the police station for interrogation about the deaths of Jonathan and Donald. After deliberately not reading *Miranda* warnings to Seibert, the officers obtained a confession in which Seibert admitted leaving Donald inside the trailer before the fire was set. Around 20 minutes after obtaining Seibert’s first confession, the officers advised Seibert of her *Miranda* rights, which she waived. After reminding Seibert that she previously had confessed, the officers obtained a second confession. The State of Missouri (plaintiff) charged Seibert with Donald’s murder. Seibert filed a pretrial motion to suppress both confessions as *Miranda* violations*.*The trial court suppressed the first confession but not the second. A jury convicted Seibert of second-degree murder. She appealed to the Missouri Court of Appeals, which affirmed her conviction. She then appealed to the Missouri Supreme Court, which held that her second confession violated *Miranda* and should be suppressed. The State successfully petitioned the United States Supreme Court.

#### Issue

Is a second confession after a *Miranda* waiver admissible if there was a long enough break following the initial confession without a *Miranda* waiver to give a reasonable suspect the belief that he or she had a right not to speak to officers?

#### Holding and Reasoning (Souter, J.)

Yes. At issue is the practice of two-stage, "question-first" interrogation, in which officers ask a suspect questions, typically wait for the suspect to confess, and then advise the suspect of his or her *Miranda*rights and ask for a waiver, so that any post-waiver statements will be admissible against the suspect. This practice has become increasingly popular and threatens *Miranda*'s goal of decreasing the risk that coerced confessions will be used against suspects. The relevant inquiry is whether *Miranda* warnings delivered midstream in a two-stage interrogation are effective, which requires analysis of (1) the thoroughness and detail of the questions and answers in the first round of interrogation, (2) how much the content of the suspect's two statements overlap, (3) the timing and setting of each round of interrogation, (4) whether the officers were the same in both rounds, and (5) to what extent the second interrogator treated the second round as a continuation of the first. A second confession after a *Miranda*waiver is admissible only if there was a long enough break following the initial confession without a *Miranda* waiver to give a reasonable suspect the belief that he or she had a right not to speak to officers. This is an objective test; the four-judge plurality agrees that both the subjective intent of the officers and the suspect’s subjective understanding of his or her rights are irrelevant. Here, the first round of interrogation occurred at the station house, and the questioning prior to the *Miranda* warnings was extremely thorough. After the warnings were given, the second round of interrogation began in the same location, with the same officer, after only about 20 minutes. The interrogating officer gave Seibert the impression that the second round was merely a continuation of the first and did not explain to Seibert that the advice that anything she said could be used against her also applied to the substance of her pre-warning confession. Applying an objective standard, Seibert’s first and second confessions were given during a single, continuous interrogation, and thus her second confession was inadmissible despite her *Miranda* waiver. Accordingly, the judgment of the Missouri Supreme Court is affirmed.

#### Concurrence (Kennedy, J.)

The standard should be a subjective one that asks whether officers acted in bad faith in deliberately withholding *Miranda* warnings before the first confession with the intent of facilitating a second confession after a *Miranda* waiver. Because the officers acted with bad faith in obtaining Seibert’s second confession, it was inadmissible. [**Editor's Note**: Because the Court's holding was a plurality opinion, and this concurrence supplied the critical fifth vote for affirmance, a majority of lower courts have since held that the subjective standard controls rather than the plurality’s objective standard.]

#### Concurrence (Breyer, J.)

The Court’s holding effectively means that except where the failure to give a suspect his or her *Miranda* warnings is in good faith, courts should exclude all fruits of the initial unwarned questions.

#### Dissent (O'Connor, J.)

A second confession following a *Miranda* waiver isn’t suppressible even if the officers deliberately refused to read *Miranda* warnings in obtaining a first confession. The second confession would only be inadmissible if it were involuntary.

**Key Terms:**

**Miranda Warnings** - The notices of constitutional rights set forth in the opinion of the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436(1966) that law enforcement authorities must provide to a suspect in a criminal investigation prior to initiation of a custodial interrogation. The suspect must be advised that the suspect has the right to remain silent, anything the suspect says may be used against the suspect, and the suspect has the right to an attorney.

**Part 8 – Physical Evidence Obtained in Violation of *Miranda***

# \*\*UNITED STATES v. PATANE\*\*

#### United States Supreme Court 542 U.S. 630 (2004)

#### Rule of Law

**Because the introduction of physical evidence at trial does not implicate the Self-Incrimination Clause, suppression of physical evidence found as a result of a suspect’s voluntary but unwarned statements is not required.**

#### Facts

Samuel Francis Patane (defendant) was arrested and placed under a temporary restraining order for harassing his ex-girlfriend. Colorado Springs Police were investigating allegations that Patane violated the order by calling his ex-girlfriend, and the Bureau of Alcohol, Tobacco and Firearms (ATF) was investigating reports that Patane illegally possessed a gun. Patane was arrested, and an officer began to give the *Miranda*warnings. Patane claimed he knew his rights and cut the officer off. The officer then asked about the gun, and Patane reluctantly allowed the officer to seize it. Patane was indicted by a grand jury for illegally possessing the gun. Patane moved to suppress the gun on the basis that the gun was the fruit of Patane’s unwarned statements. The district court suppressed the gun, but did so on the grounds that there was no probable cause to arrest Patane. The appellate court reversed the finding that there was no probable cause, but upheld the suppression on the basis of Patane’s original argument. The United States Supreme Court granted certiorari.

#### Issue

Must physical evidence found as a result of a suspect’s voluntary statements be suppressed because *Miranda*warnings were not given?

#### Holding and Reasoning (Thomas, J.)

No. Physical evidence found on the bases of a suspect’s voluntary but unwarned statements is admissible at trial. *Miranda*warnings are required to protect a suspect’s rights under the Self-Incrimination Clause, but admission of physical evidence found on the basis of a suspect’s voluntary but unwarned statement does not violate the clause. The Self-Incrimination Clause guarantees that criminal defendants will not be forced to testify against themselves at trial. Nevertheless, courts have extended the protections of the Clause to allow suspects to refuse to answer questions that may later be used against them in criminal court. Because official custodial interrogations present such a grave risk to the privilege against self-incrimination, *Miranda*creates a presumption that statements made by a suspect who has not been advised of his rights are coerced for purposes of admissibility. This does not mean that police violate a suspect’s constitutional rights simply by not giving the *Miranda*warnings. Rather, the suspect’s rights are only violated if those unwarned statements are admitted at trial. Suppression of unwarned statements therefore cures *Miranda*violations. Thus, the fruit-of-the-poisonous tree doctrine is inapplicable unless physical evidence is found as a result of involuntary, coerced statements. *Miranda*’s general presumption that unwarned statements are coerced serves only to protect a suspect’s privilege against self-incrimination with respect to testimonial evidence, and therefore does not extend to physical evidence found as a result of voluntary, unwarned statements. The ruling of the lower court is reversed.

#### Concurrence (Kennedy, J.)

In cases subsequent to *Miranda*, evidence found after unwarned questioning has been admitted into evidence. This is because the purposes of *Miranda* must be balanced with the goals of law enforcement. Admission of probative physical evidence serves law enforcement goals and presents no danger that a suspect’s coerced statements will somehow be used against him at trial. It is unnecessary to decide whether the failure to warn Patane violated *Miranda*.

#### Dissent (Souter, J.)

The Court’s holding creates an incentive for police to ignore the *Miranda* rule. *Miranda* sets forth a simple rule that eliminates the need for difficult inquiries into the voluntariness of a suspect’s statements. Failure to provide *Miranda* warnings creates a presumption of coercion, and any evidence found as a result of unwarned statements should be excluded under the Fifth Amendment.

#### Dissent (Breyer, J.)

The fruit-of-the-poisonous tree doctrine should be applied to exclude any evidence found based on unwarned statements, unless the police acted in good faith.

**Key Terms:**

**Miranda Warnings** - The notices of constitutional rights set forth in the opinion of the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436(1966) that law enforcement authorities must provide to a suspect in a criminal investigation prior to initiation of a custodial interrogation. The suspect must be advised that the suspect has the right to remain silent, anything the suspect says may be used against the suspect, and the suspect has the right to an attorney.

**Fruit of the Poisonous Tree Doctrine** - Rule barring admission of any evidence found on the basis of illegally obtained evidence.

**Miranda v. Arizona**

United States Supreme Court  
384 U.S. 436 (1966)

#### Rule of Law

**Without certain hallmark warnings regarding the right to remain silent and the right to counsel, statements made during custodial interrogation are inadmissible at trial.**

# Oregon v. Elstad

#### United States Supreme Court 470 U.S. 298 (1985)

#### Rule of Law

**A suspect can make a statement that is admissible in court after being read his *Miranda* warnings, even when he previously made an unwarned statement, because the initial failure to read a suspect his *Miranda* warnings does not taint later voluntary statements.**

#### Facts

A home was burglarized and a witness implicated Elstad (defendant) in the crime. After obtaining an arrest warrant, two officers went to Elstad’s home where his mother let them inside. While one officer went into the kitchen to explain what was happening to Elstad’s mother, the other officer remained in the living room with Elstad. Without reading Elstad his *Miranda* warnings, the officer in the living room began talking with Elstad. When the officer said that he believed Elstad was involved in the robbery, Elstad replied, “Yes, I was there.” Once the officers and Elstad arrived at the police station, Elstad was read his *Miranda* warnings which he then waived. Elstad then made a full statement implicating himself in the burglary. The statement was put into writing, signed by Elstad and admitted at trial where Elstad was convicted of burglary. The court of appeals reversed, holding that the signed confession was inadmissible because it was “tainted” by the initial questioning that occurred without Elstad’s *Miranda* warnings having been read.

#### Issue

If the police initially fail to administer a suspect his *Miranda* warnings, are subsequent statements that are made after the police administer the *Miranda* warnings, inadmissible because they are “tainted” by the initial failure?

#### Holding and Reasoning (O’Connor, J.)

No. A violation of *Miranda* has no fruit except for the statement itself so a subsequent statement, made after the *Miranda* warnings have been read, is not tainted and is admissible at trial. *Miranda* violations differ from Fourth Amendment violations where the exclusionary rule applies because a *Miranda* warning is a procedural safeguard; it is not in itself a constitutional right. In addition, the goals of the exclusionary rule and the Fifth Amendment are not necessarily invoked by an initial violation of *Miranda*. The exclusionary rule seeks to deter illegal police conduct, and one of the purposes of the Fifth Amendment is to ensure trustworthy evidence. Neither concern is present in a case where a suspect is free to speak or remain silent after he has been read his *Miranda* warnings. Therefore, while a subsequent statement, made after *Miranda* has been given, will be inadmissible if it is coerced, there is no such presumption that arises due to the initial *Miranda* violation. However, if the unwarned statement was in fact coerced, the voluntariness of any subsequent statements would be suspect. However, here, there is no indication Elstad’s initial statement was anything but voluntary. He then willingly waived his rights after being read his *Miranda* warnings and continued to talk to the police. Therefore, the court of appeals was wrong to reverse the conviction.

#### Dissent (Brennan, J.)

The Court’s holding strips citizens of a proper remedy for *Miranda*violations, it is inconsistent with precedents, and it demonstrates a lack of understanding about how police interrogation works.

**Key Terms:**

**Miranda Warnings** - The notices of constitutional rights set forth in the opinion of the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436(1966) that law enforcement authorities must provide to a suspect in a criminal investigation prior to initiation of a custodial interrogation. The suspect must be advised that the suspect has the right to remain silent, anything the suspect says may be used against the suspect, and the suspect has the right to an attorney.

**Exclusionary Rule** - A rule that excludes or suppresses evidence in a criminal proceeding where that evidence was obtained in violation of an individual’s constitutional rights.

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Fifth Amendment** - An amendment added to the U.S. Constitution as part of the Bill of Rights that provides important protections from government actions, including a guarantee that no person will be required to answer for a capital crime unless first indicted by a grand jury; no one will suffer double jeopardy; no one must testify against himself or herself; no one will be deprived of life, liberty, or property without due process of law; and no property will be taken for public use without just compensation.

# Dickerson v. United States

#### United States Supreme Court 530 U.S. 428 (2000)

#### Rule of Law

**Congress cannot legislatively supersede a decision by the United States Supreme Court that interprets and applies the Constitution.**

# Chavez v. Martinez

#### United States Supreme Court 538 U.S. 760 (2003)

#### Rule of Law

**(1) The Fifth Amendment is not violated by a coercive interrogation if the suspect's confession is never used in a criminal case.**

**(2) A coercive interrogation may violate substantive due process even if the suspect's confession is never used in a criminal case.**

# United States v. Hubbell

#### United States Supreme Court 530 U.S. 27 (2000)

#### Rule of Law

**(1) The Fifth Amendment protects a witness from being compelled to disclose the existence of incriminating documents that the government is unable to describe with reasonable particularity because the act of producing those documents is testimonial.**

**(2) If the government grants a witness immunity to overcome his Fifth Amendment privilege against self-incrimination and compel production of documents, evidence derived from those documents cannot be used in a later criminal prosecution against that witness.**

#### Facts

An independent counsel appointed in 1994 to investigate possible violations of federal law related to the Whitewater Development Corporation subpoenaed Webster Hubbell (defendant) in October 1996 to produce documents in 11 broad categories. Hubbell invoked his Fifth Amendment right against self-incrimination. The prosecutor then produced an order from the district court directing Hubbell to respond to the subpoena and granting him immunity “to the extent allowed by law.” Hubbell then produced 13,120 pages of documents and responded that the documents were all the documents in his control or custody that were responsive to the subpoena. On April 30, 1998, a grand jury indicted Hubbell for various tax-related crimes and mail and wire fraud. The district court dismissed the indictment because all of the evidence the prosecution would offer against Hubbell derived from the testimonial aspects of his immunized act of producing the documents. The court of appeals vacated and remanded for the district court to hold a hearing for the prosecution to demonstrate with reasonable particularity a prior awareness that the documents sought in the subpoena existed and were in Hubbell’s possession. On remand, the independent counsel acknowledged that he could not satisfy the reasonable-particularity standard and entered into a plea deal with Hubbell. The independent counsel then petitioned for a writ of certiorari to determine the scope of a grant of immunity with respect to the production of documents in response to a subpoena.

#### Issue

(1) Does the Fifth Amendment protect a witness from being compelled to disclose the existence of incriminating documents that the government is unable to describe with reasonable particularity?

(2) If the government grants a witness immunity to overcome his Fifth Amendment privilege against self-incrimination and compel production of documents, can evidence derived from those documents be used in a later criminal prosecution against that witness?

#### Holding and Reasoning (Stevens, J.)

(1) Yes. The constitutional privilege against self-incrimination protects the target of a grand-jury investigation from being compelled to answer questions designed to elicit information about the existence of sources of potentially incriminating evidence. That protection extends to the testimonial aspect of a response to a subpoena seeking discovery of those sources. In this case, Hubbell needed to make extensive use of the contents of his own mind in identifying the documents responsive to the subpoena. Thus, Hubbell could not be compelled to produce the documents without first receiving a grant of immunity. Under U.S.C. § 6002 (which provides that the prosecution may not use the act of production against the defendant or any evidence derived from the testimonial aspects of the act of production), the indictment against Hubbell must be dismissed unless the prosecution can show that the evidence it used to obtain the indictment and the evidence it proposes to use at trial came from sources “wholly independent” of the testimonial aspect of Hubbell’s assembling and producing the documents. The prosecution has admitted it cannot, and so the indictment must be dismissed.

(2) No. Once the government has granted a witness immunity coextensive with the privilege against self-incrimination so that he may be compelled to produce documents, the government may not use evidence derived from those documents in a criminal prosecution of that witness. An individual may be compelled to produce incriminating documents without violating the privilege so long as he was not forced to create the documents. Nevertheless, production of subpoenaed documents may have a testimonial quality and convey factual statements. Further, the individual may be forced to answer questions about those documents to prove compliance with the subpoena. The testimonial component of document production is the proof of the documents’ existence, authenticity, and ownership or custody. The privilege against self-incrimination applies to these testimonial aspects of document production. In this case, although the government claims it will not enter the produced documents into evidence, it has made substantial derivative use of the production. Complying with the extensive subpoena in this case was equivalent to responding to interrogatories or answering questions about the documents’ existence, types, and locations. The document production provided the prosecutor with sources and leads for gathering inculpatory evidence, which the prosecutor used to secure a series of indictments wholly unrelated to Hubbell’s prior plea agreement. Hubbell could not have been forced to produce the documents in this case without being granted immunity as broad as the privilege itself. The derivative use of the documents produced by Hubbell violated that grant of immunity. The government cannot demonstrate that its evidence against Hubbell came from a “wholly independent” source, as required by *Kastigar v. United States*, 406 U.S. 441 (1972). The judgment of the court of appeals is affirmed.

#### Concurrence (Thomas, J.)

The Court holds that the privilege against self-incrimination applies if the production of documents has a testimonial aspect. This may be a departure from the original intent of the Fifth Amendment, which may have been intended to bar forced production of any type of incriminating evidence. The scope of the privilege should be explored in a later case.

**Key Terms:**

**Subpoena Duces Tecum** - A court order for the production and inspection of documents or other items of physical evidence.

**Testimonial Evidence -** Oral or written evidence of an individual’s thoughts.

**Fifth Amendment Privilege Against Self-Incrimination** - Constitutional protection that prevents the government from compelling a person to give testimony against himself.

**Withrow v. Williams**

113 S.Ct. 1745

Supreme Court of the United States

**Pamela WITHROW, Petitioner**

**v.**

**Robert Allen WILLIAMS, Jr.**

No. 91–1030.

Argued Nov. 3, 1992.Decided April 21, 1993.Rehearing Denied June 28, 1993.See [509 U.S. 933, 113 S.Ct. 3066](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&pubNum=0000708&cite=113SCT3066&originatingDoc=I82300de09c7e11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

## Synopsis

State inmate petitioned for writ of habeas corpus. The United States District Court for the Eastern District of Michigan, [Barbara K. Hackett](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0179501601&originatingDoc=I82300de09c7e11d9bdd1cfdd544ca3a4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I82300de09c7e11d9bdd1cfdd544ca3a4), J., granted petition, and warden appealed. The Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Idd014ff594c111d9a707f4371c9c34f0&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[944 F.2d 284,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991153204&pubNum=350&originatingDoc=I82300de09c7e11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))affirmed. On warden's petition for certiorari, the Supreme Court of the United States, Justice [Souter](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0263202201&originatingDoc=I82300de09c7e11d9bdd1cfdd544ca3a4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I82300de09c7e11d9bdd1cfdd544ca3a4) held that: (1) [Stone](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1976142452&originatingDoc=I82300de09c7e11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))restrictions on exercise of federal habeas jurisdiction in Fourth Amendment cases did not extend to state prisoner's claim that his conviction rested on statements obtained in violation of Mirandasafeguards, but (2) where state prisoner's federal habeas claim raised only one claim going to admissibility of his statements to police, on ground that police had elicited those statements without satisfying Mirandarequirements, it was error for district court, without evidentiary hearing or argument, to go beyond habeas petition and find statements petitioner made after receiving Mirandawarnings to be involuntary under due process criteria.

Affirmed in part and reversed in part, and remanded.

Justice [O'Connor](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0209675601&originatingDoc=I82300de09c7e11d9bdd1cfdd544ca3a4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I82300de09c7e11d9bdd1cfdd544ca3a4) filed opinion concurring in part and dissenting in part in which Chief Justice [Rehnquist](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0238463201&originatingDoc=I82300de09c7e11d9bdd1cfdd544ca3a4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I82300de09c7e11d9bdd1cfdd544ca3a4) joined.

Justice [Scalia](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254763301&originatingDoc=I82300de09c7e11d9bdd1cfdd544ca3a4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I82300de09c7e11d9bdd1cfdd544ca3a4) filed opinion concurring in part and dissenting in part in which Justice Thomas joined.

**Procedural Posture(s):** On Appeal.

# New York v. Quarles

#### United States Supreme Court 467 U.S. 649 (1984)

#### Rule of Law

**There is a public-safety exception to the requirement that *Miranda* warnings be given before a suspect’s statements may be admitted into evidence at trial.**

# Kastigar v. United States

#### United States Supreme Court 406 U.S. 441 (1972)

#### Rule of Law

**The government may compel testimony from a witness who has invoked the Fifth Amendment right to silence by giving that witness immunity from use of both the compelled testimony and any evidence derived from that testimony in a subsequent criminal proceeding.**

#### Facts

The Central District of California subpoenaed Kastigar and another (defendants) for a grand jury hearing. The government granted the defendants immunity under 18 U.S.C. § 6002, which provides immunity from the use of the compelled testimony and any evidence derived from that testimony in any criminal case other than a prosecution for perjury, making a false statement, or some other failure to comply with the order to testify. The defendants argued that the immunity granted was not as broad as the privilege against self-incrimination and could not justify compulsion of their testimony. The district court rejected these arguments and ordered the defendants to testify. When the defendants refused, the district court found them in contempt and ordered them to remain in the Attorney General’s custody until they testified or the grand jury expired. The United States Court of Appeals for the Ninth Circuit affirmed. The United States Supreme Court granted certiorari to address whether a witness's testimony may be compelled by the grant of use-and-derivative-use immunity (*i.e.*, immunity from the use of the compelled testimony and any evidence derived from that testimony) or whether a grant of transactional immunity (*i.e.*, immunity from prosecution for offenses related to the compelled testimony) is required to compel testimony normally protected by the Fifth Amendment privilege against self-incrimination.

#### Issue

May the government compel testimony from a witness who has invoked the Fifth Amendment right to silence by giving that witness immunity from use of both the compelled testimony and any evidence derived from that testimony in a subsequent criminal proceeding?

#### Holding and Reasoning (Powell, J.)

Yes. The government may compel testimony from a witness who has invoked the Fifth Amendment right to silence by giving that witness immunity from use of both the compelled testimony and any evidence derived from that testimony in a subsequent criminal proceeding. In other words, a witness may not assert the Fifth Amendment privilege against self-incrimination and refuse to testify if the witness has been granted use-and-derivative-use immunity. Immunity statutes have widely been used to strike a reasonable balance between an individual’s privilege against self-incrimination and the government’s legitimate need to compel testimony. There is no merit to the claim that no immunity statute can ever overcome the privilege to allow compulsion of otherwise privileged testimony. Rather, the only issue is whether the immunity granted by the particular statute is as broad as the scope of the privilege. In this case, the defendants may only be compelled to testify if the immunity is as broad as the privilege. The statute guarantees that neither the compelled testimony nor any information derived from that testimony may be used against the individual in a subsequent criminal prosecution, other than a prosecution for perjury, making a false statement, or some other failure to comply with the order to testify. This is use-and-derivative-use immunity, which places the police and the prosecution in the same position they would have been in without the testimony. Use-and-derivative-use immunity is coextensive with the scope of the Fifth Amendment privilege against self-incrimination and is sufficient to warrant compulsion of otherwise privileged testimony. Transactional immunity, on the other hand, would go much further and immunize the witness from prosecution for any crime to which the testimony pertains. This result is not required by the Fifth Amendment. The burden remains on the prosecution in any subsequent criminal trial to prove that no evidence was derived from the witnesses’ testimony and that any evidence used comes from a “wholly independent” source. Because the use-and-derivative-use immunity granted to the defendants under the statute was sufficient to overcome their privilege against self-incrimination and compel their testimony, the appellate court's judgment is affirmed.

#### Dissent (Douglas, J.)

The Fifth Amendment privilege against self-incrimination must be broadly construed. Use-and-derivative-use immunity does not provide the same protection that the privilege does, and ultimately information discovered through testimony may be used to later prosecute the witness. It is not within the scope of Congress’s authority to supplant the privilege and void the right to remain silent. In fact, widespread use of this type of immunity may impede law enforcement if witnesses choose to risk contempt rather than testify.

#### Dissent (Marshall, J.)

The Court’s ruling permits the government to force a witness to give incriminating testimony and then try him for crimes related to his testimony. Immunity may be used to overcome the privilege, but that grant must be sufficient to ensure that the testimony cannot be used in any subsequent prosecution. The witness must be no worse off than if he had remained silent.

**Key Terms:**

**Transactional Immunity -** Complete immunity from future prosecution for the crime the compelled testimony relates to.

**Use and Derivative Use Immunity -** A type of immunity against prosecution which provides that the prosecution may not use the information given against defendant nor use any evidence derived from the information given against the defendant.

# Missouri v. Seibert

#### United States Supreme Court 542 U.S. 600 (2004)

#### Rule of Law

**A second confession after a *Miranda* waiver is admissible only if there was a long enough break following the initial confession without a *Miranda* waiver to give a reasonable suspect the belief that he or she had a right not to speak to officers.**

# \*\*MISSOURI v. SEIBERT\*\*

#### United States Supreme Court 542 U.S. 600 (2004)

#### Rule of Law

**A second confession after a *Miranda* waiver is admissible only if there was a long enough break following the initial confession without a *Miranda*waiver to give a reasonable suspect the belief that he or she had a right not to speak to officers.**

#### Facts

Patrice Seibert (defendant) had a 12-year-old son with cerebral palsy, Jonathan, who died of natural causes in the family’s trailer home. Because Jonathan had bed sores, Seibert feared that she would be charged with child abuse if the sores were discovered during an autopsy. She devised a scheme to burn down the trailer with Jonathan’s body inside to destroy his corpse. She also left Donald Rector, a mentally ill teenager living with the family, inside the trailer to avoid the appearance that Jonathan had been left unattended. Seibert directed her other son, Darian, to set the fire. Donald perished in the fire. Police officers arrested Seibert and took her to the police station for interrogation about the deaths of Jonathan and Donald. After deliberately not reading *Miranda* warnings to Seibert, the officers obtained a confession in which Seibert admitted leaving Donald inside the trailer before the fire was set. Around 20 minutes after obtaining Seibert’s first confession, the officers advised Seibert of her *Miranda* rights, which she waived. After reminding Seibert that she previously had confessed, the officers obtained a second confession. The State of Missouri (plaintiff) charged Seibert with Donald’s murder. Seibert filed a pretrial motion to suppress both confessions as *Miranda* violations*.*The trial court suppressed the first confession but not the second. A jury convicted Seibert of second-degree murder. She appealed to the Missouri Court of Appeals, which affirmed her conviction. She then appealed to the Missouri Supreme Court, which held that her second confession violated *Miranda* and should be suppressed. The State successfully petitioned the United States Supreme Court.

#### Issue

Is a second confession after a *Miranda* waiver admissible if there was a long enough break following the initial confession without a *Miranda* waiver to give a reasonable suspect the belief that he or she had a right not to speak to officers?

#### Holding and Reasoning (Souter, J.)

Yes. At issue is the practice of two-stage, "question-first" interrogation, in which officers ask a suspect questions, typically wait for the suspect to confess, and then advise the suspect of his or her *Miranda*rights and ask for a waiver, so that any post-waiver statements will be admissible against the suspect. This practice has become increasingly popular and threatens *Miranda*'s goal of decreasing the risk that coerced confessions will be used against suspects. The relevant inquiry is whether *Miranda* warnings delivered midstream in a two-stage interrogation are effective, which requires analysis of (1) the thoroughness and detail of the questions and answers in the first round of interrogation, (2) how much the content of the suspect's two statements overlap, (3) the timing and setting of each round of interrogation, (4) whether the officers were the same in both rounds, and (5) to what extent the second interrogator treated the second round as a continuation of the first. A second confession after a *Miranda*waiver is admissible only if there was a long enough break following the initial confession without a *Miranda* waiver to give a reasonable suspect the belief that he or she had a right not to speak to officers. This is an objective test; the four-judge plurality agrees that both the subjective intent of the officers and the suspect’s subjective understanding of his or her rights are irrelevant. Here, the first round of interrogation occurred at the station house, and the questioning prior to the *Miranda* warnings was extremely thorough. After the warnings were given, the second round of interrogation began in the same location, with the same officer, after only about 20 minutes. The interrogating officer gave Seibert the impression that the second round was merely a continuation of the first and did not explain to Seibert that the advice that anything she said could be used against her also applied to the substance of her pre-warning confession. Applying an objective standard, Seibert’s first and second confessions were given during a single, continuous interrogation, and thus her second confession was inadmissible despite her *Miranda* waiver. Accordingly, the judgment of the Missouri Supreme Court is affirmed.

#### Concurrence (Kennedy, J.)

The standard should be a subjective one that asks whether officers acted in bad faith in deliberately withholding *Miranda* warnings before the first confession with the intent of facilitating a second confession after a *Miranda* waiver. Because the officers acted with bad faith in obtaining Seibert’s second confession, it was inadmissible. [**Editor's Note**: Because the Court's holding was a plurality opinion, and this concurrence supplied the critical fifth vote for affirmance, a majority of lower courts have since held that the subjective standard controls rather than the plurality’s objective standard.]

#### Concurrence (Breyer, J.)

The Court’s holding effectively means that except where the failure to give a suspect his or her *Miranda* warnings is in good faith, courts should exclude all fruits of the initial unwarned questions.

#### Dissent (O'Connor, J.)

A second confession following a *Miranda* waiver isn’t suppressible even if the officers deliberately refused to read *Miranda* warnings in obtaining a first confession. The second confession would only be inadmissible if it were involuntary.

**Key Terms:**

**Miranda Warnings** - The notices of constitutional rights set forth in the opinion of the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436(1966) that law enforcement authorities must provide to a suspect in a criminal investigation prior to initiation of a custodial interrogation. The suspect must be advised that the suspect has the right to remain silent, anything the suspect says may be used against the suspect, and the suspect has the right to an attorney.

# Miranda v. Arizona

#### United States Supreme Court 384 U.S. 436 (1966)

#### Rule of Law

**Without certain hallmark warnings regarding the right to remain silent and the right to counsel, statements made during custodial interrogation are inadmissible at trial.**

# Oregon v. Elstad

#### United States Supreme Court 470 U.S. 298 (1985)

#### Rule of Law

**A suspect can make a statement that is admissible in court after being read his *Miranda* warnings, even when he previously made an unwarned statement, because the initial failure to read a suspect his *Miranda* warnings does not taint later voluntary statements.**

# Dickerson v. United States

#### United States Supreme Court 530 U.S. 428 (2000)

#### Rule of Law

**Congress cannot legislatively supersede a decision by the United States Supreme Court that interprets and applies the Constitution.**

**Part 9 – Failure of Police to Inform Suspect that Lawyer is Present after Valid *Miranda* Waiver**

# \*\*MORAN v. BURBINE\*\*

#### United States Supreme Court  475 U.S. 412 (1986)

#### Rule of Law

**If a suspect has knowingly waived his *Miranda* rights, officers' deception of a lawyer seeking to represent the suspect and their refusal to inform the suspect that his family had obtained a lawyer for him does not invalidate the suspect's *Miranda*waiver.**

#### Facts

Police arrested Brian Burbine (defendant) for burglary and then realized he was suspected of a murder that happened months earlier. Burbine’s sister called the public defender’s office to get a lawyer to represent Burbine on the burglary charge; she was not aware that he was suspected of murder. A lawyer then called the police station and stated that she would represent Burbine if he was going to be put in a lineup or questioned. The lawyer was told by police that Burbine would not be questioned or put in a lineup that evening. The police did not tell the lawyer that Burbine was suspected of murder. Burbine never knew that his sister retained a lawyer to represent him or that the lawyer called the police station. Shortly after the lawyer’s phone call, police began interviewing Burbine about the murder. Before each interview, they gave Burbine proper *Miranda* warnings. Burbine signed three separate written waivers of his *Miranda* rights and three written statements admitting to the murder. Burbine moved to suppress the written confessions prior to his trial. The court denied his motion to suppress and held that he had knowingly waived his *Miranda* rights. He was convicted of murder in the first degree. On appeal to the state supreme court, his conviction was affirmed. Burbine petitioned the federal court for a writ of habeas corpus but was denied. On appeal to the Court of Appeals for the First Circuit, his conviction was reversed. The United States Supreme Court granted certiorari.

#### Issue

If a suspect has knowingly waived his *Miranda* rights, does the fact that officers deceived a lawyer seeking to represent the suspect and refused to inform the suspect that his family had obtained a lawyer for him invalidate the suspect's *Miranda*waiver?

#### Holding and Reasoning (O’Connor, J.)

No. If a suspect has knowingly waived his *Miranda* rights, officers' deception of a lawyer seeking to represent the suspect and their refusal to inform the suspect that his family had obtained a lawyer for him does not invalidate the suspect's *Miranda*waiver. To be valid, a defendant’s waiver of his *Miranda* rights must be voluntarily, knowingly, and intelligently given. Circumstances of which a defendant is unaware have no effect on his ability to knowingly give up his constitutional rights. Moreover, *Miranda*warnings are designed to protect the suspect’s Fifth Amendment rights during interrogation, and a rule regarding how police interact with lawyers does not further that goal. Although requiring police to tell a defendant when his lawyer calls would minimally further the goals of *Miranda*, the complexity that adopting such a rule would add to the *Miranda* rules outweighs any benefit the rule would have. In this case, Burbine understood that he had the right to remain silent and request an attorney. He knew that his statements could be used against him. His waiver was not coerced, and he had all the information that *Miranda*requires the police to tell him. Therefore, even though Burbine did not know that his family had obtained a lawyer for him or that his lawyer had called the police station, his waiver was valid. Burbine's argument that his Sixth Amendment right to an attorney requires the court to suppress his confession is without merit. The Sixth Amendment applies only after adversary judicial proceedings are initiated against a defendant and not, as Burbine argues, when an attorney-client relationship has formed. Lastly, Burbine’s argument that the alleged police misconduct was so offensive that it deprived him of due process is unavailing. The police behavior in this case is not so extreme to justify federal interference in state criminal proceedings. Accordingly the appellate court's judgment is reversed, and the case is remanded.

#### Dissent (Stevens, J.)

The police’s failure to tell Burbine that his lawyer called invalidates Burbine’s waiver of his *Miranda* rights. The Court makes an unwarranted distinction between police misleading a defendant and police keeping information from a defendant. *Miranda* prohibits both. When Burbine’s lawyer called the police station, she was acting as Burbine’s agent. Therefore, the police’s deception of Burbine’s lawyer amounted to deception of Burbine and thus violated his constitutional rights. Lastly, the police violated due process by interfering with communications between Burbine and his lawyer.

**Key Terms:**

**Miranda Warnings** - The notices of constitutional rights set forth in the opinion of the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436(1966) that law enforcement authorities must provide to a suspect in a criminal investigation prior to initiation of a custodial interrogation. The suspect must be advised that the suspect has the right to remain silent, anything the suspect says may be used against the suspect, and the suspect has the right to an attorney.

# Miranda v. Arizona

#### United States Supreme Court 384 U.S. 436 (1966)

#### Rule of Law

**Without certain hallmark warnings regarding the right to remain silent and the right to counsel, statements made during custodial interrogation are inadmissible at trial.**

# Colorado v. Spring

#### United States Supreme Court 479 U.S. 564 (1987)

#### Rule of Law

**A suspect’s awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege.**

#### Facts

ATF agents received a tip that Spring (defendant) was illegally selling firearms and that he was involved in a murder. An agent set up a sting and purchased firearms from Spring. After federal agents arrested Spring, they read him his *Miranda*rights and he signed a written waiver. They asked him about the firearms deal, and then asked Spring if he had ever shot anyone. He stated that he had “shot [a] guy once.” Subsequently, federal agents questioned Spring again, and during this questioning, he confessed to the murder. The trial court convicted Spring. The Colorado Supreme Court reversed, finding that the agents’ reading of the *Miranda*rights was invalid because they did not tell Spring the scope of the upcoming questioning. Specifically, the agents did not tell Spring that they would be asking him about whether he shot someone. The result, according to the Colorado Supreme Court, was that the subsequent confession was inadmissible. The United States Supreme Court granted certiorari.

#### Issue

Must a suspect be aware of all the possible subjects of questioning in advance of interrogation for the suspect’s waiver of his Fifth Amendment rights to be voluntary, knowing, and intelligent?

#### Holding and Reasoning (Powell, J.)

No. A suspect’s awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege. This awareness requirement simply is not in the Constitution. Any additional information that law enforcement gives prior to questioning may affect the wisdom (from the suspect’s perspective) of a suspect’s waiver, but not whether it was voluntary, knowing, or intelligent. In the present case, Spring’s waiver of his Fifth Amendment rights was voluntary, knowing, and intelligent. The federal agents read him his *Miranda*rights and he signed a written waiver of those rights. It is irrelevant that Spring was unaware of the full scope of the agents’ questioning. Accordingly, Spring’s confession is admissible. The Colorado Supreme Court is reversed.

#### Dissent (Marshall, J.)

Interrogation about unexpected, and, indeed, more serious matters takes unfair advantage of a suspect’s mindset in the interrogation room. Such questioning causes a suspect’s “compulsive pressures suddenly to reappear.” This practice undermines the purpose of *Miranda* warnings in the first place.

**Key Terms:**

**Custodial Interrogation** - Questioning by law enforcement authorities of a suspect in a criminal investigation under circumstances in which the suspect is not free to terminate the questioning and leave at will or under circumstances that lead the suspect to believe that he is not free to leave at will.

# Edwards v. Arizona

#### United States Supreme Court 451 U.S. 477 (1981)

#### Rule of Law

**Once a suspect has received his *Miranda* warnings and invoked his right to counsel, the police may not further interrogate the suspect until the suspect has been given access to counsel, unless the suspect initiates further communication with the police.**

# Escobedo v. Illinois

#### United States Supreme Court 378 U.S. 478 (1964)

#### Rule of Law

**When an investigation shifts from a general inquiry into an unsolved crime to a focus on a particular suspect, that suspect has been taken into police custody for questioning, the suspect has asked for and been denied his lawyer, and the police have not properly warned him of his right to remain silent, any confession made during the remainder of the interrogation is inadmissible.**

# Michigan v. Mosley

#### United States Supreme Court 423 U.S. 96 (1975)

**Rule of Law**

***Miranda v. Arizona*. 384 U.S. 436 (1966) does not bar police from subsequently questioning a suspect who previously invoked his right to remain silent, as long as the suspect’s right to end questioning has been scrupulously honored.**

**Chapter 6, Section 5 – The Court Reaffirms *Miranda***

# \*\*DICKERSON v. UNITED STATES\*\*

#### United States Supreme Court 530 U.S. 428 (2000)

#### Rule of Law

**Congress cannot legislatively supersede a decision by the United States Supreme Court that interprets and applies the Constitution.**

#### Facts

Dickerson (defendant) was indicted for bank robbery. Dickerson moved to have statements he made during an FBI interrogation suppressed, claiming he never received proper *Miranda* warnings. The trial court found that Dickerson had not in fact received proper *Miranda* warnings. However, two years after *Miranda  
v. Arizona,*384 U.S. 436 (1966) was decided, Congress passed 18 U.S.C. § 3501, which permits statements made by a suspect during a custodial police interrogation to be admitted at trial as long as they were made voluntarily. The trial court held that *Miranda* was not a constitutional holding, and Congress therefore had the authority to effectively overrule *Miranda* with a statute. The court of appeals agreed, holding that the protections put forth in *Miranda* are not constitutionally required.

#### Issue

Does the holding in *Miranda* establish a constitutional rule that cannot be superseded by an act of Congress?

#### Holding and Reasoning (Rehnquist, C.J.)

Yes. *Miranda v. Arizona,*384 U.S. 436 (1966), is a constitutional decision, and Congress cannot supersede it by passing legislation. A number of factors support the position that *Miranda* was a constitutional decision. First, *Miranda*, and two of its companion cases, applied the new rule to state cases and, since then, *Miranda* has been applied to cases arising out of state courts. Second, the *Miranda* decision acknowledged that it was establishing “constitutional guidelines for law enforcement agencies and courts to follow.” Third, the *Miranda* opinion recognized that Congress had the authority to create new guidelines, but any subsequent legislation had to be at least as effective in informing suspects of the right against self-incrimination. Finally, the doctrine of*stare decisis* forbids the overruling of *Miranda*. The *Miranda* warnings have become routine, have proven effective, and subsequent cases have all supported their doctrinal underpinnings. Prior to *Miranda*, to satisfy the requirements of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment, a confession had to be voluntary. This was determined by looking at the totality of the circumstances. However, this standard proved unworkable in light of modern interrogation tactics that are themselves inherently coercive. Therefore, *Miranda* established four warnings to ensure that a suspect’s constitutional rights are protected. 18 U.S.C. § 3501 reinstalls the totality of the circumstances test that was held unconstitutional in *Miranda* and therefore it cannot stand.

#### Dissent (Scalia, J.)

While the Court refuses to acknowledge it, the Court here recognizes that a *Miranda* violation does not necessarily amount to a Fifth Amendment violation. The Court never holds that *Miranda* is a constitutional requirement, but merely that it has a constitutional basis. Likewise, it never holds that § 3501 violates the Constitution. Post-*Miranda* cases in which the Court allowed evidence to be admitted without proper *Miranda* warnings support the position that *Miranda* does not establish a constitutional law. The Court here is effectively adopting a new principle of constitutional law, that statutes passed by Congress may be disregarded if they contradict a decision that produces a “constitutional rule.” *Marbury v. Madison*, 5 U.S. (Cranch 1) 137 (1803), established the power of Congress to pass legislation as long as the law is not unconstitutional. *Miranda* should be overruled, and the federal statute should stand.

**Key Terms:**

**Fourteenth Amendment Due Process** **Clause** - The provision set forth at Amendment XIV, Section 1 of the United States Constitution prohibiting states from depriving any person of life, liberty, or property by means that are arbitrary or fundamentally unfair.

**Miranda Warnings** - The notices of constitutional rights set forth in the opinion of the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436(1966) that law enforcement authorities must provide to a suspect in a criminal investigation prior to initiation of a custodial interrogation. The suspect must be advised that the suspect has the right to remain silent, anything the suspect says may be used against the suspect, and the suspect has the right to an attorney.

**Fifth Amendment** - An amendment added to the U.S. Constitution as part of the Bill of Rights that provides important protections from government actions, including a guarantee that no person will be required to answer for a capital crime unless first indicted by a grand jury; no one will suffer double jeopardy; no one must testify against himself or herself; no one will be deprived of life, liberty, or property without due process of law; and no property will be taken for public use without just compensation.

# Miranda v. Arizona

#### United States Supreme Court 384 U.S. 436 (1966)

#### Rule of Law

**Without certain hallmark warnings regarding the right to remain silent and the right to counsel, statements made during custodial interrogation are inadmissible at trial.**

# Bram v. United States

#### United States Supreme Court 168 U.S. 532 (1897)

#### Rule of Law

**To be admissible at trial, a confession must be voluntary and may not be coerced by fear, no matter how slightly the emotion is implanted.**

#### Facts

A murder occurred on a ship and when the ship came into port, one of the customs officials suspected that Bram (defendant) was responsible. The official had Bram strip-searched to find evidence of the crime and Bram was questioned. His statements were taken as a confession to the murder. At Bram’s trial, the official testified to what Bram said during this questioning.

#### Issue

Is a confession made pursuant to a strip search and police questioning voluntarily made?

#### Holding and Reasoning (White, J.)

No. Where a suspect confesses pursuant to a strip-search and questioning, the state has exerted some influence over the suspect. In such situations there is doubt regarding the voluntariness of the confession and the court must decide in favor of the accused. Therefore, the trial court erred when it permitted the official to testify to Bram’s statements at trial.

#### Dissent (Brewer, J.)

The trial court properly allowed the official to testify at trial because his testimony and the record support the finding that there were no threats or inducements made to Bram. Therefore, there is nothing supporting the finding that Bram’s confession was not freely and voluntarily made.

**Key Terms:**

**Fifth Amendment** - An amendment added to the U.S. Constitution as part of the Bill of Rights that provides important protections from government actions, including a guarantee that no person will be required to answer for a capital crime unless first indicted by a grand jury; no one will suffer double jeopardy; no one must testify against himself or herself; no one will be deprived of life, liberty, or property without due process of law; and no property will be taken for public use without just compensation.

# Brown v. Mississippi

#### United States Supreme Court 297 U.S. 278 (1936)

#### Rule of Law

**The Due Process Clause of the Fourteenth Amendment requires that state action be consistent with fundamental principles of liberty and justice.**

#### Facts

Brown (defendant) and two other men were found guilty of murdering Reymond Stewart and were sentenced to death. The evidence against them consisted solely of their own confessions which were induced by severe beatings at the hands of the local authorities. At trial, Brown and the others objected to the admission of the confessions and testified to the torture, saying their confessions were false. Other witnesses were called to testify to first-hand knowledge of the beatings and Brown and the other men still bore many of the psychical scars of the whippings when the trial commenced. The judge submitted the case to the jury, instructing them that if they had reasonable doubt as to the veracity of the confessions, the confessions should not be considered as evidence. Brown appealed to the state supreme court and the conviction was affirmed.

#### Issue

Are convictions resting solely on confessions induced by violence perpetrated by state actors, consistent with the Due Process Clause of the Fourteenth Amendment?

#### Holding and Reasoning (Hughes, C.J.)

No. Confessions induced by violence are not consistent with the Due Process Clause and such evidence is therefore inadmissible at trial. Severe beatings to garner a confession clearly violate fundamental principles of justice and therefore amount to a violation of due process. Where such confessions are the only evidence against the defendants, as is the case here, the result is simply the pretense of a fair trial. The trial court had sufficient evidence that the confessions were the result of coercion and brutality and the court wrongly permitted the confessions to be introduced into evidence. Accordingly, the judgment is reversed.

**Key Terms:**

**Fundamental Principles of Rights** - Principles and rights that are so deeply rooted and ingrained in history and tradition as to be central to U.S. notions of liberty and justice.

# Escobedo v. Illinois

#### United States Supreme Court 378 U.S. 478 (1964)

#### Rule of Law

**When an investigation shifts from a general inquiry into an unsolved crime to a focus on a particular suspect, that suspect has been taken into police custody for questioning, the suspect has asked for and been denied his lawyer, and the police have not properly warned him of his right to remain silent, any confession made during the remainder of the interrogation is inadmissible.**

# City of Boerne v. Flores

#### United States Supreme Court 521 U.S. 507 (1997)

#### Rule of Law

**In exercising its remedial and preventive power to enforce a constitutional right under Section 5 of the Fourteenth Amendment, Congress may enact only legislation that utilizes congruent and proportional means for to achieving that legislative purpose.**

#### Facts

In 1993, Congress enacted the Religious Freedom Restoration Act (RFRA) in an express attempt to overturn the United States Supreme Court’s decision in *Employment Div., Dept. of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990). In *Smith*, Oregon’s prohibition on peyote use in Native American religious practice was upheld because the Oregon state law was one of general applicability. The RFRA prohibits the government from substantially burdening a person’s free exercise of religion, even if the burden is derived from a law of general applicability. A person’s free exercise of religion can only be substantially burdened if the government can show that its actions were necessary to achieve a compelling government interest and were the least restrictive means of furthering that interest. Archbishop Flores (plaintiff) brought suit against the City of Boerne (defendant) under the RFRA after the City of Boerne denied his church’s application for a building permit to make necessary expansions to its current building. The city denied the church’s permit pursuant to a city ordinance that prevented expansions and alterations of structures designated as historic landmarks or existing within historic districts. The church’s permit was denied because the City’s Historic Landmark Commission determined the church was located in a historic district. Archbishop Flores sought relief under the RFRA in the District Court for the Western District of Texas. The district court held that the RFRA was unconstitutional, but the Fifth Circuit Court of Appeals reversed. The United States Supreme Court granted certiorari.

#### Issue

In exercising its remedial and preventive power to enforce a constitutional right under Section 5 of the Fourteenth Amendment, may Congress enact only legislation that utilizes congruent and proportional means for achieving that legislative purpose?

#### Holding and Reasoning (Kennedy, J.)

Yes. Congress has broad, but not unlimited, enforcement powers. Specifically, Congress’s powers under § 5 of the Fourteenth Amendment are strictly remedial and not plenary. Accordingly, Congress has the power to enforce laws to prevent the violation of a constitutional right, but it does not have the power to define the substance of that constitutional right. There must be congruence and proportionality between the means Congress uses and the preventive or remedial ends it hopes to achieve. Without this congruence and proportionality, Congress's actions may cross the line into unacceptable substantive legislation. This interpretation of Congress’s powers is supported by the legislative history surrounding the adoption of the Fourteenth Amendment. Here, the RFRA is outside the scope of Congress’s remedial enforcement powers, because it is overly broad in its scope and reach in relation to the desired ends of promoting religious freedom. The RFRA would impose a much more significant burden on states in terms of litigation costs and difficulty of proof than was appropriate in relation to the proposed federal interest. Relying on prior jurisprudence, the RFRA is an unconstitutional exercise of Congress’s power. The decision of the court of appeals is reversed.

#### Concurrence (Stevens, J.)

The RFRA is a “law respecting the establishment of religion” as prohibited by the First Amendment to the Constitution. If the historical building had been owned by an atheist, that person would not have been able to challenge the denial of a building permit based on the RFRA. Thus, the RFRA unconstitutionally promoted the establishment of religion and should be struck down.

#### Concurrence (Scalia, J.)

The dissent’s argument that historical materials suggest that *Smith* should be overturned as an improper interpretation of the Free Exercise Clause is incorrect. Not all zoning laws such as those in this case need to be struck down as improper restraints on the free exercise of religion as suggested by the dissent. The dissent does not properly support its position with sufficient historical evidence.

#### Dissent (O’Connor, J.)

*Smith* was wrongly decided. Instead of deciding the present case, the parties should reexamine *Smith,* which improperly restricts the free exercise of religion. Only after achieving a new understanding of the Free Exercise Clause can the Court properly analyze the constitutionality of the RFRA.

#### Dissent (Souter, J.)

*Smith* has little value as precedent and should not be followed in the present case. The case should be set for reargument where a plenary reexamination can be conducted of the Free Exercise Clause issue. Until this occurs, a proper decision regarding the constitutionality of the RFRA cannot be made.

**Key Terms:**

**Free Exercise Clause** - The accompanying clause with the Establishment Clause of the First Amendment to the United States Constitution which states, in part, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”

# New York v. Quarles

#### United States Supreme Court 467 U.S. 649 (1984)

#### Rule of Law

**There is a public-safety exception to the requirement that *Miranda* warnings be given before a suspect’s statements may be admitted into evidence at trial.**

**Michigan v. Tucker**

94 S.Ct. 2357

Supreme Court of the United States

**State of MICHIGAN, Petitioner,**

**v.**

**Thomas W. TUCKER.**

No. 73—482.

Argued March 20, 1974.Decided June 10, 1974.

**Synopsis**

A state court prisoner's petition for writ of habeas corpus was granted by the United States District Court for the Eastern District of Michigan, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I806d7ac1550b11d9a99c85a9e6023ffa&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[352 F.Supp. 266,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972107225&pubNum=345&originatingDoc=Id8dc64c89c1c11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) and the Court of Appeals for the Sixth Circuit affirmed, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I5db41b81902311d9bc61beebb95be672&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[480 F.2d 927.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1973201166&pubNum=350&originatingDoc=Id8dc64c89c1c11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) On certiorari, the Supreme Court, Mr. Justice Rehnquist, held that where police before interrogating a suspect warned the suspect fully except that they failed to advise that he had a right to free counsel if he could not afford to hire counsel, and where at the time of interrogation it had not yet been held that police were obliged to advise a suspect as to his right to free counsel, and where the statements made by the suspect were not admitted at his trial, the trial transpiring after the Supreme Court had upheld the suspect's right to such advice, recourse to the suspect's statements only by use, at his trial, of a witness discovered as a result of the statements was not violative of the Fifth, Sixth or Fourteenth Amendment.

Reversed.

Mr. Justice Stewart filed a concurring opinion.

Mr. Justice Brennan filed a concurring opinion in which Mr. Justice Marshall joined.

Mr. Justice White filed a concurring opinion.

Mr. Justice Douglas dissented and filed opinion.

# Oregon v. Elstad

#### United States Supreme Court 470 U.S. 298 (1985)

#### Rule of Law

**A suspect can make a statement that is admissible in court after being read his *Miranda* warnings, even when he previously made an unwarned statement, because the initial failure to read a suspect his *Miranda* warnings does not taint later voluntary statements.**

# Marbury v. Madison

#### United States Supreme Court 5 U.S. (1 Cranch) 137 (1803)

#### Rule of Law

**The Supreme Court of the United States has the authority to review laws and legislative acts to determine whether they comply with the United States Constitution.**

#### Facts

U.S. President John Adams appointed several individuals to the judiciary in the final days of his presidency. The group of appointees was duly approved by Congress, and Adams had signed their commissions. However, finalizing the appointments required delivering the commissions to the appointees, and that step had not been completed by the time Adams's term expired. The next president, Thomas Jefferson, refused to fully finalize Adams's judicial appointments and directed his Secretary of State, James Madison (defendant) not to deliver the commissions. William Marbury (plaintiff), who had been appointed a Justice of the Peace of the District of Columbia by Adams, brought an action against Madison in the United States Supreme Court. Marbury sought a writ of mandamus to compel Madison to deliver the commission and finalize Marbury’s appointment. Congress had authorized the Supreme Court to issue writs of mandamus as part of the Judiciary Act of 1789, so Marbury brought his action under the Court's original jurisdiction.

#### Issue

Does the Supreme Court of the United States have the authority to review laws and legislative acts to determine whether they comply with the United States Constitution?

#### Holding and Reasoning (Marshall, C.J.)

Yes. The Supreme Court of the United States has the authority to review laws and legislative acts to determine whether they comply with the United States Constitution. The Constitution clearly limits the powers that may be exercised by each branch of government. The legislative branch must operate within these Constitutionally defined limits in passing laws. The role of the judicial branch is to identify, interpret, and apply the law to decide cases. If there is a conflict between a law passed by Congress and the Constitution, then the Constitution must control, and the offending law will be void. Here, Marbury has a right to his commission as Justice of the Peace because he was lawfully appointed to that position by the president's act of signing his commission, further enforced by his confirmation in the Senate. Madison's refusal to finalize Marbury’s appointment interferes with Marbury’s legal title, and Marbury is entitled to a remedy under federal law. However, even though a writ of mandamus would have been an appropriate remedy, Section 13 of the Judiciary Act of 1789, which authorized the United States Supreme Court to give such a remedy, is unconstitutional. The Act allows the Supreme Court to have original jurisdiction over actions for writs of mandamus. However, this provision directly conflicts with Article III of the Constitution, which greatly limits the cases in which the Supreme Court has original jurisdiction and provides it with appellate jurisdiction in all other cases. The Act is unconstitutional because it seeks to expand the Supreme Court’s original jurisdiction, and therefore, the Court cannot exercise jurisdiction over Marbury’s claim.

**Key Terms:**

**Appellate Jurisdiction** - The authority of a court to review and change decisions made by a lower court.

**Article III of the U.S. Constitution** - Establishes the powers and jurisdiction of the judicial branch of the federal government, comprised of the Supreme Court of the United States and the lower courts created by Congress.

**Judicial Review** - A court’s authority or ability to examine an executive or legislative act or other issues.

**Original Jurisdiction -** The right of a court to hear a case for the first time, rather than on appeal.

**Writ of Mandamus -** A legal directive ordering a public agency, governmental entity, or governmental official to perform an act required by law.

# North Carolina v. Pearce

#### United States Supreme Court 395 U.S. 711 (1969)

#### Rule of Law

**When a criminal defendant is reconvicted of an offense after being granted a new trial, it is unconstitutional to deny credit for time already served and it is unconstitutional for the court to impose a longer sentence in the absence of a finding of conduct subsequent to the original conviction that will justify imposing a longer sentence.**

#### Facts

Pearce (defendant) was convicted of criminal charges in the state courts of North Carolina. Pearce was sentenced to a term of 12 to 15 years in prison. Several years after his conviction, Pearce’s conviction was reversed and he was afforded a new trial. Pearce was reconvicted at the new trial and given an eight-year prison sentence. The state court would not grant credit for time already served. The new sentence, combined with time already served, amounted to a longer prison term than the original sentence. Pearce appealed and the federal district court and court of appeals held that the longer sentence was unconstitutional. The state of North Carolina petitioned the United States Supreme Court for review, and Pearce’s case was consolidated with the case of Rice. Rice pled guilty to criminal charges in the state courts of Alabama and was sentenced to 10 years in prison. Rice was retried after his original convictions were vacated. At the new trial, Rice was convicted again and sentenced to a total of 25 years in prison. Rice was not granted credit for time served. Rice appealed and both the federal district court and court of appeals held that the longer sentence was unconstitutional. The state of Alabama petitioned the United States Supreme Court for review.

#### Issue

When a criminal defendant is reconvicted of an offense after being granted a new trial, is it unconstitutional to deny credit for time already served and for the court to impose a longer sentence in the absence of a finding of conduct subsequent to the original conviction that will justify imposing a longer sentence?

#### Holding and Reasoning (Stewart, J.)

Yes. When a criminal defendant is reconvicted of an offense after being granted a new trial, it is unconstitutional to deny credit for time already served and it is unconstitutional for the court to impose a longer sentence in the absence of a finding of conduct subsequent to the original conviction that will justify imposing a longer sentence. In addition to protecting against prosecution for the same offense after acquittal or conviction, the double jeopardy guarantee of the Fifth Amendment prohibits the imposition of multiple punishments for the same offense. Failure to credit time served against the punishment imposed after retrial violates the Fifth Amendment. By contrast, the double jeopardy guarantee does not foreclose the imposition of a harsher sentence upon retrial. The rationale underlying this doctrine recognizes that the grant of a new trial effectively nullifies both the original conviction and the original sentence. The trial judge has discretion to impose a more severe sentence based upon evidence of the defendant’s conduct subsequent to the original conviction. The state may not impose a stricter punishment for the sole purpose of penalizing a defendant for exercising constitutional rights. The threat of such a penalty would unconstitutionally deter defendants from pursuing their rights to appeal convictions. In order to justify the imposition of a stricter sentence upon retrial, the trial judge must set forth on the record objective information regarding specific conduct of the defendant subsequent to the original conviction. In the two cases before the Court, neither state has offered any evidence justifying the increase in the defendants’ sentences. As such, the judgment of the court of appeals in each case is affirmed.

#### Concurrence (White, J.)

I concur in the opinion but I believe that the trial court should be able to consider any objective evidence not considered at the original conviction as justification for imposing a stricter sentence upon reconviction.

#### Concurrence (Douglas, J.)

When a defendant successfully overturns a conviction for which he has already served the full sentence, the state may not impose an additional sentence upon reconviction. Accordingly, the state may not impose a longer sentence upon reconviction which amounts to an additional sentence on top of the sentence already being served.

#### Concurrence/Dissent (Harlan, J.)

I believe the Court’s decision in *Green v. United States*, 355 U.S. 184 (1957), stands for the proposition that the Double Jeopardy Clause prohibits both the refusal to grant credit for time served and the imposition of a more severe sentence upon reconviction. *Green* held that a defendant convicted of a lesser included offense at trial may only be retried for the lesser offense and may not be subjected to retrial for the more serious offense of which the defendant has already been implicitly acquitted. The same reasoning applies to the imposition of sentence on retrial. In both cases, it has already been determined that the defendant committed a crime of particular severity deserving of a particular punishment. The threat of a potentially harsher sentence will have the same deterrent effect against the exercise of constitutional rights as the denial of credit for time served.

#### Concurrence/Dissent (Black, J.)

The Court has the authority to vacate a sentence upon a factual finding that a stricter sentence has been imposed solely for punitive motives. The Court does not have the authority to dictate the procedures that state courts must follow in order to guarantee the absence of punitive motives.

**Key Terms:**

**Fourteenth Amendment Due Process** **Clause** - The provision set forth at Amendment XIV, Section 1 of the United States Constitution prohibiting states from depriving any person of life, liberty, or property by means that are arbitrary or fundamentally unfair.

**Fifth Amendment** - An amendment added to the U.S. Constitution as part of the Bill of Rights that provides important protections from government actions, including a guarantee that no person will be required to answer for a capital crime unless first indicted by a grand jury; no one will suffer double jeopardy; no one must testify against himself or herself; no one will be deprived of life, liberty, or property without due process of law; and no property will be taken for public use without just compensation.

**Double Jeopardy Clause -** A portion of the Fifth Amendment to the United States Constitution incorporated in the Bill of Rights that prohibits the government from trying a person more than once for the same offense.

# United States v. Goodwin

#### United States Supreme Court 457 U.S. 368 (1982)

#### Rule of Law

**A presumption of vindictiveness does not arise from the addition of new charges after a defendant demands a jury trial.**

#### Facts

Goodwin (defendant) was charged by the United States government (plaintiff) with several misdemeanor and petty offenses after striking a federal park officer with his vehicle and fleeing after a traffic stop. Plea negotiations took place with a Department of Justice attorney, but Goodwin demanded a jury trial in district court. An assistant U.S. attorney took over the prosecution in district court and added a felony charge for assaulting a federal officer. A jury convicted Goodwin of the felony and one misdemeanor count. Goodwin moved to have the verdict set aside due to prosecutorial vindictiveness, alleging that the felony charge had been added as retaliation for Goodwin’s jury-trial demand. The district court denied the motion, finding that the prosecutor had no retaliatory intent. The court of appeals reversed, holding that although there was no actual vindictiveness, there existed a presumption of vindictiveness in the absence of evidence that the felony could not have been brought prior to the jury-trial demand. The United States Supreme Court granted certiorari.

#### Issue

Does a presumption of vindictiveness arise from the addition of new charges after a defendant demands a jury trial?

#### Holding and Reasoning (Stevens, J.)

No. Vindictiveness cannot be presumed simply because charges are added at the pretrial stage after a defendant demands a jury trial. In *North Carolina v. Pearce*, 395 U.S. 711 (1969), this Court held that a trial judge may constitutionally impose a heavier sentence upon retrial of an overturned conviction. However, the new sentence cannot be based on retaliation, and due process requires that the defendant be free from fear of retaliation. Therefore, *Pearce* creates a presumption of vindictiveness by trial judges that can be overcome only by objective information of record justifying the harsher sentence. In *Blackledge v. Perry*, 417 U.S. 21 (1974), this Court held that prosecutors are subject to a presumption of vindictiveness similar to that of trial judges. In *Blackledge*, the defendant was found guilty of a misdemeanor and sentenced to six months in prison. The defendant appealed, and the prosecutor added a felony charge to which the defendant later plead guilty and received a sentence of five to seven years in prison. Even where no actual vindictiveness is found, due process requires that defendants be free from the potential retaliation of a prosecutor wishing to avoid the burden of retrying a convicted defendant. The presumption of vindictiveness does not extend, however, to pretrial plea negotiations during which a prosecutor carries out a threat to add charges against a defendant who refuses to plead guilty to the original charges. *See Bordenkircher v. Hayes*, 434 U.S. 357 (1978). Vindictiveness should not be measured or presumed at the pretrial stage, where charges may be added or dropped for many reasons. In this case, this Court likewise will not adopt a presumption of vindictiveness simply because charges were added after a jury-trial demand. The addition of charges is just as likely the result of a closer review of the case or the discovery of additional information as opposed to retaliation. A prosecutor has broader discretion before trial to develop a case than after trial, when presumably little new information is gained. The distinction between the burden of a prosecutor in presenting a jury trial as compared to a bench trial does not add enough significance to warrant a presumption of vindictiveness. Thus, there is no presumption of vindictiveness for Goodwin’s felony charge. Accordingly, the judgment of the court of appeals is reversed and remanded.

#### Concurrence (Blackmun, J.)

There is no distinction between pretrial and posttrial vindictiveness. In either case, the prosecutor should have to demonstrate that the charges were added based on objective information occurring after the time of the original charges.

#### Dissent (Marshall, J.)

The majority incorrectly finds that there is little distinction between a bench trial and a jury trial in this context. A jury trial involves far more prosecutorial preparation than a bench trial. Therefore, a presumption of vindictiveness should arise when a prosecutor adds charges after a jury-trial demand.

**Key Terms:**

**Right to a Jury Trial -** A constitutional right to a jury trial exists under the Sixth Amendment, in federal and state criminal trials where a defendant faces punishment of greater than six months’ imprisonment, and under the Seventh Amendment, in federal civil cases where a plaintiff seeks money damages.

**Presumption of Vindictiveness -** Protects the due-process rights of the accused by requiring proof of objective reasons for a judge to issue a harsher sentence upon retrial or a prosecutor to add new charges after the accused has exercised his or her appellate rights.

**Chapter 6, Section 6 – When is *Miranda* Violated?**

# \*\*CHAVEZ v. MARTINEZ\*\*

#### United States Supreme Court 538 U.S. 760 (2003)

#### Rule of Law

**(1) The Fifth Amendment is not violated by a coercive interrogation if the suspect's confession is never used in a criminal case.**

**(2) A coercive interrogation may violate substantive due process even if the suspect's confession is never used in a criminal case.**

#### Facts

Oliviero Martinez (plaintiff) was suspected of a crime. During a confrontation with two police officers, Martinez grabbed one of the officer's guns, and the other officer shot Martinez multiple times. The officers arrested Martinez and went with him to the hospital, where Martinez underwent emergency medical treatment. Patrol supervisor Ben Chavez (defendant) came to the hospital as Martinez was being treated and immediately began to interrogate him. Martinez ultimately confessed, thinking he was about to die. None of the officers ever gave *Miranda*warnings to Martinez. Martinez was never charged with a crime. Martinez subsequently brought a civil-rights action under 42 U.S.C. § 1983, claiming that Chavez violated his Fifth Amendment right against self-incrimination and his Fourteenth Amendment right to be free from coercive interrogation. Chavez moved for summary judgment, arguing that because Martinez's confession was never introduced as evidence at a criminal trial, Martinez's constitutional rights were not violated. The district court denied Chavez's motion, and the court of appeals affirmed on interlocutory appeal. Chavez petitioned the United States Supreme Court for review.

#### Issue

(1) Does an officer's coercive interrogation of a suspect violate the suspect's Fifth Amendment privilege against self-incrimination if the suspect's confession is never used in a criminal case?

(2) May a coercive interrogation violate substantive due process if the suspect's confession is never used in a criminal case?

#### Holding and Reasoning (Thomas, J.)

(1) No. The Fifth Amendment is not violated by a coercive interrogation if the suspect's confession is never used against the suspect in court during a criminal trial. The Fifth Amendment, by its terms, protects a person from being compelled to testify against himself in a "criminal case." At the very least, a criminal case requires the initiation of legal proceedings. An interrogation does not constitute a criminal case. Although the right against self-incrimination can now be asserted in non-criminal cases, and witnesses can be compelled to testify with immunity for self-incriminating statements, these developments do not expand the scope of the Fifth Amendment. Here, therefore, Martinez’s Fifth Amendment right against self-incrimination was never violated because his confession was never used against him during a criminal proceeding.

(2) Yes. A coercive interrogation may violate substantive due process even if the suspect's confession is never used in a criminal case. This Court has previously suggested that unauthorized police conduct that "shocks the conscience" may violate the Due Process Clause and form the basis for liability under 42 U.S.C. § 1983. Here, further development of the factual and legal record is required to consider Martinez's substantive-due-process claim. Accordingly, the case is remanded to determine whether the Chavez’s conduct “shocks the conscience”.

#### Concurrence (Souter, J.)

The Court’s decision limits the Fifth Amendment right against self-incrimination to the use of a compelled statement in a courtroom during a criminal trial. However, the scope of the Fifth Amendment should be expanded if it is shown that such an expansion is necessary to protect the core of the amendment in the face of increasingly invasive tactics brought on by contemporary society. However, Martinez cannot make the necessary showing to expand the protection against self-incrimination to civil liability. Most significantly, his request to expand the definition of “criminal case” to the entire investigatory process fails because it would apply to every instance of interrogation that compels a statement inadmissible under the Fifth or Fourteenth Amendments. This would completely change Fifth and Fourteenth Amendment constitutional law.

#### Concurrence/Dissent (Kennedy, J.)

The Self-Incrimination Clause is a substantive constraint on police forces and is not merely an evidentiary rule. Therefore, the Court is wrong when it holds that a Fifth Amendment violation only occurs once a compelled statement is used against a witness at a criminal trial.

#### Concurrence/Dissent (Ginsburg, J.)

The Self-Incrimination Clause applies any time the police use severe compulsion to convince a suspect to make a statement. The Due Process Clause and the Fifth Amendment protect people from all arbitrary government authority, whether it is exercised by the prosecution or the police.

#### Dissent (Thomas, J.)

Martinez did not establish that Chavez's conduct during the interrogation was so egregious or conscience-shocking that it constituted a due-process violation. [**Editor's Note**: Although Justice Thomas wrote the majority opinion regarding the Fifth Amendment issue, his view on the substantive-due-process issue was joined by only two other justices. Accordingly, it was a dissenting view to the Court's holding that the case should be remanded for further development of Martinez's substantive-due-process claim.]

**Key Terms:**

**Fourteenth Amendment Due Process** **Clause** - The provision set forth at Amendment XIV, Section 1 of the United States Constitution prohibiting states from depriving any person of life, liberty, or property by means that are arbitrary or fundamentally unfair.

**Fifth Amendment** - An amendment added to the U.S. Constitution as part of the Bill of Rights that provides important protections from government actions, including a guarantee that no person will be required to answer for a capital crime unless first indicted by a grand jury; no one will suffer double jeopardy; no one must testify against himself or herself; no one will be deprived of life, liberty, or property without due process of law; and no property will be taken for public use without just compensation.

# 42 U.S.C. § 1983 - Federal law that allows individuals to sue state officials for violating their constitutional rights while acting under “color” of state law.

# Miranda v. Arizona

#### United States Supreme Court 384 U.S. 436 (1966)

#### Rule of Law

**Without certain hallmark warnings regarding the right to remain silent and the right to counsel, statements made during custodial interrogation are inadmissible at trial.**

# United States v. Patane

#### United States Supreme Court 542 U.S. 630 (2004)

#### Rule of Law

**Because the introduction of physical evidence at trial does not implicate the Self-Incrimination Clause, suppression of physical evidence found as a result of a suspect’s voluntary but unwarned statements is not required.**

# Dickerson v. United States

#### United States Supreme Court 530 U.S. 428 (2000)

#### Rule of Law

**Congress cannot legislatively supersede a decision by the United States Supreme Court that interprets and applies the Constitution.**

# Oregon v. Elstad

#### United States Supreme Court 470 U.S. 298 (1985)

#### Rule of Law

**A suspect can make a statement that is admissible in court after being read his *Miranda* warnings, even when he previously made an unwarned statement, because the initial failure to read a suspect his *Miranda*warnings does not taint later voluntary statements.**

# New York v. Quarles

#### United States Supreme Court 467 U.S. 649 (1984)

#### Rule of Law

**There is a public-safety exception to the requirement that *Miranda* warnings be given before a suspect’s statements may be admitted into evidence at trial.**

**Withrow v. Williams**

113 S.Ct. 1745

Supreme Court of the United States

**Pamela WITHROW, Petitioner**

**v.**

**Robert Allen WILLIAMS, Jr.**

No. 91–1030.

Argued Nov. 3, 1992.Decided April 21, 1993.Rehearing Denied June 28, 1993.See [509 U.S. 933, 113 S.Ct. 3066](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&pubNum=0000708&cite=113SCT3066&originatingDoc=I82300de09c7e11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

## Synopsis

State inmate petitioned for writ of habeas corpus. The United States District Court for the Eastern District of Michigan, [Barbara K. Hackett](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0179501601&originatingDoc=I82300de09c7e11d9bdd1cfdd544ca3a4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I82300de09c7e11d9bdd1cfdd544ca3a4), J., granted petition, and warden appealed. The Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Idd014ff594c111d9a707f4371c9c34f0&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[944 F.2d 284,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991153204&pubNum=350&originatingDoc=I82300de09c7e11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))affirmed. On warden's petition for certiorari, the Supreme Court of the United States, Justice [Souter](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0263202201&originatingDoc=I82300de09c7e11d9bdd1cfdd544ca3a4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I82300de09c7e11d9bdd1cfdd544ca3a4) held that: (1) [Stone](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1976142452&originatingDoc=I82300de09c7e11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))restrictions on exercise of federal habeas jurisdiction in Fourth Amendment cases did not extend to state prisoner's claim that his conviction rested on statements obtained in violation of Mirandasafeguards, but (2) where state prisoner's federal habeas claim raised only one claim going to admissibility of his statements to police, on ground that police had elicited those statements without satisfying Mirandarequirements, it was error for district court, without evidentiary hearing or argument, to go beyond habeas petition and find statements petitioner made after receiving Mirandawarnings to be involuntary under due process criteria.

Affirmed in part and reversed in part, and remanded.

Justice [O'Connor](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0209675601&originatingDoc=I82300de09c7e11d9bdd1cfdd544ca3a4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I82300de09c7e11d9bdd1cfdd544ca3a4) filed opinion concurring in part and dissenting in part in which Chief Justice [Rehnquist](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0238463201&originatingDoc=I82300de09c7e11d9bdd1cfdd544ca3a4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I82300de09c7e11d9bdd1cfdd544ca3a4) joined.

Justice [Scalia](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254763301&originatingDoc=I82300de09c7e11d9bdd1cfdd544ca3a4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I82300de09c7e11d9bdd1cfdd544ca3a4) filed opinion concurring in part and dissenting in part in which Justice Thomas joined.

**Procedural Posture(s):** On Appeal.

**County of Sacramento v. Lewis**

United States Supreme Court  
523 U.S. 833 (1998)

**Rule of Law**

**A specific action by a state official violates substantive due process under the Fourteenth Amendment when it is deliberate and thus constitutes “arbitrary conduct shocking to the conscience” and violates the “decencies of civilized conduct.”**

**Facts**

James Everett Smith, a Sacramento County sheriff’s deputy, and another officer, Murray Stapp, responded to a call to break up a fight. Upon returning to their patrol car, Stapp saw a motorcycle approaching at a very high speed which was operated by Brian Willard, age 18, and carried Philip Lewis, age 16. Willard sped off and Smith pursued at speeds in excess of one hundred miles per hour. The chase ended when the motorcycle tipped over, causing Smith to strike and kill Lewis who could not get out of the way. Lewis’ parents (plaintiffs) brought suit in district court alleging Smith and the County of Sacramento Police Department (defendants) violated Lewis’ substantive due process right to life under the Fourteenth Amendment. The district court denied Lewis’ request for relief. The court of appeals reversed, and the United States Supreme Court granted certiorari.

**Issue**

Whether a police officer violates the Fourteenth Amendment’s guarantee of substantive due process by causing death through deliberate or reckless indifference to life in a high-speed automobile chase aimed at apprehending a suspected offender.

**Holding and Reasoning (Souter, J.)**

No. The core concept involved in the right to substantive due process is the protection against arbitrary action by the government. However, the criteria used to identify what action is fatally arbitrary differs depending on whether the arbitrary act originates from legislation or a specific act of a governmental officer. For specific acts by a governmental officer, only the most egregious official conduct can be said to be arbitrary in the constitutional sense. Basic tort liability for negligence is not sufficient to meet this standard. Rather, state officials’ conduct has to be “deliberate” to justify Fourteenth Amendment liability. Police officials such as Smith frequently face situations on the job that require prompt action. A decision to engage in the high-speed chase of a fleeing suspect is an instance that involves a hurried and pressured decision without the luxury of a second chance. Thus Smith should not be held liable for a non-deliberate choice made in the heat of the moment. When a police officer causes death in a high-speed automobile chase aimed at apprehending a suspected offender, the element of “arbitrary conduct shocking to the conscience” that is necessary for a substantive due process violation only exists if the police officer acted with a purpose to cause harm unrelated to the legitimate object of arrest. The decision of the court of appeals is affirmed.

**Concurrence (Stevens, J.)**

The majority should have declined to resolve the difficult constitutional questions presented in the case. The §1983 claims at issue can be sufficiently resolved by a finding that Smith is entitled to qualified immunity due to his official position.

**Concurrence (Rehnquist, C.J.)**

The majority is correct to apply the “shocks the conscience” standard in determining whether official conduct violates substantive due process. This high standard was not met in the present case.

**Concurrence (Kennedy, J.)**

While the majority’s “shocks the conscience” standard implicates significant subjective connotations, the standard is useful as a starting point for courts to examine objectively whether state action is consistent with the traditions, precedents, and historical understanding of the Constitution. These traditions recognize the need for police officers to employ significant discretion in making quick judgments in pursuing suspects.

**Concurrence (Breyer, J.)**

Lower courts should have the flexibility to decide such cases on the basis of qualified immunity and thus avoid wrestling with difficult constitutional questions poorly presented.

**Concurrence (Scalia, J.)**

The majority’s holding is correct, but the majority’s reasoning departs significantly from its prior treatment of substantive due process issues. In *Washington v. Glucksberg*, 521 U.S. 702 (1997), the Court declined to recognize a right as fundamental unless founded in history and tradition. Here, the majority adopts a broad view of the nature of substantive due process rights and articulates a standard that invalidates any state action shocking the conscience, regardless of the nature of the right at stake. A state action is invalid only if the action unduly burdens a fundamental right rooted in history and tradition. No such right is asserted by Lewis in the present case.

**Key Terms:**

**Substantive Due Process -** Provides that the government may not deprive a person of certain fundamental liberties.

# Mincey v. Arizona

#### United States Supreme Court 437 U.S. 385 (1978)

#### Rule of Law

**The fact that a homicide has occurred does not justify making an exception to the rule that police must obtain a warrant prior to searching a suspect’s home.**

#### Facts

Police officer Barry Headricks, working undercover, arranged to purchase heroin from Mincey (plaintiff). Officer Headricks and other officers later went to Mincey’s home where Officer Headricks was shot and killed. Shortly after Officer Headricks was shot, other officers arrived and began investigating and searching for evidence. Over four days, Mincey’s home was thoroughly searched, although a warrant was never obtained. Mincey made a pretrial motion to suppress the fruits of the four-day warrantless search of his home, but the court denied that motion. The trial court convicted Mincey of murder, assault, and drug charges despite his claim that evidence used against him at trial was unlawfully seized. Mincey appealed and the Arizona Supreme Court upheld its previous rulings that there is an exception to the warrant requirement when searching the scene of a homicide. Mincey’s appeal was denied. The Supreme Court granted certiorari.

#### Issue

Where a homicide occurs, may police search the scene of the crime without first obtaining a warrant?

#### Holding and Reasoning (Stewart, J.)

No. The Fourth Amendment protects individuals against unreasonable searches and seizures. In *Katz v. United States*, 389 U.S. 347, 357 (1967), the Court held that a search conducted without first obtaining a warrant is per se unreasonable unless it falls into one of the exceptions to the warrant requirements. In Mincey’s case, the Arizona Supreme Court has made an exception to the warrant requirement that allows police officers to search the scene of a homicide without first obtaining a warrant. This exception should not stand. First, Arizona argues that Mincey gave up any reasonable expectation of privacy in his apartment when he shot Officer Headricks and that the search of Mincey’s apartment did not violate his right to privacy. This argument unfairly assumes Mincey is guilty before his trial. Second, Arizona argues that the possibility of a homicide is an emergency that requires officers to react immediately. While it is true that officers may search the area without a warrant for people who need aid or other victims, the four-day search of Mincey’s apartment went far beyond what could be justified as an emergency search. Third, Arizona argues that the public’s interest in the quick investigation of a homicide justifies this exception. If we followed this line of reasoning, we would have to make an exception to every serious crime. Furthermore, the protections of the Fourth Amendment must not be set aside simply because it would make investigating a crime more convenient. We therefore hold that a warrant is required to search a person or his home unless there are exigent circumstances. There were no exigent circumstances in Mincey’s case and a warrant could have easily been obtained. The fact a homicide was committed at Mincey’s apartment does not create an exigent circumstance that would negate the warrant requirement. The search of Mincey’s apartment without a warrant was unconstitutional. Arizona’s creation of an exception to the warrant requirement where police are searching the scene of a homicide is also unconstitutional. The judgment of the Arizona Supreme Court is reversed.

**Chapter 6, Section 7 – *Massiah* Revisited**

# \*\*BREWER v. WILLIAMS\*\*

#### United States Supreme Court 430 U.S. 387 (1977)

#### Rule of Law

**A defendant has not effectively waived his right to counsel if, at the advice of counsel, he continues to invoke his right to remain silent until he has the opportunity to confer with his attorney but then makes a statement after being subject to police interrogation.**

#### Facts

Williams (defendant) had escaped from a mental institution and was suspected of kidnapping a young girl from a YMCA in Des Moines. The Des Moines police issued a warrant for his arrest. Two days after the abduction, and after consulting with a Des Moines attorney who advised him not to talk to the police, Williams turned himself in to the Davenport police where he was arrested pursuant to the outstanding warrant. Williams’ attorney in Des Moines arranged for two officers to go pick Williams up in Davenport, and they agreed not to question Williams during the 160 mile trip back to Des Moines. Williams was arraigned in Davenport and he was able to consult with a Davenport attorney who advised him not to say anything until he arrived back in Des Moines and could talk with his attorney there. Before putting him in the police car for the ride back to Des Moines, the attorney in Davenport again reiterated to the police that they were not to question Williams during the trip. Once in the car, Williams told the police that he would tell them everything that happened once they got back to Des Moines and he could talk with his lawyer. However, one of the officers then delivered the “Christian burial speech.” The officer told Williams that he was not asking him any questions, but he just wanted Williams to think about something on the ride back to Des Moines. He wanted Williams to think about how bad the weather was outside, that it was going to snow, that the snow would cover the girl’s body, and the police may never be able to recover it and give her the chance at a proper Christian burial. The officer knew that Williams had escaped from a mental institution and also that he was very religious. The officer also testified that his statement was intended to get information from Williams. A few hours into the trip, Williams eventually told the police to stop and showed them where the body was hidden. Williams was indicted for first-degree murder. The trial judge denied Williams’ motion to suppress all evidence resulting from his statements made in the police car, holding that the officer’s “Christian burial speech” amounted to interrogation but that Williams had waived his right to have an attorney present when he began speaking to the police in the car. Applying the totality of the circumstances test to hold that Williams had waived his right to counsel, the state supreme court affirmed. The federal district court granted a petition for a writ of habeas corpus holding that as a matter of law the evidence resulting from Williams’ statements made in the car were wrongly admitted at trial. The court of appeals affirmed, holding that the state failed to establish that Williams intentionally waived his right to have counsel present.

#### Issue

Has a defendant effectively waived his right to counsel if, at the advice of counsel, he continues to invoke his right to remain silent until he has the opportunity to confer with his attorney but then makes a statement after being subject to police interrogation?

#### Holding and Reasoning (Stewart, J.)

No. An effective waiver requires actual relinquishment of a right. If a defendant consistently relies on the advice of counsel in dealing with the police, any suggestion that he waived his right to counsel is refuted. Under the Sixth and Fourteenth Amendments, a person has a right to counsel at or after the time that judicial proceedings have been initiated against him. Furthermore, the police may not interrogate a suspect alone after he has invoked his right to counsel. In this case, judicial proceedings had been initiated against Williams at the time of his car trip back to Des Moines. The officer’s “Christian burial speech” amounted to interrogation because the officer himself testified to the fact that his statements were intended to elicit information from Williams. Williams invoked his right to counsel throughout his ordeal. He contacted his attorney before turning himself in, he continued to employ the advice of counsel by remaining silent, and he even told the police he would tell them everything but only after he consulted with his attorney. Despite this, the officer elicited incriminating statements from Williams without first reading him his *Miranda* rights or ascertaining whether Williams wished to waive his right to counsel. Under such facts, no effective waiver took place. Accordingly, the judgment of the federal court of appeals is affirmed.

#### Concurrence (Stevens, J.)

A lawyer often acts as the middleman between the state and an individual. Therefore, a suspect should be able to rely on his lawyer’s advice. In this case, Williams was not able to because the police broke their word to Williams’ attorney that Williams would not be questioned.

#### Concurrence (Marshall, J.)

The officer intentionally and deliberately denied Williams his constitutional right to an attorney. The dissent condemns the Court’s opinion today and applauds the officer’s conduct as good police work. However, good police work does not involve catching a criminal at any cost but demands strict compliance with the law, no matter how heinous the crime may be.

#### Concurrence (Powell, J.)

The dissent is wrong when it criticizes the majority for holding that a defendant is not able to change his mind and choose to talk to the police. However, in this case, the state produced no affirmative evidence that Williams knowingly and intelligently waived his right to counsel.

#### Dissent (Blackmun, J.)

The Court improperly found that the officer deliberately tried to isolate Williams from his counsel to learn incriminating information from him. Williams was separated from his lawyer as a necessary part of being transported to the county where the crime occurred. Additionally, the officer was not attempting solely to learn incriminating information from Williams. At that point, it was not clear that the girl was dead, and the officer was trying to gain information in hopes of finding her. Moreover, not every attempt to learn information is an interrogation, and the officer's statements and comments during the ride here did not amount to an interrogation. If there is no interrogation, a defendant's truly voluntary statements should be admitted. This matter should be remanded for further consideration of the voluntariness of Williams's statements.

#### Dissent (Burger, C.J.)

The Court’s holding suggests that once a suspect has exercised his right to remain silent and his right to a lawyer, he is not able to later waive these rights. In this case, Williams made a valid waiver of his constitutional rights when he showed the police where the body was. He knew he had the right to counsel and that he could remain silent. The Court never even questions Williams’ mental competence. The only reasonable conclusion is that Williams knew that telling the police where the body was would have further legal consequences for himself but chose to talk to them anyway. The Court’s opinion punishes society instead of punishing the police who actually make the mistake.

#### Dissent (White, J.)

Williams’ statement, and the resulting evidence obtained, should be admissible at trial. Williams knew of his right to remain silent and he intentionally relinquished that right. He had been told a number of times that he did not need to speak and demonstrated his understanding when he told the police in the car that he would tell them what happened once he saw his lawyer. He intentionally relinquished his right because the officer’s “Christian burial speech” was not coercive; the officer even told Williams he did not need to respond. Furthermore, the police’s statement was made hours before Williams actually took them to the body. In addition, the Court applies the holding in *Massiah v. United States*, 377 U.S. 201 (1964). According to the Court’s opinion, *Massiah* offers suspects a slightly different right than that set forth in *Miranda v. Arizona*, 384 U.S. 486 (1966). According to the Court, *Massiah* holds that the right of an individual is the right not to be asked any questions without the presence of counsel, rather than a right not to answer any questions without counsel present. Such a thin distinction should not lead to such disparate results.

**Key Terms:**

**Miranda Warnings** - The notices of constitutional rights set forth in the opinion of the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436(1966) that law enforcement authorities must provide to a suspect in a criminal investigation prior to initiation of a custodial interrogation. The suspect must be advised that the suspect has the right to remain silent, anything the suspect says may be used against the suspect, and the suspect has the right to an attorney.

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

# Miranda v. Arizona

#### United States Supreme Court 384 U.S. 436 (1966)

#### Rule of Law

**Without certain hallmark warnings regarding the right to remain silent and the right to counsel, statements made during custodial interrogation are inadmissible at trial.**

# Texas v. Cobb

#### United States Supreme Court 532 U.S. 162 (2001)

#### Rule of Law

**A criminal defendant's Sixth Amendment right to counsel is offense-specific and does not attach to the investigation of unrelated offenses arising from the same set of facts that led to the original charge.**

#### Facts

Raymond Cobb (defendant) was suspected of burglarizing a home shared by Lindsey Owings, Margaret Owings, and the Owings's 16-month-old daughter. Margaret and the daughter were reported missing after the burglary. While Cobb was in custody on suspicion of unrelated crimes, Cobb confessed to the burglary but claimed to have no knowledge about the disappearances. Cobb was indicted for burglary, and a lawyer was appointed to represent Cobb on the burglary charge. After Cobb was released on bond, police received a call from Cobb’s father informing them that Cobb had confessed to killing Margaret Owings during the burglary. Police took Cobb into custody and administered *Miranda* warnings. Cobb waived his rights under *Miranda* and confessed to murdering Margaret Owings and her daughter. Cobb was convicted of capital murder. The appellate court reversed Cobb's conviction, finding that Cobb had invoked his Sixth Amendment right to counsel when he was taken into custody on the burglary charge and concluding that the right attached to any subsequent charges bearing a close factual relationship to the burglary. The appellate court thus ruled that Cobb's confession was inadmissible. The State of Texas (plaintiff) petitioned the United States Supreme Court for review, and the Court granted certiorari.

#### Issue

Does a criminal defendant's Sixth Amendment right to counsel attach to the investigation of unrelated offenses arising from the same set of facts that led to the original charge?

#### Holding and Reasoning (Rehnquist, C.J.)

No. A criminal defendant's Sixth Amendment right to counsel is offense-specific and does not attach to the investigation of unrelated offenses arising from the same set of facts that led to the original charge. In *McNeil v. Wisconsin*, 501 U.S. 171 (1991), this Court held that the right to counsel arises after a formal charge and does not attach to uncharged offenses. Some jurisdictions have interpreted *McNeil* in conjunction with two prior cases, *Brewer v. Williams*, 430 U.S. 387 (1977), and *Maine v. Moulton*, 474 U.S. 159 (1985), to mean that the right attaches to any charges bearing a factual relationship to the original offense. However, that interpretation is incorrect. In *Brewer*, a suspect was transported to another jurisdiction after arraignment on an abduction charge. During the transport, police interrogated the suspect and persuaded him to lead them to the victim's body, and the suspect was eventually convicted of the victim's murder. The *Brewer*Court held that the interrogation during transport violated the suspect's Sixth Amendment right to counsel, but the Court's opinion did not address the significance of the fact that the suspect had only been arraigned on the abduction charge at the time of the interrogation. Constitutional principles may not be inferred from an opinion if those principles are not actually considered. Furthermore, the *Moulton* decision explicitly addressed the offense-specific nature of the Sixth Amendment right to counsel. There is no basis to conclude that restricting the Sixth Amendment right to individual offenses will afford police free reign to interrogate suspects without representation. *Miranda* requires that before a custodial interrogation, suspects must be advised of their right against compulsory self-incrimination and the right to consult with a lawyer. Moreover, the state and the public have an interest in law enforcement interviewing suspects, even if a suspect has been charged with other offenses. Nothing in the Constitution impedes that interest. In *Blockburger v. United States*, 284 U.S. 299 (1932), this Court explained that if the same set of facts supports multiple charges without proof of any additional facts, the charges are considered to arise from the same offense. The *Blockburger*test has been used to define the scope of the Double Jeopardy Clause, and the same test should be applied to define the scope of the Sixth Amendment right to counsel. In this case, Cobb had been indicted for burglary when he confessed to the murders. He had not been charged with the murders, so no right to counsel arose. Under Texas law, burglary and murder require proof of different facts and are two distinct offenses under the *Blockburger* test. Cobb’s invocation of his right to counsel for the burglary charge did not render interrogation about the murders a violation of the Sixth Amendment. Thus, Cobb’s confession was admissible, and the conviction is affirmed.

#### Concurrence (Kennedy, J.)

The Sixth Amendment right to counsel is distinct from the Fifth Amendment rights embraced in *Miranda v. Arizona*, 384 U.S. 436 (1966). The right to counsel arises after commencement of formal criminal proceedings. *Miranda* rights apply after taking a suspect into custody and before formal proceedings. Thus, the right to counsel is independent of the right to remain silent. The dissent would presume that suspects wish to remain silent even when the evidence does not support that. A defendant may want counsel for guidance through legal proceedings while still desiring to tell his story. The dissent would effectively prohibit a defendant from making such a choice of his own volition.

#### Dissent (Breyer, J.)

The Sixth Amendment right to counsel arises when the adversarial process begins. The right is one of the most fundamental safeguards of fairness in criminal procedure. Even if a suspect has waived his Fifth Amendment rights, law enforcement is generally required to communicate through a defendant’s lawyer once the right to counsel is triggered. The majority’s definition of “offense” would require police to ascertain whether an interrogation will uncover proof of some fact that is not an element of an offense already charged or risk engaging in an impermissible interrogation pertaining to the same offense for which the defendant has already invoked the right to counsel. The Court's holding undermines the Sixth Amendment by opening the door for interrogations without representation so long as the interrogation is tailored to elicit information related to additional offenses arising from the same circumstances but requiring proof of some different fact. A defendant might renew his Fifth Amendment rights, but the majority places the unsophisticated defendant in the position of having to make a critical legal decision without a lawyer after asking for one. Additionally, distinguishing between separate offenses under the *Blockburger* test is an exercise that challenges judges and attorneys. To place that burden on officers invites a host of legal challenges. A more common-sense approach would find that the right to counsel, once invoked, should cover all offenses factually related to the charged crime. Most jurisdictions have embraced this approach and employ tests of time, location, and factual distinction to identify unrelated offenses. In this case, the burglary and murders occurred in the same location in the same time period. The police believed Cobb’s representation in the burglary extended to the murders and asked his lawyer’s permission to interrogate him about the murders. It would be impossible to avoid information relevant to the burglary during an interrogation about the murders. The police should not have interrogated Cobb without counsel. The decision of the appellate court should be upheld.

**Key Terms:**

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

# Kirby v. Illinois

#### United States Supreme Court 406 U.S. 682 (1972)

#### Rule of Law

**Under the Sixth Amendment, police may conduct an identification outside the presence of counsel before a suspect has been formally charged with a crime.**

#### Facts

Kirby and Bean (defendants) were arrested for robbing Willie Shard. After the arrest, police brought Shard to the station for a showup identification. Shard identified the defendants as the robbers. Kirby and Bean had not been told that they had a right to an attorney or requested counsel. Kirby and Bean made a pretrial motion to suppress Shard’s testimony. The trial court denied the motion. Shard testified about the original identification and identified Kirby and Bean in court as the perpetrators. Kirby and Bean were convicted by a jury, and Kirby’s conviction was upheld on appeal. The United States Supreme Court granted certiorari.

#### Issue

Under the Sixth Amendment, may police conduct an identification outside the presence of counsel before a suspect has been charged?

#### Holding and Reasoning (Stewart, J.)

Yes. Police may conduct a lineup without an attorney present if the suspect has not yet been indicted or formally charged with a crime. Under *United States v. Wade*, 388 U.S. 218 (1967), and *Gilbert v. California*, 388 U.S. 263 (1967), a lineup conducted after arraignment is a “critical stage of the prosecution,” which requires notification and/or the presence of the defendant’s attorney under the Sixth Amendment. If this right is denied, identification testimony and in-court identifications must be excluded at trial. Nevertheless, the Sixth Amendment right to counsel does not attach until criminal prosecution has formally begun, signified by an arraignment or other judicial hearing. This marks the official beginning of the adversarial process and the activation of the Sixth Amendment. The Court will not extend the amendment’s protections to events that occur before the initiation of formal proceedings. Abuses that occur during pre-arraignment identifications will be evaluated under the Due Process Clause of the Fifth and Fourteenth Amendments. Thus, the ruling of the lower court is affirmed.

#### Concurrence (Powell, J.)

The *Wade-Gilbert* rule should not be extended.

#### Dissent (Brennan, J.)

In order to determine whether a defendant has a right to counsel at any given stage of a criminal investigation, the Court must determine whether the defendant’s rights to a fair trial and to confront any witnesses against him will be protected without an attorney present. A defendant can rebut fingerprint or blood sample evidence by cross-examining government witnesses or presenting his own expert. In contrast, it is all but impossible for a defendant to question the validity of an identification procedure if no attorney was present. There is a high risk that a witness may be influenced by police during identification procedures, and that is the reason that the Court in *Wade* held that the presence of counsel is required at post-arraignment lineups. Contrary to the Court’s formalistic argument, criminal prosecutions begin at arrest. The lineup in this case was particularly suggestive and likely to mislead the witness. The underlying rationale of the *Wade*ruling is just as valid with respect to pre-arraignment identifications.

#### Dissent (White, J.)

Under *Wade* and *Gilbert*, the ruling of the lower court should be overturned.

**Key Terms:**

**Sixth Amendment Right to Counsel** - Right of a person accused of a crime to have the help of an attorney throughout any criminal prosecution.

# Massiah v. United States

#### United States Supreme Court 377 U.S. 201 (1964)

#### Rule of Law

**A person who has been indicted on criminal charges has as much a constitutional right to have an attorney present during police interrogations as he does during the trial itself.**

# Johnson v. Zerbst

#### United States Supreme Court 304 U.S. 458 (1938)

#### Rule of Law

**The Sixth Amendment guarantees the right of a criminal defendant to a lawyer's assistance, unless the defendant knowingly and intelligently waives that right.**

#### Facts

The federal government prosecuted Johnson (plaintiff) for counterfeiting. Trial in the United States District Court for the Eastern District of South Carolina commenced after Johnson told the judge he was willing to proceed without a lawyer. Johnson was convicted and sent to prison, where he was deprived of legal representation to help in filing an appeal; consequently, he missed the appeal deadline. Johnson then petitioned the district court to issue a writ of habeas corpus to Zerbst (defendant), the prison warden, on the grounds Johnson was tried without the assistance of counsel guaranteed him by the Sixth Amendment to the United States Constitution. The district court did not determine whether Johnson waived his right to counsel. The court dismissed Johnson's petition, ruling that Johnson's failure to file a timely appeal, whether from ignorance or negligence, was insufficient to give the court habeas corpus jurisdiction to reopen Johnson's case. Johnson appealed to the United States Court of Appeals for the Fifth Circuit, which affirmed the district court's ruling. The United States Supreme Court granted certiorari to hear Johnson's appeal.

#### Issue

Does the Sixth Amendment guarantee the right of a criminal defendant to a lawyer's assistance, unless the defendant knowingly and intelligently waives that right?

#### Holding and Reasoning (Black, J.)

Yes. The Sixth Amendment guarantees the right of a criminal defendant to a lawyer's assistance, unless the defendant knowingly and intelligently waives that right. The Sixth Amendment recognizes that a lay defendant may lack the professional skills needed to conduct an effective legal defense. Without a lawyer to represent the defendant, the court loses its jurisdiction to try the defendant, unless the defendant waives representation. It is up to the trial judge to determine whether the defendant's waiver is knowing and intelligent, given all the facts and circumstances surrounding the case, including the defendant's background, experience, and conduct. On appeal, if the trial record does not show that the trial judge made this determination, the appellate court itself must hear evidence as to whether the defendant's waiver of counsel was competent. Here, Johnson should have challenged his conviction by filing a timely appeal. Having missed the filing deadline, Johnson petitioned for habeas corpus. Ordinarily, habeas corpus is an inappropriate procedure for challenging a trial court's errors. However, if Johnson had no lawyer and did not waive his right to counsel, the trial court had no jurisdiction to try him. If Johnson's failure to file a timely appeal was due to his lack of access to a lawyer, then habeas corpus proceedings are the only remaining and effective way to protect Johnson's Sixth Amendment right. Under these circumstances, the district court erred in ruling it had no habeas corpus jurisdiction. The court of appeals judgment affirming that ruling is reversed. The case is remanded for the district court to determine, from the trial record or its own inquiry, whether Johnson knowingly and intelligently waived his right to counsel.

#### Dissent (Butler, J.)

The record shows that Johnson waived his right to counsel. Therefore, the trial court had jurisdiction to try Johnson, and the court of appeals judgment upholding the district court's dismissal of Johnson's petition for a writ of habeas corpus should be affirmed.

#### Dissent (McReynolds, J.)

The court of appeals ruling upholding the district court's dismissal of Johnson's petition for a writ of habeas corpus should be affirmed.

**Key Terms:**

**Sixth Amendment Right to Counsel** - Right of a person accused of a crime to have the help of an attorney throughout any criminal prosecution.

**Remand** - Returning a case back to the previous court, such as the trial court or the state court, for some additional action.

# Nix v. Williams

#### United States Supreme Court 467 U.S. 431 (1984)

#### Rule of Law

**Evidence obtained in violation of the Sixth Amendment may be admitted if police would have inevitably discovered it.**

# Stone v. Powell

#### United States Supreme Court 428 U.S. 465 (1976)

#### Rule of Law

**Federal district courts should not hear habeas corpus petitions based on claims that illegally obtained evidence was admitted at trial if there has been a full and fair review at the state level.**

#### Facts

Powell and others (defendants) were convicted in state court. On appeal, the convictions were affirmed. The defendants all claimed that their convictions were based on illegally obtained evidence and petitioned for writs of habeas corpus on that ground. The United States Supreme Court granted certiorari.

#### Issue

Should federal district courts hear habeas corpus petitions based on claims that illegally obtained evidence was admitted at trial if there has been a full and fair review at the state level?

#### Holding and Reasoning (Powell, J.)

No. Under *Brown v. Allen*, 344 U.S. 443 (1953), prisoners have a right to full reconsideration of all constitutional claims raised by habeas corpus petition even if those claims were fully reviewed by the state court. The Court did not limit the types of cases entitled to review. Nevertheless, before *Kaufman v. United States*, 394 U.S. 217 (1969), federal courts generally held that prisoners were not entitled to collateral review of illegal search-and-seizure claims. The different treatment of Fourth Amendment violations was justified on the grounds that exclusion of illegally obtained evidence served only as a deterrent of future constitutional violations, whereas Fifth And Sixth Amendment violations “impugn the integrity of the fact-finding process.” *Kaufman* extended federal review to search and seizure claims in order to give effect to the Fourth Amendment. That decision is now overruled, and habeas corpus relief is unavailable to prisoners who have had full adjudication of such claims at the state level. The Fourth Amendment protects the sanctity of the person, the home, and property. Courts created the exclusionary rule to give meaning to the Fourth Amendment’s protections. *Mapp v. Ohio*, 367 U.S. 643 (1961), applied the exclusionary rule to the states primarily on the basis of deterring police misconduct. Pure judicial integrity would forbid introduction of illegal evidence to a grand jury or to impeach the defendant, but judicial integrity must be balanced against the cost of excluding probative evidence. Exclusion serves principally as a deterrent of police misconduct and is not an individual right or remedy for privacy violations. The exclusionary rule deters police misconduct at a high cost. Probative evidence is excluded and guilty people go free. The deterrent effect is significantly reduced at the collateral review stage and does not justify the costs. The purposes of the rule are served by the possibility of exclusion at trial and direct appeal. Thus, where a prisoner’s search and seizure claims have been fully reviewed by the state court, habeas corpus relief may not be granted on those grounds. This decision does not limit federal courts’ jurisdiction over Fourth Amendment claims.

#### Dissent (Brennan, J.)

The Court’s ruling erodes the exclusionary rule and federal habeas corpus jurisdiction without providing any legal foundation for doing so. The Court applies a balancing test to invalidate the previously held “view” that safeguarding the protections of the Fourth Amendment requires granting habeas corpus relief when a prisoner’s conviction is based on illegally obtained evidence. This goes against habeas statutes, the weight of case law, and the acts of Congress. The Court does not even purport to overrule the numerous precedents that are completely contrary to this decision. *Mapp* requires state courts to exclude evidence obtained in violation of the Fourth Amendment. A person convicted on the basis of such evidence is unconstitutionally detained. There is no logical basis for arbitrarily determining that unconstitutional detention is no longer unconstitutional on collateral attack. There is no foundation for the claim that an individual has no right to have illegally obtained evidence excluded. There are no additional “costs” created by extending the exclusionary rule to federal habeas review because the state court should have excluded the evidence at trial or appeal. Disallowing habeas corpus relief rewards states for such misconduct. The Court completely restructures the habeas statutes set out by Congress and revises the history of habeas jurisdiction. The Court claims these determinations are unrelated to the justice of the defendant’s detention and that the federal courts have not placed sufficient trust in the fully competent state courts and judges. This ruling endangers habeas jurisdiction and the body of case law regarding unconstitutional detention. *Brown* guarantees a right to reconsideration of constitutional claims under federal habeas corpus jurisdiction. The Court now attempts to create a hierarchy of rights that does not exist in the Constitution and forbids review for violations of disfavored rights. A paradigm shift of this nature should be left to Congress, and yet the Court provides no sufficient reason for turning its back on its own precedent.

# United States v. Janis

#### United States Supreme Court 428 U.S. 433 (1976)

#### Rule of Law

**The Fourth Amendment may serve as the basis for excluding from a federal criminal trial evidence seized by a federal officer in violation of the Amendment.**

#### Facts

Los Angeles police officers searched an apartment pursuant to a warrant. Based on the search, the officers arrested the occupants (plaintiffs) for conducting a bookmaking operation. After seizing the occupants’ bookmaking records, the officers turned the information over to the Internal Revenue Service (IRS). Relying on these records, the IRS assessed the occupants’ back taxes. A judge ruled that the police search of the apartment was illegal due to defects in the warrant. The occupants took the position that the United States’ (defendant) IRS claim should be dismissed because the evidence upon which it was based had been obtained illegally. The case came before the United States Supreme Court.

#### Issue

Is evidence seized by a state criminal law enforcement officer admissible in a civil proceeding by or against the United States where the officer seized the evidence in good faith, but in a manner that was nonetheless unconstitutional?

#### Holding and Reasoning (Blackmun, J.)

Yes. The Fourth Amendment may serve as the basis for excluding from a federal criminal trial evidence seized by a federal officer in violation of the Amendment. The main purpose of this rule is to deter future police misconduct. To determine whether the exclusionary rule applies to other judicial proceedings, courts balance the possible deterrent effect of an extension of the exclusionary rule against the social costs of not applying the rule in such proceedings. Here, the exclusion from federal civil proceedings of evidence unlawfully seized by a state criminal law enforcement officer does not have a sufficient likelihood of deterring future misconduct by the state police to outweigh the societal costs that exclusion of the evidence would impose. Accordingly, the Court may not extend the exclusionary rule to the federal civil proceedings at issue in this case.

#### Dissent (Brennan, J.)

The exclusionary rule is a necessary and inherent component of the protections extended by the Fourth Amendment.

#### Dissent (Stewart, J.)

Allowing the unconstitutionally seized evidence in this case to be used in the IRS proceedings frustrates the deterrent purpose of the exclusionary rule.

**Key Terms:**

**4th Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Exclusionary Rule** - A rule that excludes or suppresses evidence in a criminal proceeding where that evidence was obtained in violation of an individual’s constitutional rights.

**United States v. Calendra**

94 S.Ct. 613

Supreme Court of the **United** **States**

**UNITED STATES, Petitioner,**

**v.**

**John P. CALANDRA.**

No. 72—734.

Argued Oct. 11, 1973.Decided Jan. 8. 1974.

**Synopsis**

Proceeding, ancillary to a grand jury investigation, seeking suppression of certain evidence seized from a witness' place of business. The **United** **States** District Court for the Northern District of [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I1596811a550611d997e0acd5cbb90d3f&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=77a95fd16130415abaa69d7da1c3fe10&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[Ohio, 332 F.Supp. 737,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971106784&pubNum=345&originatingDoc=Id4cfe7d79c1d11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))granted the motion, and an appeal was noted. Motion to dismiss the appeal was denied, [455 F.2d 750,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972108424&pubNum=350&originatingDoc=Id4cfe7d79c1d11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and the Court of Appeals affirmed, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I1fb23d678ff311d98e8fb00d6c6a02dd&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=77a95fd16130415abaa69d7da1c3fe10&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[465 F.2d 1218.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972111764&pubNum=350&originatingDoc=Id4cfe7d79c1d11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) Petition for certiorari was granted. The Supreme Court, Mr. Justice Powell, held that a witness summoned to appear and testify before the grand jury may not refuse to answer questions on the ground that they are based on evidence obtained from unlawful search and seizure.

Reversed.

Mr. Justice Brennan dissented and filed opinion in which Mr. Justice Douglas and Mr. Justice Marshall joined.

**Procedural Posture(s):** On Appeal; Motion to Dismiss.

# Faretta v. California

#### United States Supreme Court 422 U.S. 806 (1975)

#### Rule of Law

**The right to defend is personal and defendants have the constitutional right to represent themselves at trial if they so choose.**

#### Facts

Faretta (defendant) was charged with grand theft in state court. Faretta had a high school education and requested that he be able to represent himself at trial. Initially, the trial judge, after warning Faretta of the dangers of representing himself, allowed Faretta to do so. However, at a hearing the judge later decided that Faretta did not have sufficient legal knowledge to represent himself. The judge then ruled that Faretta had not knowingly and intelligently waived his right to counsel and appointed him a public defender. The jury found Faretta guilty, and the judge sentenced him to prison.

#### Issue

Does a defendant in a state criminal proceeding have the constitutional right to reject the assistance of counsel and represent himself at trial?

#### Holding and Reasoning (Stewart, J.)

Yes. Defendants have the constitutional right to represent themselves at trial. First, such a right is implied in the Sixth Amendment. The Sixth Amendment outlines what a constitutionally complete defense requires. The rights outlined in the amendment–the right to notice, confrontation and compulsory process–are personal rights given to the defendant to make his own defense. He can therefore represent himself if he decides it would be the best course of action. Furthermore, the plain language of the Sixth Amendment speaks to the “assistance” of counsel. If counsel is imposed on the defendant, the defendant is no longer in charge of his own defense but is subject to the will of the attorney. Second, history supports the position that states may not impose counsel on unwilling defendants. From the common law of the seventeenth century, to the American colonies, self-representation has been the norm. While the Founders saw the benefit of having counsel present, there is no indication that they intended that the right to counsel be a compulsory one. In addition, defendants have had the right to represent themselves in federal courts since the United States was founded and most states today allow defendants to do so as well. Finally, forcing counsel on an unwilling defendant could actually hurt his case. The defendant could become convinced that the law works against him. Also, there are times when a defendant could actually represent himself more effectively than an attorney could. Therefore, defendants may knowingly and intelligently waive their right to counsel. This is what Faretta did in this case. He made it clear to the judge that he wanted to represent himself. He was literate, competent, understanding, and had been warned of the dangers of representing himself. He was therefore denied his constitutional right to conduct his own defense when the state courts forbade him to represent himself.

#### Dissent (Burger, J.)

There is no independent basis in the Constitution supporting the position that criminal defendants have a constitutional right to represent themselves at trial. The Court is wrong to assume that such a right is implied in the Constitution. The rights proffered in the Sixth Amendment are mandatory and guarantee that all defendants will receive the fullest defense possible. This will generally require the assistance of counsel at trial. In addition, the majority’s use of history to justify its conclusion is not only misplaced but it is also misleading. The Court takes examples of common law and early American law out of context. Furthermore, when the Court points to the federal court system, its holding is actually weakened. Federal courts have allowed self-representation since congress passed the Judiciary Act. If the right were embedded in the Sixth Amendment, no law would be necessary. In addition, the Judiciary Act was passed at approximately the same time as the Constitution, and both documents were drafted by many of the same people. Including the right in the statute but not in the Constitution suggests that there is no constitutional right to self-representation.

#### Dissent (Blackmun, J.)

The Court’s holding will lead to a number of procedural problems. Some of the unanswered questions which will plague the courts include: Should a pro se defendant be treated differently than counsel would? Does the pro se defendant have the right to change his mind during the trial?

**Key Terms:**

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

**Pro Se -** Representing oneself without the assistance of counsel.

# \*\*KUHLMAN v. WILSON\*\*

#### United States Supreme Court 477 U.S. 436 (1986)

#### Rule of Law

**The Sixth Amendment does not require suppression of statements made by a prisoner to a covert police informant if the informant only listened passively and did not deliberately elicit those statements.**

#### Facts

Wilson (defendant) and two other men were suspected of robbery and murder. After Wilson’s arraignment, a police informant was placed in Wilson’s cell overlooking the crime scene. The informant was instructed not to ask Wilson any questions and only to listen for the names of the other men involved. After an upsetting visit with his brother, Wilson made incriminating statements. The informant told police. Wilson moved to suppress his statements, but the trial court denied his motion. Wilson was convicted by a jury for common-law murder and possession of a weapon. Wilson was sentenced to 20 years to life imprisonment for murder and 7 years imprisonment for the weapons charge. Wilson’s petition for a writ of habeas corpus was denied. After the ruling in *United States v. Henry*, 447 U.S. 264 (1980), was handed down, Wilson again petitioned for a writ of habeas corpus. The court of appeals granted Wilson’s petition on the basis of *Henry*stating further consideration of successive habeas corpus petitions was necessary in light of *Henry*. The United States Supreme Court granted certiorari.

#### Issue

Does the Sixth Amendment require suppression of statements made by a prisoner to a covert police informant if the informant only listened passively and did not attempt to interrogate the prisoner?

#### Holding and Reasoning (Powell, J.)

No. Statements made by a prisoner to a police informant who only passively listened and made no effort to elicit or induce those statements are admissible at trial. *Henry* held that statements made by a prisoner to a paid government informant should have been excluded under the rule set forth in *Massiah v. United States*, 377 U.S. 201 (1964). Nevertheless, *Henry*did not address whether statements made to a police informant who listened but did not prompt, ask questions, or in any way attempt to elicit those statements were admissible. The purpose of *Massiah* was to prevent police from using covert interrogation techniques to circumvent the Sixth Amendment. There must be some deliberate action on the part of police for a violation of the Sixth Amendment to occur. Thus, there was no violation in this case, because police instructed the informant to listen to Wilson but avoid asking questions. The ruling of the court of appeals is reversed.

#### Concurrence (Burger, C.J.)

The informant in this case merely listened. This is significantly different than the informant used to engage the defendant in conversations in *Henry*. This misuse of the writ of habeas corpus must be stopped to inhibit the “‘sporting contest’ theory of criminal justice so widely practiced today.”

#### Dissent (Brennan, J.)

Under the Sixth Amendment, a criminal defendant has the right to communicate with police through counsel. The government has a duty to respect that right, and it is a violation of the Sixth Amendment for the government to purposefully construct a situation designed to induce the defendant to make incriminating statements. All of the government’s actions must be taken together to determine whether a statement was deliberately elicited. In this case, Wilson was incarcerated and particularly vulnerable to such deceptive practices. Like the agents in *Henry*, police used a paid informant with an incentive to induce incriminating statements. Although Wilson’s visit with his brother may have ultimately led to the confession, there is no question that police purposefully designed a situation that was likely to cause Wilson to make inculpatory statements outside the presence of his attorney. Thus, the statements were deliberately elicited under *Henry*.

**Key Terms:**

**Sixth Amendment Right to Counsel** - Right of a person accused of a crime to have the help of an attorney throughout any criminal prosecution.

# Massiah v. United States

#### United States Supreme Court 377 U.S. 201 (1964)

#### Rule of Law

**A person who has been indicted on criminal charges has as much a constitutional right to have an attorney present during police interrogations as he does during the trial itself.**

# United States v. Henry

#### United States Supreme Court 447 U.S. 264 (1980)

#### Rule of Law

**Statements made by an accused in custody to a covert government informant may not be admitted at trial without violating the Sixth Amendment right to counsel.**

# Maine v. Moulton

#### United States Supreme Court 474 U.S. 159 (1985)

#### Rule of Law

**Evidence obtained with the intent to frustrate a criminal defendant’s Sixth Amendment right to counsel is not admissible for purposes of proving the defendant’s guilt in the charges to which the evidence pertains.**

#### Facts

Moulton (defendant) and co-defendant Colson were arrested under suspicion of receiving stolen property. After being released on bail, the two defendants met and Moulton suggested killing a key witness. After the meeting, Colson gave a full confession. The police offered Colson immunity from any further prosecution in exchange for cooperation in the investigation and prosecution of Moulton. Colson agreed and the police installed a recording device on his telephone. Colson had three telephone conversations with Moulton. When Moulton arranged to meet Colson in person, the police asked Colson to wear a hidden recording device. The police told Colson not to actively question Moulton about his involvement in the alleged crimes. During the conversation, Colson brought up Moulton’s previous suggestion about killing witnesses. After Moulton stated that he did not think that killing witnesses would work, the conversation turned to the development of false alibis. The conversation about alibis involved extensive discussion of the defendants’ criminal activities. Colson encouraged Moulton to give details of several criminal acts by pretending not to remember certain details and by instigating the exchange of stories relating to particular crimes. The recording was admitted into evidence during Moulton’s trial. Moulton was convicted and appealed his conviction through the state courts. The state supreme court reversed his conviction on grounds that admission of the recorded statements into evidence violated Moulton’s Sixth Amendment right to the assistance of counsel. The State of Maine appealed to the United States Supreme Court.

#### Issue

Is evidence obtained with the intent to frustrate a criminal defendant’s Sixth Amendment right to counsel admissible for purposes of proving the defendant’s guilt in the charges to which the evidence pertains?

#### Holding and Reasoning (Brennan, J.)

No. Evidence obtained with the intent to frustrate a criminal defendant’s Sixth Amendment right to counsel is not admissible for purposes of proving the defendant’s guilt in the charges to which the evidence pertains. In *Massiah v. United States*, 377 U.S. 201 (1964), this Court reversed the criminal conviction of a defendant who offered incriminating statements to an informant during a meeting arranged by a law enforcement agent. Similarly, in *United States v. Henry*, 447 U.S. 264 (1980) we held that a defendant’s Sixth Amendment rights had been violated by the admission of statements offered to an informant who had been placed by law enforcement in shared confinement with the defendant. In *Henry*, we placed emphasis on the facts that the informant was motivated to elicit incriminating information by the promise of payment, that the defendant had no knowledge of the informant’s affiliation with the government, and that the context of mutual incarceration would tend to deceive a defendant about the nature of his relationship to the informant. We concluded that even though the government agent had instructed the informant not to actively elicit incriminating information, the government must have anticipated that the informant would attempt to do so under the circumstances. As such, we held that the defendant’s Sixth Amendment rights were violated by the deliberate manufacture of a situation that would have the probable effect of encouraging the defendant to make incriminatory statements. The State of Maine attempts to distinguish the present case from *Massiah*and *Henry* by virtue of the fact that the meeting between Colson and Moulton was arranged by the defendant rather than by law enforcement. The fact that law enforcement officials arranged circumstances leading to incriminating conversations was not germane to our decisions in *Massiah*and *Henry*. To the contrary, in *Beatty v. United States* 389 U.S. 45 (1967) we reversed a conviction founded upon statements obtained during a meeting arranged by the defendant. Once formal charges have been filed, the Sixth Amendment guarantees the right to the intervention of legal counsel in any interactions between the defendant and the state. That guarantee prohibits the state from acting in a fashion that frustrates the constitutional protections afforded by the right to representation. The Sixth Amendment does not bar the state from taking advantage of statements voluntarily made by a represented defendant in the absence of counsel, but it does prohibit active and intentional efforts to defeat a defendant’s exercise of the right to representation. In this case, the police knew that the purpose of the meeting between Colson and Moulton was to strategize about a mutual defense to the pending charges. The police employed Colson as their agent with full knowledge that Moulton was likely to make incriminating statements absent the protections of legal counsel. This denial of Moulton’s right to counsel violated the guarantees of the Sixth Amendment. The state further argues that Moulton’s statements should be admissible because garnering evidence in support of the pending charges was not the state’s only purpose. The state asserts that it was justified in listening in to conversations between the defendants in order to ensure Colson’s safety and further investigate Moulton’s plans to kill witnesses. The government presented the same argument in *Massiah*. We opined that continued investigation relating to other acts or potential future crimes did not violate the defendant’s constitutional rights, but self-incriminating statements made in violation of the defendant’s Sixth Amendment rights could not be used as evidence supporting a conviction in the pending criminal case. The state and the public have an interest in facilitating the investigation of suspected criminal activity, but allowing the admission of self-incriminating statements under circumstances in which a defendant is denied the assistance of counsel, even when those statements serve a purpose beyond the prosecution of pending charges, would render the Sixth Amendment meaningless. We hold that the State of Maine knowingly violated Moulton’s Sixth Amendment rights and that the existence of any other lawful purpose for obtaining Moulton’s statements in the absence of counsel is immaterial. The state supreme court decision is affirmed.

#### Dissent (Burger, C.J.)

The majority opinion omits several relevant factual considerations. The police were aware that Moulton had threatened to kill witnesses. The police also knew that several witnesses had received threats. Colson himself had been the target of threats. The police knew that Colson expected a call from Moulton after Moulton had formulated his plans for killing witnesses. In the three recorded telephone conversations, Moulton made incriminating statements and alluded to having finalized a plan. The fact that the police knew that Colson had received threats supports their testimony that the hidden recording device was employed, at least in part, to protect Colson’s safety during the meeting. Colson testified that his understanding of the reasons he was asked to wear the device was for the dual purpose of safety and the acquisition of information relating to any plans to kill witnesses. The trial court allowed the admission of portions of the recording during which Moulton discussed the crimes for which he was under prosecution. The court concluded that the state had legitimate purposes for surreptitiously obtaining the recording. The state supreme court agreed that the evidence supported the trial court’s findings of fact as to the legitimacy of the state’s purpose. The majority opinion establishes a framework that presumes a violation of the Sixth Amendment and then inquires whether a legitimate ancillary purpose justifies the violation. In my opinion, no Sixth Amendment violation has occurred in the first place when the acquisition of information is motivated by legitimate purposes unrelated to the prosecution of pending charges. The majority holds that information relevant to the prosecution of pending charges must be excluded even though the same information would be admissible for the prosecution of crimes not yet charged. The majority presumes that the police initiated surveillance with anticipation that they would acquire information relevant to the pending prosecution. The appropriate inquiry should be whether the primary purpose was to acquire inculpatory evidence pertaining to pending charges. If the state did not intend to acquire inculpatory evidence about pending charges, then it cannot be deemed to have intentionally infringed upon the defendant’s right to counsel. In this case, the defendant was being investigated in relation to alleged plans to obstruct justice by killing witnesses. There is no right to counsel in planning for the commission of a crime. This is not a case like *Massiah* where the right to counsel implicated the fairness of a trial. The rules proscribing the admission of evidence obtained in bad faith are intended to deter police conduct that violates the rights of the accused. Inculpatory evidence obtained in good faith should not be excluded from admission at a trial on pending charges. Nothing in the evidence suggests any improper motive on the part of the police. To the contrary, the actions of the police may have saved the lives of several witnesses and should be commended.

**Key Terms:**

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

**Inculpatory Evidence -** Evidence tending to prove a defendant’s guilt of a crime.

**February 25, 2021**

**Chapter 7 – Pretrial Identification Procedures**

**Neil v. Biggers, 409 U.S. 188 (1972)**

**State v. Scarborough, 300 S.W.3d 717 (2009)**

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**Chapter 7 – Pretrial Identification Procedures**

# \*\*UNITED STATES v. WADE\*\*

#### United States Supreme Court 388 U.S. 218 (1967)

**Rule of Law**

**A post-indictment witness identification of a criminal suspect, conducted without notice to and in the absence of the suspect's counsel, violates the Sixth Amendment right to the assistance of counsel.**

**Facts**

Wade (defendant) was arrested under suspicion of involvement in a bank robbery. The court appointed counsel for Wade. An FBI agent subsequently arranged a lineup to have two bank employees identify the man they remembered from the robbery. The agent did not notify Wade’s attorney prior to conducting the lineup. At the lineup, both employees identified Wade as the bank robber. At trial, the employees identified Wade when asked if they saw the robber present in the courtroom. On cross-examination, the employees confirmed that they had previously picked Wade out of the lineup and testified that prior to the lineup, they had seen Wade in the hallway with the FBI agent before the other lineup participants were brought in. Wade moved for a judgment of acquittal or to strike the courtroom identifications, claiming that because the lineup was conducted without notice to and in the absence of Wade's appointed counsel, the lineup violated his Fifth Amendment privilege against self-incrimination and his Sixth Amendment right to counsel. The trial court denied the motion. Wade was convicted. The appellate court held that the lineup did not violate the Wade’s Fifth Amendment rights but did violate his Sixth Amendment right to counsel. The court of appeals reversed the conviction and remanded for a new trial that excluded the employees’ courtroom identifications. The United States Supreme Court granted certiorari.

**Issue**

Does a post-indictment witness identification of a criminal suspect, conducted without notice to and in the absence of the suspect's counsel, violate the Sixth Amendment right to the assistance of counsel?

**Holding and Reasoning (Brennan, J.)**

Yes. The Sixth Amendment right to counsel is intended to afford the accused protection against state action during any critical stage of criminal proceedings, formal or otherwise, at which the right to a fair trial might be jeopardized by the lack of legal representation. A post-indictment witness identification is a critical stage of the proceedings. Witness identifications are notoriously unreliable, and conducting a lineup without the oversight of counsel allows the opportunity for suggestion to influence witness identification. A defendant’s ability to identify infirmities in the identification process is severely limited, and the defendant labors under an inherent deficiency in credibility as compared to the police officers who would likely testify as to the soundness of the identification process. Here, the witnesses who identified Wade testified that they had seen him standing alone with the FBI agent before other lineup participants were brought in. Wade’s conviction may have been decided well before he had the opportunity to present a defense at trial. The lineup clearly constituted a critical stage in the proceedings leading to his conviction, and the lineup should not have been conducted without notice to Wade's attorney or in his attorney's absence, unless Wade waived the right to have his counsel present. However, the absence of counsel at Wade’s lineup does not necessarily require a new trial and the exclusion of the courtroom identification. Rather, the state should have the opportunity to prove that there was an independent source for the courtroom identification. In other words, the court must determine whether the courtroom identification arose exclusively from the impermissible lineup or whether it arose from circumstances sufficiently distinct from the lineup to remove it from exclusion as the fruit of illegal procedure. Accordingly, the appellate court's judgment is vacated, and the appellate court is directed to enter a new judgment vacating the convictions and remanding to the district court for further proceedings.

**Concurrence/Dissent (White, J.)**

In practice, the rule announced by the majority prohibits courtroom identification any time a pretrial identification has been conducted without the presence of counsel. The scope of the rule is not limited to lineup identifications; it would apply to any contact between the defendant and a witness in the absence of counsel. However, the majority rule allows courtroom identifications when no pretrial identification has occurred, even though a witness will obviously know that the defendant has been identified as a prime suspect. The majority additionally indicates that states might implement legislation or procedural safeguards that would remove a pretrial identification from the category of a critical stage in proceedings. That being the case, the court should simply set forth guidelines for establishing acceptable procedures rather than impose a rule of general application. Additionally, the majority rule invalidates any identification made without the presence of counsel in situations in which video or audio recording would suffice to give counsel knowledge of the manner in which the identification was conducted. The ostensible benefits of legal representation to the criminal justice process do not justify intrusion upon the states’ interests in determining their own processes for conducting criminal proceedings. Finally, this rule likely will not increase the reliability of witness identification. Police have a duty to avoid convicting the innocent, but defense counsel has no obligation to ensure the conviction of a guilty client. The majority rule, in the absence of some reciprocal limitations on the conduct of defense counsel, is likely to have a negative impact on the reliability of witness identifications.

**Concurrence/Dissent (Black, J.)**

The court correctly determined that the lineup without representation violated Wade’s Sixth Amendment right to counsel. However, the case should not be remanded for determination of whether the courtroom identifications arose from sources independent of the lineup identification. This type of determination appears practically impossible because it requires the witness to search for clear distinctions between memories based on the lineup identification as opposed to memories derived from other observations. It is difficult to perceive what type of evidence the prosecution will be able to present in support of an independent source of identification. Furthermore, the Fifth and Sixth Amendments are not violated if lineup identification is not used either as the sole source of identification or as a source of additional support for a courtroom identification. In this case, the prosecution never introduced evidence of the lineup identification. The jury only learned about the lineup because the defense brought it up on cross-examination. The defendant’s rights are not infringed when the defense has the opportunity to use prior lineup evidence to challenge the witness’ credibility. In addition, the majority rule effectively imposes a federal rule of evidence upon state courts. The Constitution grants states broad authority to individually govern criminal procedures, and this decision infringes upon that authority.

**Key Terms:**

**Fifth Amendment** - An amendment added to the U.S. Constitution as part of the Bill of Rights that provides important protections from government actions, including a guarantee that no person will be required to answer for a capital crime unless first indicted by a grand jury; no one will suffer double jeopardy; no one must testify against himself or herself; no one will be deprived of life, liberty, or property without due process of law; and no property will be taken for public use without just compensation.

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

# Powell v. Alabama (Scottsboro Boys Trial)

#### United States Supreme Court 287 U.S. 45 (1932)

#### Rule of Law

**Due process requires that criminal defendants have the right to counsel both at trial and in the time leading up to trial when consultation and preparation take place.**

#### Facts

Ozie Powell and eight other impoverished, illiterate African American teenagers (defendants), were charged with and found guilty of raping two white women. The trial judge neglected to give Powell and the others the chance to secure their own representation by withholding contact with their families who resided in neighboring states. Instead, the judge appointed “all members of the bar” to represent Powell and the others for their arraignment. Three separate trials commenced just six days later, and it was only on the morning of trial when an Alabama attorney and a Tennessee attorney volunteered to represent the nine defendants at trial. Each trial was completed within one day, and all three juries convicted the defendants, sentencing each of them to the death penalty. Powell and the others filed motions for a new trial, but the motions were overruled and the state supreme court affirmed the judgments on appeal. The cases were argued and submitted as one case.

#### Issue

Is the Due Process Clause of the Fourteenth Amendment violated when a trial judge in a capital case fails to appoint the defense counsel until the day of trial?

#### Holding and Reasoning (Sutherland, J.)

Yes. In capital cases, if a defendant is unable to employ his own counsel and cannot adequately represent himself, a trial judge must appoint counsel, whether requested or not by the defendant. The Due Process Clause of the Fourteenth Amendment guarantees criminal defendants the right to notice and a hearing. In capital cases, the right to a hearing includes the right to counsel because a layman is generally not familiar with legal proceedings and is therefore not adequately prepared to assert his own defense. This right to counsel includes the ability to consult with one’s attorney prior to trial in order to properly prepare a defense. In this case, the trial judge violated the Due Process Clause when he failed to give Powell and the other defendants the opportunity to employ their own counsel. Their youth, illiteracy, and the severity of the charges make it clear that Powell and the others could not have effectively represented themselves at trial. Furthermore, by merely appointing “all members of the bar” for the “purpose of arraigning the defendants,” the judge failed to assign proper counsel because no specific attorney was given clear responsibility of the case until the day of trial. There was therefore not enough time for Powell to prepare a proper defense in violation of the Due Process Clause of the Fourteenth Amendment. The judgments are therefore reversed and the case remanded back to the trial court.

#### Dissent (Butler, J.)

There was adequate time to prepare for trial, and therefore there was no due-process violation. The two attorneys who took responsibility of the case on the day of trial never requested a postponement and even now they do not support the claim that they were ill-prepared on the day of trial. In addition, at issue is only whether the trial court denied Powell due process of law when it failed to give him and the others the opportunity to secure their own representation. The Court exceeds its authority when it goes on to hold that the failure of the trial judge to appoint Powell counsel is a violation of the Due Process Clause of the Fourteenth Amendment.

**Key Terms:**

**Fourteenth Amendment Due Process** **Clause** - The provision set forth at Amendment XIV, Section 1 of the United States Constitution prohibiting states from depriving any person of life, liberty, or property by means that are arbitrary or fundamentally unfair.

# Stovall v. Denno

#### United States Supreme Court 388 U.S. 293 (1967)

**Rule of Law**

**An in-person confrontation between a single suspect and an eyewitness does not violate the suspect’s due-process rights if the totality of the circumstances demonstrates that the confrontation was necessary.**

**Facts**

Theodore Stovall (defendant) was arrested for murdering a man in his home and for stabbing the man's wife numerous times when she tried to fight back. The woman was in serious condition and could not leave the hospital. The police brought Stovall to the hospital so the woman could identify him as the assailant. He was the only Black person in the room and was handcuffed to a police officer. The woman identified him after he made a statement, at the police’s direction, so she could make a voice identification. At Stovall’s trial, she made an in-court identification as well. Stovall was convicted and sentenced to death. Stovall's conviction was affirmed on direct review, and he filed a habeas corpus petition challenging his conviction. The district court dismissed the petition, and the appellate court affirmed. The United States Supreme Court granted certiorari.

**Issue**

Does an in-person confrontation between a single suspect and an eyewitness for identification purposes violate the suspect’s due process rights if the totality of the circumstances demonstrates that the confrontation was necessary?

**Holding and Reasoning (Brennan, J.)**

No. An in-person confrontation between a single suspect and an eyewitness does mot violate the suspect’s due-process rights if the totality of the circumstances demonstrates that the confrontation was necessary. An eyewitness-identification procedure may violate a defendant's due process rights if the procedure is unnecessarily suggestive and could lead to an irreparable mistaken identification. Courts must examine the totality of the circumstances to determine whether a due-process violation occurred. Here, the woman could not travel from the hospital to make a lineup identification of Stovall, and she was the only person who could establish whether he was the stabber. It was unclear how long the witness may live and the need for immediate identification was clear. Accordingly, the totality of the circumstances demonstrates that Stovall's due-process rights were not violated. The judgment is affirmed.

**Dissent (Black, J.)**

The Court's totality-of-the-circumstances test for determining whether a due-process violation occurred improperly lets courts substitute their own judgment of what the Constitution allows for what the Framers actually intended. Moreover, letting courts decide the fairness of identification procedures on a case-by-case basis does not provide clear, permanent constitutional standards to state and federal governments.

**Key Terms:**

**Fourteenth Amendment Due Process** **Clause** - The provision set forth at Amendment XIV, Section 1 of the United States Constitution prohibiting states from depriving any person of life, liberty, or property by means that are arbitrary or fundamentally unfair.

**Gilbert v. California**

87 S.Ct. 1951

Supreme Court of the United States

**Jesse James GILBERT, Petitioner,**

**v.**

**STATE OF CALIFORNIA.**

No. 223.

Argued Feb. 15 and 16, 1967.Decided June 12, 1967.

**Synopsis**

Prosecution for armed robbery and murder. The Superior Court, Los Angeles County, rendered judgment, and defendant appealed. The [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I43403974fad911d9bf60c1d57ebc853e&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[California Supreme Court, 63 Cal.2d 690, 47 Cal.Rptr. 909, 408 P.2d 365,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966111780&pubNum=661&originatingDoc=I9886aac29c1c11d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed in part and reversed in part, and defendant obtained certiorari. The Supreme Court, Mr. Justice Brennan, held that the taking of a handwriting exemplar in absence of counsel did not deny Fifth or Sixth Amendment rights, but that admission of in-court identifications without determination that they were not tainted by illegal lineup was constitutional error, and that testimony that witnesses had identified defendant at illegal lineup was per se inadmissible.

Judgment and conviction vacated and case remanded.

Mr. Justice Black, Mr. Justice White, Mr. Justice Fortas, Mr. Chief Justice Warren, Mr. Justice Harlan, and Mr. Justice Stewart dissented in part.

# Wong Sun v. United States

#### United States Supreme Court 371 U.S. 471 (1963)

#### Rule of Law

**Although evidence obtained through illegal police conduct must be excluded at trial as it is “fruit of the poisonous tree,” the connection between the illegal police conduct and a relevant piece of evidence can become so attenuated as to dissipate the taint, and such evidence may then be admissible.**

#### Facts

Federal narcotics agents arrested Hom Way for drug possession. Hom Way told the police he got the drugs from “Blackie Toy” who owned a laundry business. The agents went to Toy's business, and James Wah Toy answered the door. When he realized it was the police, he ran back into the building. The police chased and arrested him. No drugs were found, but when the agents told him why they were there he said he never sold drugs but that “Johnny” sells drugs. The agents then had Toy take them to Johnny Yee’s home where they found Yee in the bedroom. Yee surrendered his drugs and drug paraphernalia. Yee and Toy were then taken to the Office of the Bureau of Narcotics where Yee told the agents he received the drugs from “Sea Dog,” whose real name, Toy said, was Wong Sun (defendant). Toy then took the agents to Wong Sun’s house where Wong Sun’s wife let them into the home. Wong Sun was arrested. No drugs were found. Toy, Yee and Wong Sun were all arraigned and released on their own recognizance. The men returned to the office several days later. The agents interrogated all three men separately and drafted statements for them to sign. Toy refused to sign his statement. Wong Sun would not sign his but admitted that it was accurate. The court of appeals found that there was no probable cause or reasonable grounds for Toy’s or Wong Sun’s arrest.

#### Issue

Is evidence obtained through illegal police conduct admissible if the evidence is far removed from the illegal police conduct?

#### Holding and Reasoning (Brennan, J.)

Yes. Evidence that has been acquired through illegal police conduct is admissible if it has been so far removed from the illegal action so as to dissipate the taint of illegality. In this case, the police violated Wong Sun’s constitutional rights when they arrested him. However, his subsequent unsigned confession is admissible because after his unlawful arrest, Wong Sun was released and returned voluntarily a few days later when he was interrogated by the agents. Therefore, the connection between his unlawful arrest and his statement had become so attenuated as to dissipate the taint of illegality. In addition, the drugs taken from Yee cannot be admitted into evidence against Toy. Toy’s statement to the police regarding Yee is inadmissible because the statement is a fruit of illegal police action; the police had no authority to chase Toy into his home. Therefore, the police only knew about Yee because of Toy’s statement, which derived from illegal police conduct. Therefore, the statement is still tainted by the illegality and must be excluded at trial.

#### Concurrence (Douglas, J.)

The Court correctly concluded that the agents lacked probable cause to arrest the defendants. However, the arrests were also unconstitutional because the agents did not obtain arrest warrants even though there was time to do so.

#### Dissent (Clark, J.)

There was probable cause supporting the arrests in this case, and there was sufficient evidence corroborating the confessions.

**Key Terms:**

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

# Chapman v. California

#### United States Supreme Court 386 U.S. 18 (1967)

#### Rule of Law

**In order for a federal constitutional error to be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.**

#### Facts

At Chapman’s (defendant) murder trial, the prosecutor commented on his failure to testify and told the jury that it could infer adverse consequences from his silence. That comment violated his privilege against self-incrimination under *Griffin v. California*, 380 U.S. 609 (1965). The Supreme Court of California held that the error was harmless. The United States Supreme Court granted certiorari.

#### Issue

In order for a federal constitutional error to be held harmless, must the court be able to declare a belief that it was harmless beyond a reasonable doubt?

#### Holding and Reasoning (Black, J.)

Yes. In order for a federal constitutional error to be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. Concerning the question whether state or federal law applies, we apply federal law here because the issue involves a state’s failure to protect federal constitutionally protected rights, namely, the privilege against self-incrimination. This important right is protected by the Fifth and the Fourteenth Amendments. Next, Chapman urges the Court to hold that all errors involving federal constitutional rights are harmful errors, thus requiring the reversal of the trial-court decision. We think this is wrong, since all 50 states have adopted harmless error statutes, as has the United States, by an act of Congress. These state or federal rules serve a useful purpose by preventing the setting aside of convictions in trials where small errors have occurred. In *Fahy v. Connecticut*, 375 U.S. 85 (1963), we analyzed the harmless-error statute and declared that not all trial errors that violate the Constitution call for an automatic reversal. Of course, those trial errors that “affect substantial rights” cannot be deemed harmless. Constitutional error, such as admitting legally relevant but highly prejudicial evidence, puts the burden on someone other than the individual prejudiced by that evidence to demonstrate that it was not harmless. But today we do not depart from our decision in *Fahy* and hold that there are some constitutional errors that are so insignificant that they can be called harmless, without offending the Constitution. In the case at bar, we hold that the error in Chapman’s case was not harmless.

**Key Terms:**

**Harmless Error** - A ruling by a trial judge, which is later held to be mistaken by a higher court, but is not so prejudicial to the defendant as to warrant the reversal of a conviction.

# \*\*KIRBY v. ILLINOIS\*\*

#### United States Supreme Court 406 U.S. 682 (1972)

#### Rule of Law

**Under the Sixth Amendment, police may conduct an identification outside the presence of counsel before a suspect has been formally charged with a crime.**

#### Facts

Kirby and Bean (defendants) were arrested for robbing Willie Shard. After the arrest, police brought Shard to the station for a showup identification. Shard identified the defendants as the robbers. Kirby and Bean had not been told that they had a right to an attorney or requested counsel. Kirby and Bean made a pretrial motion to suppress Shard’s testimony. The trial court denied the motion. Shard testified about the original identification and identified Kirby and Bean in court as the perpetrators. Kirby and Bean were convicted by a jury, and Kirby’s conviction was upheld on appeal. The United States Supreme Court granted certiorari.

#### Issue

Under the Sixth Amendment, may police conduct an identification outside the presence of counsel before a suspect has been charged?

#### Holding and Reasoning (Stewart, J.)

Yes. Police may conduct a lineup without an attorney present if the suspect has not yet been indicted or formally charged with a crime. Under *United States v. Wade*, 388 U.S. 218 (1967), and *Gilbert v. California*, 388 U.S. 263 (1967), a lineup conducted after arraignment is a “critical stage of the prosecution,” which requires notification and/or the presence of the defendant’s attorney under the Sixth Amendment. If this right is denied, identification testimony and in-court identifications must be excluded at trial. Nevertheless, the Sixth Amendment right to counsel does not attach until criminal prosecution has formally begun, signified by an arraignment or other judicial hearing. This marks the official beginning of the adversarial process and the activation of the Sixth Amendment. The Court will not extend the amendment’s protections to events that occur before the initiation of formal proceedings. Abuses that occur during pre-arraignment identifications will be evaluated under the Due Process Clause of the Fifth and Fourteenth Amendments. Thus, the ruling of the lower court is affirmed.

#### Concurrence (Powell, J.)

The *Wade-Gilbert* rule should not be extended.

#### Dissent (Brennan, J.)

In order to determine whether a defendant has a right to counsel at any given stage of a criminal investigation, the Court must determine whether the defendant’s rights to a fair trial and to confront any witnesses against him will be protected without an attorney present. A defendant can rebut fingerprint or blood sample evidence by cross-examining government witnesses or presenting his own expert. In contrast, it is all but impossible for a defendant to question the validity of an identification procedure if no attorney was present. There is a high risk that a witness may be influenced by police during identification procedures, and that is the reason that the Court in *Wade* held that the presence of counsel is required at post-arraignment lineups. Contrary to the Court’s formalistic argument, criminal prosecutions begin at arrest. The lineup in this case was particularly suggestive and likely to mislead the witness. The underlying rationale of the *Wade*ruling is just as valid with respect to pre-arraignment identifications.

#### Dissent (White, J.)

Under *Wade* and *Gilbert*, the ruling of the lower court should be overturned.

**Key Terms:**

**Sixth Amendment Right to Counsel** - Right of a person accused of a crime to have the help of an attorney throughout any criminal prosecution.

# United States v. Wade

#### United States Supreme Court 388 U.S. 218 (1967)

#### Rule of Law

**A post-indictment witness identification of a criminal suspect, conducted without notice to and in the absence of the suspect's counsel, violates the Sixth Amendment right to the assistance of counsel.**

**Gilbert v. California**

87 S.Ct. 1951

Supreme Court of the United States

**Jesse James GILBERT, Petitioner,**

**v.**

**STATE OF CALIFORNIA.**

No. 223.

Argued Feb. 15 and 16, 1967.Decided June 12, 1967.

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Judgment and conviction vacated and case remanded.

Mr. Justice Black, Mr. Justice White, Mr. Justice Fortas, Mr. Chief Justice Warren, Mr. Justice Harlan, and Mr. Justice Stewart dissented in part.

# Powell v. Alabama (Scottsboro Boys Trial)

#### United States Supreme Court 287 U.S. 45 (1932)

#### Rule of Law

**Due process requires that criminal defendants have the right to counsel both at trial and in the time leading up to trial when consultation and preparation take place.**

# Escobedo v. Illinois

#### United States Supreme Court 378 U.S. 478 (1964)

#### Rule of Law

**When an investigation shifts from a general inquiry into an unsolved crime to a focus on a particular suspect, that suspect has been taken into police custody for questioning, the suspect has asked for and been denied his lawyer, and the police have not properly warned him of his right to remain silent, any confession made during the remainder of the interrogation is inadmissible.**

# Miranda v. Arizona

#### United States Supreme Court 384 U.S. 436 (1966)

#### Rule of Law

**Without certain hallmark warnings regarding the right to remain silent and the right to counsel, statements made during custodial interrogation are inadmissible at trial.**

# Stovall v. Denno

#### United States Supreme Court 388 U.S. 293 (1967)

#### Rule of Law

**An in-person confrontation between a single suspect and an eyewitness does not violate the suspect’s due-process rights if the totality of the circumstances demonstrates that the confrontation was necessary.**

# United States v. Ash

#### United States Supreme Court 413 U.S. 300 (1973)

#### Rule of Law

**Under the Sixth Amendment, police may conduct a post-indictment photo lineup outside the presence of counsel.**

# \*\*MANSON v. BRATHWAITE\*\*

#### United States Supreme Court 432 U.S. 98 (1977)

#### Rule of Law

**Where a defendant claims that his right to due process of law has been violated because of the manner in which he was forced to confront a witness, the court must look to the reliability of the identification to determine whether it is admissible.**

#### Facts

Glover, an undercover narcotics officer, went to an apartment to buy drugs. He knocked on the door of an apartment and a man inside opened it 12 to 18 inches. Glover told the man what he wanted and handed over some money. The man inside closed the door and, when he returned, he handed Glover two bags of drugs. While the door was opened, Glover stood about two feet away from the man inside. The transaction took place during daylight hours so the sun was coming in through windows on the stairwell and windows from inside the apartment. The entire transaction took about five to seven minutes. When Glover left the building, he drove to police headquarters where he gave other officers a detailed description of the man who had sold him the drugs. One of the officers recognized the description as that of Brathwaite (defendant). The officer then found a photo of Brathwaite and put it in Glover’s office for him to look at. Two days later, and when he was alone, Glover looked at the photo and identified the man as the person who had sold him the drugs. Brathwaite was charged with possession and sale of heroin. The photo from which Glover identified Brathwaite was introduced into evidence. Glover testified he had no doubt that the man in the photo was the one who sold him the drugs. Glover also made an in-court identification. The jury found Brathwaite guilty. The court of appeals applied a per se rule, holding that suggestive, pre-trial witness identifications must be excluded from evidence.

#### Issue

Does the Due Process Clause require that a suggestive and unnecessary pretrial identification be automatically excluded from evidence, without considering the reliability of the identification?

#### Holding and Reasoning (Blackmun, J.)

No. When a defendant makes a due process claim regarding a pre-trial, suggestive and unnecessary witness identification, the identification is not automatically excluded from trial. Instead, a totality of the circumstances approach is used to determine if the identification is reliable. If so, the identification is admissible. The factors to consider when determining reliability were outlined in a previous case, *Neil v. Biggers*, 409 U.S. 188 (1972). The factors include: (1) the opportunity of the witness to view the defendant, (2) the witness’ degree of attention, (3) the accuracy of the witness’ prior description of the criminal, (4) the witness’ level of certainty with his identification, and (5) the time between the crime and the identification. This approach is preferable to a per se rule that all suggestive and unnecessary identifications are inadmissible. While previous cases on this issue have been concerned with the problems of eyewitness identification (*United States v. Wade*, 388 U.S. 218 (1967)), the per se rule keeps reliable evidence away from the jury. In addition, the totality of the circumstances approach will have the same deterrent effect on illegal police conduct as the per se rule. Finally, the per se rule would hurt the administration of justice because, again, it keeps reliable evidence away from the jury’s consideration. In this case, the officer’s pre-trial identification was reliable. First, he had plenty of time, and good light, to view Brathwaite in the door way. Second, as a trained police officer working undercover, the officer knew he would need to later identify his seller; therefore, the officer paid careful attention to what Brathwaite looked like. Third, the description the officer gave before identifying Brathwaite was made immediately following the encounter and was detailed and accurate. Fourth, the officer had no doubt that the man in Brathwaite’s photo was the seller. And fifth, only two days passed between the commission of the crime and the officer’s identification. Therefore, the officer’s pre-trial identification is admissible.

#### Concurrence (Stevens, J.)

The Court’s opinion properly ignores other evidence of Brathwaite’s guilt and focuses only on the reliability of the identification.

#### Dissent (Marshall, J.)

The Court is wrong to adopt the totality of the circumstances approach over the per se rule. Not only is the deterrent effect of the per se rule far greater than that of the totality test, but the opinion simply dismisses the dangers of eyewitness identification that the Court was so concerned with in *Wade*. Furthermore, the per se rule does not impede the administration of justice as the Court suggests. Unlike other exclusionary remedies, while a pre-trial identification may be inadmissible, an in-court identification is often a viable option for the prosecution. Also, while other exclusionary rules have been criticized for keeping relevant information from the jury, suggestively obtained eyewitness identifications that result from police implying who the criminal is, are excluded precisely because they are unreliable. In addition, the Court’s holding that a pre-trial, suggestive identification is admissible if it is reliable is frightening. It suggests that violations of due process are permissible if the state has a strong case against the defendant. Finally, even assuming that the Court is right to adopt the totality test, the pre-trial identification should still be excluded because the five factors outlined in *Biggers* are not adequately satisfied.

**Key Terms:**

**Fourteenth Amendment Due Process** **Clause** - The provision set forth at Amendment XIV, Section 1 of the United States Constitution prohibiting states from depriving any person of life, liberty, or property by means that are arbitrary or fundamentally unfair.

**Per Se Rule -** A rule that is applied uniformly without consideration of the specific situation or circumstance.

# United States v. Wade

#### United States Supreme Court 388 U.S. 218 (1967)

#### Rule of Law

**A post-indictment witness identification of a criminal suspect, conducted without notice to and in the absence of the suspect's counsel, violates the Sixth Amendment right to the assistance of counsel.**

**Gilbert v. California**

87 S.Ct. 1951

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Judgment and conviction vacated and case remanded.

Mr. Justice Black, Mr. Justice White, Mr. Justice Fortas, Mr. Chief Justice Warren, Mr. Justice Harlan, and Mr. Justice Stewart dissented in part.

# Stovall v. Denno

#### United States Supreme Court 388 U.S. 293 (1967)

#### Rule of Law

**An in-person confrontation between a single suspect and an eyewitness does not violate the suspect’s due-process rights if the totality of the circumstances demonstrates that the confrontation was necessary.**

# Neil v. Biggers

#### United States Supreme Court 409 U.S. 188 (1972)

#### Rule of Law

**Under the Due Process Clause, identification evidence may be admitted even if the procedure was suggestive so long as the identification is reliable.**

# \*\*PERRY v. NEW HAMPSHIRE\*\*

#### United States Supreme Court 132 S.Ct. 716 (2012)

#### Rule of Law

**A suggestive identification procedure does not violate due process if the police are not involved in creating the suggestive circumstances.**

#### Facts

On August 15, 2008, the Nashua Police Department received a report that an African-American male was breaking into cars in the parking lot of an apartment building. Officer Nicole Clay arrived on the scene and found Barion Perry (defendant) holding two car-stereo amplifiers. During this time, Nubia Blandon alerted her neighbor, Alex Clavijo, that she had witnessed someone breaking into his car. Clavijo went to investigate and found that his car had been broken into and that his speakers and amplifiers were missing. Clay had Perry stay in the parking lot with another officer while she questioned Blandon and Clavijo in the building. Blandon stated that she had seen an African-American man opening the trunk of Clavijo’s car. Clay asked Blandon for a specific description of the man. Blandon pointed outside her window to where Perry and the officer stood in the parking lot, and identified Perry as the man she had seen. Perry was charged with theft by unauthorized taking and criminal mischief. Perry moved to suppress Blandon’s identification on grounds that it was suggestive and in violation of his Sixth Amendment rights. The New Hampshire Superior Court denied Perry’s motion. The jury found Perry guilty of theft. The New Hampshire Supreme Court affirmed his conviction.

#### Issue

Does a suggestive identification procedure violate due process if the police are not involved in creating the suggestive circumstances?

#### Holding and Reasoning (Ginsburg, J.)

No. The Court’s previous decisions make clear that the admission of a witness’s identification of a criminal suspect is not permitted at trial when law enforcement has arranged suggestive circumstances leading the witness to identify a particular individual. In *Stovall v. Denno*, 388 U.S. 293 (1967), the Court held that a witness’s identification of a handcuffed man in her hotel room was suggestive but did not violate the Due Process Clause because the witness was the only person who could identify or exonerate the suspect; she was confined to her hospital room; and there were questions regarding whether she would live to identify the defendant at a later date. Thus, when determining whether a witness’s identification is impermissibly suggestive a court should review the totality of the circumstance in each case to decide whether improper conduct created a “substantial likelihood of misidentification.” *Manson v. Brathwaite*, 432 U.S. 98 (1972). Perry argues that the Court should create a rule requiring trial judges to prescreen eyewitness evidence for reliability any time an identification is made under suggestive circumstances. However, such a rule would be overly burdensome on the courts. If law enforcement is aware that their methods of identifying a particular suspect are subject to scrutiny, they will take extra precautions to ensure reliability. Once a particular identification of a suspect is made, there are many questions defense counsel may ask on cross examination to question the identification’s reliability, namely the passage of time between exposure and identification of the defendant, the amount of stress the witness was under at the time of the identification, distance from the witness to the suspect, and the vision of the witness. Here, Nubia’s identification of Perry was not the result of overly suggestive circumstances created by law enforcement and not required to be preliminarily reviewed by the trial court for reliability. The judgment of the New Hampshire Supreme Court is affirmed.

#### Concurrence (Thomas, J.)

The Court correctly concludes that there is a due process right to the pretrial exclusion of an unreliable eyewitness identification only if the identification results from suggestive circumstances created by law enforcement. However, the Court places too much reliance upon *Stovall v. Denno* and its progeny in making its decision.

#### Dissent (Sotomayor, J.)

The New Hampshire Supreme Court failed to conduct a full analysis under the totality of the circumstances approach articulated by the majority to determine whether Nubia’s identification of Perry had corrosive effects flowing into his trial that may have violated the Due Process Clause.

**Key Terms:**

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

# Stovall v. Denno

#### United States Supreme Court 388 U.S. 293 (1967)

#### Rule of Law

**An in-person confrontation between a single suspect and an eyewitness does not violate the suspect’s due-process rights if the totality of the circumstances demonstrates that the confrontation was necessary.**

# Manson v. Brathwaite

#### United States Supreme Court 432 U.S. 98 (1977)

#### Rule of Law

**Where a defendant claims that his right to due process of law has been violated because of the manner in which he was forced to confront a witness, the court must look to the reliability of the identification to determine whether it is admissible.**

# United States v. Wade

#### United States Supreme Court 388 U.S. 218 (1967)

#### Rule of Law

**A post-indictment witness identification of a criminal suspect, conducted without notice to and in the absence of the suspect's counsel, violates the Sixth Amendment right to the assistance of counsel.**

**Neil v. Biggers, 409 U.S. 188 (1972)**

# \*\*NEIL v. BIGGERS\*\*

#### United States Supreme Court 409 U.S. 188 (1972)

#### Rule of Law

**Under the Due Process Clause, identification evidence may be admitted even if the procedure was suggestive so long as the identification is reliable.**

#### Facts

Biggers (defendant) was suspected of rape. Although it was dark, the victim claimed to have seen the assailant in the light of her bedroom and later in the light of the full moon. The victim described the rapist’s age, size, skin, and voice. Police conducted numerous photo lineups, but the victim made no identification. Biggers was arrested for an unrelated offense. Police could not find anyone fitting the rapist’s description, so they conducted a showup identification. Police walked Biggers by the victim and asked Biggers to speak. The victim identified Biggers as the rapist. Biggers was convicted by a jury and sentenced to 20 years in prison. After a habeas corpus hearing, the district court overturned Biggers’ conviction. The court of appeals affirmed. The United States Supreme Court granted certiorari.

#### Issue

Does the admission of identification evidence gathered by a showup identification violate the Due Process Clause?

#### Holding and Reasoning (Powell, J.)

No. An identification made at an unfairly suggestive lineup is admissible if the identification is reliable. While an in-court identification is inadmissible if it is based upon a pretrial lineup so suggestive it was very likely to result in an irreparable mistaken identification, a pretrial identification is inadmissible if the procedure is so suggestive as to create a high likelihood of misidentification. The Court in *Foster v. California*, 394 U.S. 440 (1969), held identification evidence inadmissible because that likelihood of mistaken identification violates a criminal defendant’s due process rights. Unfairly suggestive procedures heighten the risk of mistaken identifications. Nevertheless, under *Stovall v. Denno*, 388 U.S. 293 (1967), showup identifications are not necessarily unconstitutional. The question is whether an identification made after a suggestive lineup is nevertheless reliable. The totality of the circumstances, including the conditions of the identification and the witness’s certainty, must be evaluated in each case. The decision of the district court in this case centered on the advantages of lineup identifications over showup identifications. Nevertheless, the conditions under which the victim observed the rapist, the victim’s certainty, and the fact that the victim made no prior mistaken identifications all suggest that the identification evidence was reliable. In light of all the surrounding facts and circumstances, the likelihood of a mistaken identification was not significant in this case. The ruling of the district court is reversed as clearly erroneous.

#### Dissent (Brennan, J.)

An identification made during the course of a suggestive lineup may still be admissible if, in light of he totality of the circumstances, the identification was reliable. Two lower courts agreed that the identification was not sufficiently reliable to overcome the risk of misidentification. The Court in this case seeks to impose its own view of the facts in contravention of the longstanding principle that the Court does not reverse findings of fact where two lower courts agree, absent proof that those findings are clearly erroneous.

**Key Terms:**

**Due Process -** A constitutional guarantee that a law shall not be unreasonable, arbitrary, or capricious and that individuals will be given notice of legal proceedings conducted fairly with an opportunity for an individual to be heard before the government may impose sanctions on one’s life, liberty, or property.

**Totality of the Circumstances -** A factual consideration of all factors surrounding an agreement, which will have some bearing upon the issue being decided.

**Totality of the Circumstances Test** - A standard that considers all of the relevant facts and circumstances, rather than a few specific factors.

93 S.Ct. 375

Supreme Court of the United States

**William S. NEIL, Warden,**

**v.**

**Archie Nathaniel BIGGERS.**

No. 71—586.

Argued Oct. 18 and 19, 1972.Decided Dec. 6, 1972.

## Synopsis

Habeas corpus proceeding by state prisoner. The United States District Court for the Middle District of Tennessee, Nashville Division, entered judgment granting writ, and the state appealed. The Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Iffd3cb238fd011d9bc61beebb95be672&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[448 F.2d 91,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971112279&pubNum=350&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))affirmed, and certiorari was granted. The Supreme Court, Mr. Justice Powell, held that United States Supreme Court's equally divided affirmance of petitioner's state court conviction was not an ‘actual adjudication’ barring subsequent consideration on habeas corpus. The Court further held that even though station house showup may have been suggestive, and notwithstanding lapse of seven months between crime and the confrontation, there was no substantial likelihood of misidentification and evidence concerning the out-of-court identification by victim was admissible, where victim spent up to half an hour with her assailant, victim was with assailant under adequate artificial light in her house and under a full moon outdoors and at least twice faced him directly and intimately, victim's description to police included her assailant's approximate age, height, weight, complexion, skin texture, build, and voice, victim had ‘no doubt’ that defendant was person who raped her, and victim made no previous identification at any of the showups, lineups, or photographic showings.

Affirmed in part, reversed in part, and remanded.

Mr. Justice Marshall took no part in consideration or decision of case.

Mr. Justice Brennan concurred in part and dissented in part and filed opinion in which Mr. Justice Douglas and Mr. Justice Stewart concurred.

**Procedural Posture(s):** On Appeal.

Respondent was convicted of rape on evidence that consisted in part of testimony **\*\*377** concerning the victim's visual and voice identification of respondent at a station-house showup that occurred seven months after the rape. The victim, who had been in the presence of her assailant a considerable time and had directly observed him indoors and under a full moon outdoors, testified that she had ‘no doubt’ that respondent was her assailant. She had previously given the police a description of her assailant, which was confirmed by a police officer. Before the showup where she identified respondent, the victim had made no identification of others who were presented at previous showups, lineups, or through photographs. The police asserted that they used the showup technique because they had difficulty in finding for a lineup other individuals generally fitting respondent's description as given by the victim. The Tennessee Supreme Court's affirmance of the conviction was affirmed here by an equally divided Court. [390 U.S. 404, 88 S.Ct. 979, 19 L.Ed.2d 1267.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1968131144&pubNum=708&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) Respondent then brought a habeas corpus action in District Court. After rejecting the petitioner's contention that this Court's affirmance constituted an actual adjudication within the meaning of [28 U.S.C. s 2244(c)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=28USCAS2244&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_4b24000003ba5) and thus barred further review of the showup identification in a federal habeas corpus proceeding, the District Court, noting that a lineup is relatively more reliable than a showup, held that the confrontation here was so suggestive as to violate due process. The Court of Appeals affirmed. Held:

1. This Court's equally divided affirmance of respondent's state court conviction does not, under [28 U.S.C. s 2244(c)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=28USCAS2244&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_4b24000003ba5), bar further federal relief by habeas corpus, since such an affirmance merely ends the process of direct review but settles no issue of law. P. 378.

2. While the station-house identification may have been suggestive, under the totality of the circumstances the victim's identification of respondent was reliable and was properly allowed to go to the jury. Pp. 380—383. [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Iffd3cb238fd011d9bc61beebb95be672&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[448 F.2d 91,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971112279&pubNum=350&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed in part, reversed in part, and remanded.

## Attorneys and Law Firms

**\*189** Bart C. Durham III, Nashville, Tenn., for petitioner.

Michael Meltsner, New York City, for respondent.

## Opinion

Mr. Justice POWELL delivered the opinion of the Court.

In 1965, after a jury trial in a Tennessee court, respondent was convicted of rape and was sentenced to 20 years' imprisonment. The State's evidence consisted in part of testimony concerning a station-house identification of respondent by the victim. The Tennessee Supreme Court affirmed. [Biggers v. State, 219 Tenn. 553, 411 S.W.2d 696 (1967)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1967131656&pubNum=713&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)). On certiorari, the judgment of the Tennessee Supreme Court was affirmed by an equally divided Court. [Biggers v. Tennessee, 390 U.S. 404, 88 S.Ct. 979, 19 L.Ed.2d 1267 (1968)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1968131144&pubNum=708&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) (Marshall, J., not participating). Respondent then brought a federal habeas corpus action raising several claims. In reply,  **\*190** petitioner contended that the claims were barred by [28 U.S.C. s 2244(c)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=28USCAS2244&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_4b24000003ba5), which provides in pertinent part:

'In a habeas corpus proceeding brought in behalf of a person in custody pursuant to the judgment of a State court, a prior judgment of the Supreme Court of the United States on an appeal or review by a writ of certiorari at the instance of the prisoner of the decision of such State court, shall be conclusive as to all issues of fact or law with respect to an asserted denial of a Federal right which constitutes ground for discharge in a habeas corpus proceeding, actually adjudicated by the Supreme Court therein . . .'

The District Court held that the claims were not barred and, after a hearing, held in an unreported opinion that the station-house identification procedure was so suggestive as to violate due process. The Court of Appeals affirmed. [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Iffd3cb238fd011d9bc61beebb95be672&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[6 Cir., 448 F.2d 91 (1971)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971112279&pubNum=350&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)). We granted certiorari to decide whether an affirmance by an equally divided Court is an actual adjudication barring subsequent  **\*\*378** consideration on habeas corpus, and, if not whether the identification procedure violated due process. [405 U.S. 954, 92 S.Ct. 1167, 31 L.Ed.2d 230 (1972)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972242305&pubNum=708&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

**I**

The intended scope of the phrase ‘actually adjudicated by the Supreme Court’ must be determined by reference to the peculiarities of federal court jurisdiction and the context in which [s 2244(c)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=28USCAS2244&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_4b24000003ba5) was enacted. Jurisdiction to hear state prisoner claims on habeas corpus was first expressly conferred on the federal courts by the Judiciary Act of 1867, c. 28, 14 Stat. 385. Thereafter, decisions of this Court established not only that res judicata was inapplicable, e.g., [Salinger v. Loisel, 265 U.S. 224, 230, 44 S.Ct. 519, 521, 68 L.Ed. 989 (1924)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1924123754&pubNum=708&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_708_521&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_521); [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I236c1ca09c1e11d9bdd1cfdd544ca3a4&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default)) **\*191** [Fay v. Noia, 372 U.S. 391, 423, 83 S.Ct. 822, 840, 9 L.Ed.2d 837 (1963)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1963125316&pubNum=708&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_708_840&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_840), but also that federal courts were obliged in appropriate cases to redetermine issues of fact and federal law. By the same token, the Court developed a number of limiting principles to restrain open-ended relitigation, among them that a successive habeas corpus application raising grounds rejected in a previous application might be denied without reaching the merits. [Salinger v. Loisel, supra, 265 U.S., at 231, 44 S.Ct., at 521](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1924123754&pubNum=708&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_708_521&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_521).

[1](https://1.next.westlaw.com/Document/Ie2de3fa79bf111d9bdd1cfdd544ca3a4/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_anchor_F11972127218)In 1948, Congress codified a version of the Salinger rule in [28 U.S.C. s 2244](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=28USCAS2244&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)). As redesigned and amended in 1966, [s 2244(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=28USCAS2244&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_a83b000018c76) shields against senseless repetition of claims by state prisoners without endangering the principle that each is entitled, other limitations aside, to a redetermination of his federal claims by a federal court on habeas corpus. With this in mind, the purpose of [s 2244(c)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=28USCAS2244&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_4b24000003ba5), also enacted in 1966, becomes clear. This subsection embodies a recognition that if this Court has ‘actually adjudicated’ a claim on direct appeal or certiorari, a state prisoner has had the federal redetermination to which he is entitled. A subsequent application for habeas corpus raising the same claims would serve no valid purpose and would add unnecessarily to an already overburdened system of criminal justice.[1](https://1.next.westlaw.com/Document/Ie2de3fa79bf111d9bdd1cfdd544ca3a4/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_footnote_B00211972127218)

[2](https://1.next.westlaw.com/Document/Ie2de3fa79bf111d9bdd1cfdd544ca3a4/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_anchor_F21972127218)[3](https://1.next.westlaw.com/Document/Ie2de3fa79bf111d9bdd1cfdd544ca3a4/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_anchor_F31972127218)In this light, we review our cases explicating the disposition ‘affirmed by an equally divided Court.’ On what was apparently the first occasion of an equal division, **\*192**  [The Antelope, 10 Wheat. 66, 6 L.Ed. 268 (1825)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1825191703&pubNum=780&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), the Court simply affirmed on the point of division without much discussion. [Id., at 126—127](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1825191703&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)). Faced with a similar division during the next Term, the Court again affirmed, Chief Justice Marshall explaining that ‘the principles of law which have been argued, cannot be settled; but the judgment is affirmed, the court being divided in opinion upon it.’ [Etting v. Bank of United States, 11 Wheat. 59, 78, 6 L.Ed. 419 (1826)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1800103325&pubNum=780&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_780_78&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_78). As was later elaborated, in such cases it is the appellant or petitioner who asks the Court to overturn a lower court's decree.

'If the judges are divided, the reversal cannot be had, for no order can be made. The judgment of the court below, therefore, stands in full force. It is, indeed, the settled practice in such case to enter a judgment of affirmance; but this is only the most convenient mode of expressing the fact that the cause is finally disposed of in conformity with the action of the court below, and that that court can proceed to enforce its judgment. The legal effect would be the same if the appeal, or writ of error, were dismissed.' [Durant v. Essex Co., 7 Wall. 107, 112, 19 L.Ed. 154 (1869)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1868194932&pubNum=780&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_780_112&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_112).

**\*\*379** Nor is an affirmance by an equally divided Court entitled to precedential weight. [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ie9c126b09c1b11d9bdd1cfdd544ca3a4&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[Ohio ex rel. Eaton v. Price, 364 U.S. 263, 264, 80 S.Ct. 1463, 1464, 4 L.Ed.2d 1708 (1960)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1960122560&pubNum=708&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_708_1464&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_1464). We decline to construe [s 2244 (c)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=28USCAS2244&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_4b24000003ba5)‘s bar as extending to claims on which the judgment of a state court stands because of the absence of a majority position in this Court, and accordingly conclude that the courts below properly reached the merits.[2](https://1.next.westlaw.com/Document/Ie2de3fa79bf111d9bdd1cfdd544ca3a4/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_footnote_B00321972127218)

**\*193 II**

[4](https://1.next.westlaw.com/Document/Ie2de3fa79bf111d9bdd1cfdd544ca3a4/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_anchor_F41972127218)[5](https://1.next.westlaw.com/Document/Ie2de3fa79bf111d9bdd1cfdd544ca3a4/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_anchor_F51972127218)We proceed, then, to consider respondent's due process claim.[3](https://1.next.westlaw.com/Document/Ie2de3fa79bf111d9bdd1cfdd544ca3a4/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_footnote_B00431972127218) As the claim turns upon the facts, we must first review the relevant testimony at the jury trial and at the habeas corpus hearing regarding the rape and the identification. The victim testified at trial that on the evening of January 22, 1965, a youth with a butcher knife grabbed her in the doorway to her kitchen:

'A. (H)e grabbed me from behind, and grappled—twisted me on the floor. Threw me down on the floor.

'Q. And there was no light in that kitchen?

**\*194** 'A. Not in the kitchen.

'Q. So you couldn't have seen him then?

'A. Yet, I could see him, when I looked up in his face.

'Q. In the dark?

'A. He was right in the doorway—it was enough light from the bedroom shining through. Yes, I could see who he was.

'Q. You could see? No light? And you could see him and know him then?

'A. Yes.' Tr. of Rec. in No. 237, O.T.1967, pp. 33—34.

When the victim screamed, her 12-year-old daughter came out of her bedroom and also began to scream. The assailant directed the victim to ‘tell her (the daughter) to shut up, or I'll kill you both.’ She did so, and was then walked at knifepoint about two blocks along a railroad track, taken into a woods, and raped there. She testified that ‘the moon was shining brightly, full moon.’ After the rape, the assailant ran off, and she returned home, the whole incident having taken between 15 minutes and half an hour.

She then gave the police what the Federal District Court characterized as ‘only **\*\*380** a very general description,’ describing him as ‘being fat and flabby with smooth skin, bushy hair and a youthful voice.’ Additionally, though not mentioned by the District Court, she testified at the habeas corpus hearing that she had described her assailant as being between 16 and 18 years old and between five feet ten inches and six feet, tall, as weighing between 180 and 200 pounds, and as having a dark brown complexion. This testimony was substantially corroborated by that of a police officer who was testifying from his notes.

On several occasions over the course of the next seven months, she viewed suspects in her home or at the police **\*195** station, some in lineups and others in showups, and was shown between 30 and 40 photographs. She told the police that a man pictured in one of the photographs had features similar to those of her assailant, but identified none of the suspects. On August 17, the police called her to the station to view respondent, who was being detained on another charge. In an effort to construct a suitable lineup, the police checked the city jail and the city juvenile home. Finding no one at either place fitting respondent's unusual physical description, they conducted a showup instead.

The showup itself consisted of two detectives walking respondent past the victim. At the victim's request, the police directed respondent to say ‘shut up or I'll kill you.’ The testimony at trial was not altogether clear as to whether the victim first identified him and then asked that he repeat the words or made her identification after he had spoken.[4](https://1.next.westlaw.com/Document/Ie2de3fa79bf111d9bdd1cfdd544ca3a4/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_footnote_B00541972127218) In any event, the victim testified that she had ‘no doubt’ about her identification. At the habeas corpus hearing, she elaborated in response to questioning.

'A. That I have no doubt, I mean that I am sure that when I—see, when I first laid eyes on him, I  **\*196** knew that it was the individual, because his face—well, there was just something that I don't think I could ever forget. I believe—

'Q. You say when you first laid eyes on him, which time are you referring to?

'A. When I identified him—when I seen him in the courthouse when I was took up to view the suspect.' App. 127.

We must decide whether, as the courts below held, this identification and the circumstances surrounding it failed to comport with due process requirements.

**III**

We have considered on four occasions the scope of due process protection against the admission of evidence deriving from suggestive identification procedures. In [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Id4c6e7209c1d11d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[Stovall v. Denno, 388 U.S. 293, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1967129550&pubNum=708&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), the Court held that the defendant could claim that ‘the confrontation conducted . . . was so unnecessarily suggestive and conductive to irreparable mistaken identification that he was denied due process of law.’ [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Id4c6e7209c1d11d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[Id., at 301—302, 87 S.Ct., at 1972.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1967129550&pubNum=708&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_708_1972&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_1972) This we held, must be determined ‘on the totality of the circumstances.’ We went on to find that on the facts of the case then before us, due process was not violated, emphasizing that the critical condition of the injured witness justified a showup in  **\*\*381** her hospital room. At trial, the witness, whose view of the suspect at the time of the crime was brief, testified to the out-of-court identification, as did several police officers present in her hospital room, and also made an in-court identification.

Subsequently, in a case where the witnesses made in-court identifications arguably stemming from previous exposure to a suggestive photographic array, the Court restated the governing test:

'(W)e hold that each case must be considered on its own facts, and that convictions based on eye **\*197** -witness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.' [Simmons v. United States, 390 U.S. 377, 384, 88 S.Ct. 967, 971, 19 L.Ed.2d 1247 (1968)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1968131143&pubNum=708&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_708_971&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_971).

Again we found the identification procedure to be supportable, relying both on the need for prompt utilization of other investigative leads and on the likelihood that the photographic identifications were reliable, the witnesses having viewed the bank robbers for periods of up to five minutes under good lighting conditions at the time of the robbery.

The only case to date in which this Court has found identification procedures to be violative of due process is [Foster v. California, 394 U.S. 440, 442, 89 S.Ct. 1127, 1128, 22 L.Ed.2d 402 (1969)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1969132945&pubNum=708&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_708_1128&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_1128). There, the witness failed to identify Foster the first time he confronted him, despite a suggestive lineup. The police then arranged a showup, at which the witness could make only a tentative identification. Ultimately, at yet another confrontation, this time a lineup, the witness was able to muster a definite identification. We held all of the identifications inadmissible, observing that the identifications were ‘all but inevitable’ under the circumstances. [Id., at 443, 89 S.Ct., at 1129](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1969132945&pubNum=708&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_708_1129&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_1129).

In the most recent case of [Coleman v. Alabama, 399 U.S. 1, 90 S.Ct. 1999, 26 L.Ed.2d 387 (1970)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1970134256&pubNum=708&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), we held admissible an in-court identification by a witness who had a fleeting but ‘real good look’ at his assailant in the headlights of a passing car. The witness testified at a pretrial suppression hearing that he identified one of the petitioners among the participants in the lineup before the police placed the participants in a formal line. Mr. Justice Brennan for four members of the Court stated that this evidence could support a finding that the in-court identification was  **\*198**‘entirely based upon observations at the time of the assault and not at all induced by the conduct of the lineup.’ [Id., at 5—6, 90 S.Ct., at 2001](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1970134256&pubNum=708&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_708_2001&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_2001).

[6](https://1.next.westlaw.com/Document/Ie2de3fa79bf111d9bdd1cfdd544ca3a4/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_anchor_F61972127218)[7](https://1.next.westlaw.com/Document/Ie2de3fa79bf111d9bdd1cfdd544ca3a4/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_anchor_F71972127218)[8](https://1.next.westlaw.com/Document/Ie2de3fa79bf111d9bdd1cfdd544ca3a4/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_anchor_F81972127218)[9](https://1.next.westlaw.com/Document/Ie2de3fa79bf111d9bdd1cfdd544ca3a4/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_anchor_F91972127218)[10](https://1.next.westlaw.com/Document/Ie2de3fa79bf111d9bdd1cfdd544ca3a4/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_anchor_F101972127218)[11](https://1.next.westlaw.com/Document/Ie2de3fa79bf111d9bdd1cfdd544ca3a4/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_anchor_F111972127218)Some general guidelines emerge from these cases as to the relationship between suggestiveness and misidentification. It is, first of all, apparent that the primary evil to be avoided is ‘a very substantial likelihood of irreparable misidentification.’ [Simmons v. United States, 390 U.S., at 384, 88 S.Ct., at 971.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1968131143&pubNum=708&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_708_971&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_971)While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of ‘irreparable’ it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself.[5](https://1.next.westlaw.com/Document/Ie2de3fa79bf111d9bdd1cfdd544ca3a4/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_footnote_B00651972127218) It is  **\*\*382** the likelihood of misidentification which violates a defendant's right to due process, and it is this which was the basis of the exclusion of evidence in Foster. Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous. But as Stovall makes clear, the admission of evidence of a showup without more does not violate due process.

[12](https://1.next.westlaw.com/Document/Ie2de3fa79bf111d9bdd1cfdd544ca3a4/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_anchor_F121972127218)What is less clear from our cases is whether, as intimated by the District Court, unnecessary suggestiveness **\*199** alone requires the exclusion of evidence.[6](https://1.next.westlaw.com/Document/Ie2de3fa79bf111d9bdd1cfdd544ca3a4/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_footnote_B00761972127218) While we are inclined to agree with the courts below that the police did not exhaust all possibilities in seeking persons physically comparable to respondent, we do not think that the evidence must therefore be excluded. The purpose of a strict rule barring evidence of unnecessarily suggestive confrontations would be to deter the police from using a less reliable procedure where a more reliable one may be available, and would not be based on the assumption that in every instance the admission of evidence of such a confrontation offends due process. [Clemons v. United States, 133 U.S.App.D.C. 27, 48, 408 F.2d 1230, 1251 (1968)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1968120481&pubNum=350&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_350_1251&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_350_1251) (Leventhal, J., concurring); cf. [Gilbert v. California, 388 U.S. 263, 273, 87 S.Ct. 1951, 1957, 18 L.Ed.2d 1178 (1967)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1967129549&pubNum=708&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_708_1957&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_1957); [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I236cdffa9c1e11d9bdd1cfdd544ca3a4&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1961125528&pubNum=708&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)). Such a rule would have no place in the present case, since both the confrontation and the trial preceded Stovall v. Denno, supra, when we first gave notice that the suggestiveness of confrontation procedures was anything other than a matter to be argued to the jury.

[13](https://1.next.westlaw.com/Document/Ie2de3fa79bf111d9bdd1cfdd544ca3a4/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_anchor_F131972127218)We turn, then, to the central question, whether under the ‘totality of the circumstances' the identification was reliable even though the confrontation procedure was suggestive. As indicated by our cases, the factors to be considered in evaluating the likelihood of misidentification include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time **\*200**between the crime and the confrontation. Applying these factors, we disagree with the District Court's conclusion.

In part, as discussed above, we think the District Court focused unduly on the relative reliability of a lineup as opposed to a showup, the issue on which expert testimony was taken at the evidentiary hearing. It must be kept in mind also that the trial was conducted before Stovall and that therefore the incentive was lacking for the parties to make a record at trial of facts corroborating or undermining the identification. The testimony was addressed to the jury, and the jury apparently found the identification reliable. Some of the State's testimony at the federal evidentiary hearing may well have been self-serving in that it too neatly fit the case law, but it surely does nothing to undermine the state record, which itself fully corroborated the identification.

We find that the District Court's conclusions on the critical facts are unsupported by the record and clearly erroneous. The victim spent a considerable period of time with her assailant, up to half an hour. She was with him under adequate artificial light in her house and under a full moon outdoors, and at least twice, once in the house and later in the woods, faced him directly and intimately. She was no casual observer, but rather the victim of one of the most  **\*\*383** personally humiliating of all crimes.[7](https://1.next.westlaw.com/Document/Ie2de3fa79bf111d9bdd1cfdd544ca3a4/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_footnote_B00871972127218) Her description to the police, which included the assailant's approximate age, height, weight, complexion, skin texture, build, and voice, might not have satisfied Proust but was more than ordinarily thorough. She had ‘no doubt’ that respondent was the person who raped her. In the nature of the crime, there are rarely witnesses to a rape other than the victim, who often has a limited  **\*201**opportunity of observation.[8](https://1.next.westlaw.com/Document/Ie2de3fa79bf111d9bdd1cfdd544ca3a4/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_footnote_B00981972127218) The victim here, a practical nurse by profession, had an unusual opportunity to observe and identify her assailant. She testified at the habeas corpus hearing that there was something about his face ‘I don't think I could ever forget.’ App. 127.

[14](https://1.next.westlaw.com/Document/Ie2de3fa79bf111d9bdd1cfdd544ca3a4/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_anchor_F141972127218)There was, to be sure, a lapse of seven months between the rape and the confrontation. This would be a seriously negative factor in most cases. Here, however, the testimony is undisputed that the victim made no previous identification at any of the showups, lineups, or photographic showings. Her record for reliability was thus a good one, as she had previously resisted whatever suggestiveness inheres in a showup. Weighing all the factors, we find no substantial likelihood of misidentification. The evidence was properly allowed to go to the jury.[9](https://1.next.westlaw.com/Document/Ie2de3fa79bf111d9bdd1cfdd544ca3a4/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_footnote_B01091972127218)

Affirmed in part, reversed in part, and remanded.

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

### Concurrence in Part

Mr. Justice BRENNAN, with whom Mr. Justice DOUGLAS and Mr. Justice STEWART concur, concurring in part and dissenting in part.

We granted certiorari in this case to determine whether our affirmance by an equally divided Court f respondent's state conviction constitutes an actual adjudication  **\*202** within the meaning of [28 U.S.C. s 2244(c)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=28USCAS2244&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_4b24000003ba5), adn thus bars subsequent consideration of the same issues on federal habeas corpus. The Court holds today that such an affirmance does not bar further federal relief, and I fully concur in that aspect of the Court's opinion. Regrettably, however, the Court also addresses the merits and delves into the factual background of the case to reverse the District Court's finding, upheld by the Court of Appeals, that under the ‘totality of the circumstances,’ the pre-Stovall showup was so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. This is an unjustified departure from our long-established practice not to reverse findings of fact concurred in by two lower courts unless shown to be clearly erroneous. See, e.g., [Blau v. Lehman, 368 U.S. 403, 408—409, 82 S.Ct. 451, 454—455, 7 L.Ed.2d 403 (1962)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1962100475&pubNum=708&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_708_454&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_454); [Faulkner v. Gibbs, 338 U.S. 267, 268, 70 S.Ct. 25, 94 L.Ed. 62 (1949)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1949116841&pubNum=708&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)); [United States v. Dickinson, 331 U.S. 745, 751, 67 S.Ct. 1382, 1386, 91 L.Ed. 1789 (1947)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1947117212&pubNum=708&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_708_1386&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_1386); [United States v. Commercial Credit Co., 286 U.S. 63, 67, 52 S.Ct. 467, 468, 76 L.Ed. 978 (1932)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1932123592&pubNum=708&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_708_468&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_468); [United States v. Chemical Foundation, 272 U.S. 1, 14, 47 S.Ct. 1, 6, 71 L.Ed. 131 (1926)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1926122336&pubNum=708&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_708_6&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_6); [Baker v. Schofield, 243 U.S. 114, 118, 37 S.Ct. 333, 334, 61 L.Ed. 626 (1917)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1917102231&pubNum=708&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_708_334&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_334); [Towson v. Moore, 173 U.S. 17, 24](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1899180008&pubNum=780&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_780_24&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_24) [19 S.Ct. 332, 334, 43 L.Ed. 597 (1899)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1899180008&pubNum=708&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_708_334&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_334); cf. [Boulden v. Holman, 394 U.S. 478, 480—481, 89 S.Ct. 1138, 1139—1140, 22 L.Ed.2d 433 (1969)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1969132947&pubNum=708&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_708_1139&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_1139).

**\*\*384** As the Court recognizes, a pre-Stovall identification obtained as a result of an unnecessarily suggestive showup may still be introduced in evidence if, under the ‘totality of the circumstances,’ the identification retains strong indicia of reliability. After an extensive hearing and careful review of the state court record, however, the District Court found that, under the circumstances of this case, there existed an intolerable risk of misidentification. Moreover, in making this determination, the court specifically found that ‘the complaining witness did not get an opportunity to obtain a good view of the suspect during the commission of the crime,’ ‘the show-up confrontation was not conducted near the time of the alleged crime, but, rather, some seven months after its commission,’ **\*203** and the complaining witness was unable to give ‘a good physical description of her assailant’ to the police. App. 41—42. The Court of Appeals, which conducted its own review of the record, upheld the District Court's findings in their entirety. [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Iffd3cb238fd011d9bc61beebb95be672&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[448 F.2d 91, 95 (CA6 1971)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971112279&pubNum=350&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_350_95&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_350_95).

Although this case would seem to fall squarely within the bounds of the ‘two-court’ rule, the Court seems to suggest that the rule is ‘inapplicable here’ because ‘this is a habeas corpus case in which the facts are contained primarily in the state court record (equally available to us as to the federal courts below) . . ..’ Ante, at 379 n. 3. The ‘two-court’ rule, however, rests upon more than mere deference to the trier of fact who has a firsthand opportunity to observe the testimony and to gauge the credibility of witnesses. For the rule also serves as an indispensable judicial ‘time-saver,’ making it unnecessary for this Court to waste scarce time and resources on minor factual questions which have already been accorded consideration by two federal courts and whose resolution is without significance except to the parties immediately involved. Thus, the ‘two-court’ rule must logically apply even where, as here, the lower courts' findings of fact are based primarily upon the state court record.

The Court argues further, however, that the rule is irrelevant here because, in its view, ‘the dispute between the parties is not so much over the elemental facts as over the constitutional significance to be attached to them.’ Ante, at 379 n. 3. I cannot agree. Even a cursory examination of the Court's opinion reveals that its concern is not limited solely to the proper application of legal principles but, rather, extends to an essentially de novo inquiry into such ‘elemental facts' as the nature of the victim's opportunity to observe the assailant and the type of description the victim gave **\*204** the police at the time of the crime. And although we might reasonably disagree with the lower courts' findings as to such matters, the ‘two-court’ rule wisely inhibits us from cavalierly substituting our own view of the facts simply because we might adopt a different construction of the evidence or resolve the ambiguities differently. On the contrary, these findings are ‘final here in the absence of very exceptional showing of error.’ [Comstock v. Group of Institutional Investors, 335 U.S. 211, 214, 68 S.Ct. 1454, 1456, 92 L.Ed. 1911 (1948)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1948116310&pubNum=708&originatingDoc=Ie2de3fa79bf111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_708_1456&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_1456). The record before us is simply not susceptible of such a showing and, indeed, the petitioner does not argue otherwise. I would therefore dismiss the writ of certiorari as improvidently granted insofar as it relates to Question 2 of the Questions Presented.

**State v. Scarborough, 300 S.W.3d 717 (2009)**

**State v. Scarborough**

300 S.W.3d 717

Court of Criminal Appeals of Tennessee,

at Knoxville.

**STATE of Tennessee**

**v.**

**Bruce Warren SCARBOROUGH.**

No. E2007–01856–CCA–R3–CD.

July 29, 2008 Session.March 17, **2009**.Application for Permission to AppealDenied by Supreme CourtAug. 17, **2009**.

**Synopsis**

**Background:** Defendant was convicted by jury in the Criminal Court, Knox County, [Mary Beth Leibowitz](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0261571101&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Iab48187d140e11deb6a3a099756c05b7), J., of two counts of aggravated rape, Class A felonies, and he was sentenced to consecutive terms of 60 years as a career offender in the Department of Correction. Defendant appealed.

**Holdings:** The Court of Criminal Appeals, [Joseph M. Tipton](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0151459001&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Iab48187d140e11deb6a3a099756c05b7), P.J., held that:

[1](https://1.next.westlaw.com/Document/Iab48187d140e11deb6a3a099756c05b7/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af000000177d63b6d884d6aa399%3FpcidPrev%3D2f58f0384e354318bda5d0b6e2499f0f%26Nav%3DCASE%26fragmentIdentifier%3DIab48187d140e11deb6a3a099756c05b7%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=076fe120a513cf1fbb225cb3355e300c&list=CASE&rank=1&sessionScopeId=db57dc7ecf42d03229278314058df0e0bfb6ec8b96fe3dded19645dc755b32c3&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F92018382652) even though photographic array may have been suggestive, victim's identification of defendant was reliable, and

[2](https://1.next.westlaw.com/Document/Iab48187d140e11deb6a3a099756c05b7/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af000000177d63b6d884d6aa399%3FpcidPrev%3D2f58f0384e354318bda5d0b6e2499f0f%26Nav%3DCASE%26fragmentIdentifier%3DIab48187d140e11deb6a3a099756c05b7%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=076fe120a513cf1fbb225cb3355e300c&list=CASE&rank=1&sessionScopeId=db57dc7ecf42d03229278314058df0e0bfb6ec8b96fe3dded19645dc755b32c3&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F192018382652) consecutive sentences of 60 years were appropriate.

Affirmed.

## Attorneys and Law Firms

**\*719** Mark E. Stephens, District Public Defender, and John Halstead, Assistant Public Defender, for the appellant, Bruce Warren **Scarborough**.

[Robert E. Cooper, Jr.](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0380677701&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Iab48187d140e11deb6a3a099756c05b7), Attorney General and Reporter; Rachel West Harmon, Assistant Attorney General; [Randall E. Nichols](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0184623201&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Iab48187d140e11deb6a3a099756c05b7), District Attorney General; and Kevin Allen and Leslie Nassios, Assistant District Attorneys General, for the appellee, **State** of Tennessee.

**OPINION**

[JOSEPH M. TIPTON](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0151459001&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Iab48187d140e11deb6a3a099756c05b7), P.J., delivered the opinion of the court, in which [JERRY L. SMITH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0133405101&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Iab48187d140e11deb6a3a099756c05b7) and [NORMA McGEE OGLE](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0127306401&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Iab48187d140e11deb6a3a099756c05b7), JJ., joined.

## Opinion

[JOSEPH M. TIPTON](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0151459001&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Iab48187d140e11deb6a3a099756c05b7), P.J.

The defendant, Bruce Warren **Scarborough**, was convicted by a Knox County Criminal Court jury of two counts of aggravated rape, Class A felonies, and was sentenced to consecutive terms of sixty years as a career offender in the Department of Correction. On appeal, he argues that the trial court erred in (1) denying his motion to suppress the in-court and out-of-court identifications of him and his tattoos, (2) failing to grant a new trial due to prosecutorial misconduct during closing argument, (3) classifying him as a career offender, and (4) ordering consecutive sentences. After review, we affirm the judgments of the trial court.

This case involves the June 1997 vaginal and anal raping of the victim, K. R., for which the defendant was charged in August 2005 by presentment[1](https://1.next.westlaw.com/Document/Iab48187d140e11deb6a3a099756c05b7/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af000000177d63b6d884d6aa399%3FpcidPrev%3D2f58f0384e354318bda5d0b6e2499f0f%26Nav%3DCASE%26fragmentIdentifier%3DIab48187d140e11deb6a3a099756c05b7%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=076fe120a513cf1fbb225cb3355e300c&list=CASE&rank=1&sessionScopeId=db57dc7ecf42d03229278314058df0e0bfb6ec8b96fe3dded19645dc755b32c3&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00112018382652) with two counts of aggravated rape.

The trial was conducted on November 13–15, 2006. At the trial, the victim testified that in 1997 she lived alone at 4601 Bob White Road in Knoxville. She recalled that sometime that spring she began experiencing “kind of a creepy feeling. I thought perhaps I was being watched.” She remembered an incident one evening approximately seven to ten days before the rape when she was napping on the sofa and “woke with a start and ... saw a flash of what looked like a white t-shirt across the living room window.” The victim **stated** that she told her mother that she needed “some sort of protection” and was considering buying a baseball bat, although she never did.

The victim testified that on June 3, 1997, she was at home with “a horrible case of [laryngitis](https://1.next.westlaw.com/Link/Document/FullText?entityType=disease&entityId=Ic6c759ee475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))” and a friend brought her some cold medication around 4:30 p.m. The victim recalled that “[i]t did not register with [her]” that she did not lock the door when her friend left. The victim **stated** that during the night she was awakened by the sound of the door closing and heard footsteps on the hardwood floor. The victim remembered that she looked at the clock and it was around 3:30 a.m., and then she saw a figure standing in the doorway. The victim **stated** that with the hallway and living room lights on, the lighting was behind the figure. She recalled that the figure filled the majority of the doorway.

**\*720** The victim testified that she “bolted upright and with [laryngitis](https://1.next.westlaw.com/Link/Document/FullText?entityType=disease&entityId=Ic6c759ee475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) was screaming, ‘Who are you?’ ” She recalled that the figure “rushed” at her, leapt onto her legs and torso, and used his arms to restrain her. She said she struggled and tried to scream while trying to make sense of what was happening. The victim **stated** she realized what was happening when the man began to rip off her clothes. She noted that he smelled “[v]ery strongly of greasy body odor” and that there was nothing familiar about him.

The victim testified that the man told her to hold still and not scream while he covered her eyes with his hand. She **stated** that the man pulled a piece of tape off his upper arm and used it to cover her face. She remembered that the man told her that he had a knife, that he would use it, and that he would cut her up. The victim testified that she then heard a rustle and felt the man touch her with plastic on his hands. She said that while he was touching her, he said, “I'm going to get you.... You just hold still. You're going to like this.” She noted that the more she tried to pull away from him, “the more excited he got and the harder he would rape [her].”

The victim testified that shortly after the man began raping her, he took a pillowcase off one of her pillows, put it over her head, and “noosed it really tightly.” The victim recalled that she lied and told the man she had herpes in an effort to disgust him and also tried to make herself vomit. She said she began to pray aloud. The victim said that she went limp and did not fight him, which “wasn't as pleasing. So, he turned [her] over and began to sodomize [her].” She said that the man grabbed some Ruhl Gel, an “anti-itch, bug bite” medication, from her bedside table and rubbed it on her vagina. She noted that she did not know she could feel pain “quite like that.” The victim **stated** that sometime prior to the man raping her, he tried to kiss her and “said something about wanting oral sex,” but she refused. The victim estimated that the initial rape lasted twenty-five to thirty minutes and that she was sodomized twice. She recalled that the man did not wear a condom.

The victim testified that she was able to make out the man's figure, shape of his haircut, his hair, and moustache as he was running toward her bed. She recalled that toward the end of the attack, while she was being sodomized, the tape came off her eyes under the pillowcase and she was able to see tattoos on the man's arms. The victim said that she focused on the man's arms “for a minute and a half to two minutes,” knowing she needed to be able to identify him if she survived. She **stated** that she looked behind her at the man's face through a gape in the pillowcase. She said she observed his eyes, eyebrows, cheekbones, and moustache for “[p]robably half a minute.” She said that she noticed he was wearing a blue button-down shirt, a velcro-banded watch with a black band and blue trim around the edges and that she got an overall feel for his weight and age.

The victim testified that after the rape, the man put his pants back on as she lay naked “in the fetal position on [her] bed.” She remembered that the man pulled her up, grabbed the back of the pillowcase tightly, and walked her down the hallway to the bathroom. She **stated** that he made her get into the shower with the pillowcase still over her head, poured liquid soap onto her hand, and told her “to clean that pussy real good. He didn't want nobody to find nothing. To clean it real good.” She recalled that as she was washing herself, the man told her that he would be watching her house for a few weeks and if he saw any police cars he would come back and kill her. The victim said she washed herself **\*721** for five to ten seconds and then became aware that the man was gone. She **stated** that she heard footsteps across the living room floor and the glass front door close and that she turned off the water and listened for a car but never heard a car start.

The victim testified that she retrieved a telephone from her bedroom and locked herself in the bathroom. She said she called 9–1–1 and reported that a stranger had entered her house and raped her. She recalled that officers arrived on the scene in “[j]ust a matter of minutes” and began securing the scene. The victim said she was taken by ambulance to the hospital where a rape kit was conducted. She said she went to the police station later that morning and gave a statement. The victim **stated** that she worked with an officer to create a composite of her attacker and that she drew a freehand representation of her attacker's tattoos. She said that she drew the overall image of the tattoo on her attacker's left arm, including the shape, coloration, and pattern but that she did not know what it was specifically. At this point in the victim's testimony, the defendant was asked to show the victim his arms, and she identified his tattoos as those of her attacker.

The victim testified that she looked through books containing photographs of convicted criminals and photographs of tattoos. She said she viewed photographic lineups containing six or eight photographs each “[a]t least a dozen” times. The victim **stated** that she viewed hundreds of photographs and that she was very concerned that she not wrongly identify her attacker. The victim testified that in 2002 she received a call from Detective Ed Stair with the Knoxville Police Department at her new home in Macon, Georgia, asking her to come to Knoxville because they had a potential suspect in her case. The victim said that when she arrived at the police station, she saw six standard computer paper sized photographs on a desk and that the first photograph she looked at was the one she recognized as her attacker. The victim said that she looked through the other photographs to be sure she was not having some sort of “unusual reaction” but that she was “100 percent certain” the man in the first photograph was her attacker. She recalled that Detective Stair asked her to look through a stack of photographs of tattoos and that she “became almost hysterically insistent” that the tattoos belonged to her attacker. She noted that once she recognized the tattoos, Detective Stair told her the tattoos belonged to the man she had identified in the photograph. Asked how she knew she was not mistaken, the victim replied:

There are a few defining moments in your life. Some of them joyful.... This was a defining moment. With every bit of comprehension and power I had, I memorized who had hurt me because I knew this person had done it before. He came too prepared. And I knew this person would do it again. And I felt the one thing I could do is keep another person from being hurt, should I ever be given an opportunity to identify this person.

The victim identified the defendant in court as the man who raped her.

On cross-examination, the victim acknowledged that when her attacker initially appeared in her doorway all she saw was a shadow and then got an image of his hair and moustache when he ran toward her. The victim also acknowledged that her drawing of her attacker's left arm tattoo did not contain a peacock although the defendant's tattoo did. The victim explained, however, that “[she] was going for pattern.” She admitted she did not recall the tattoo having color in it. She agreed  **\*722** that she did not note that the tattoo on her attacker's right wrist contained a skull and a dragon.

On further cross-examination, the victim admitted that the five other men in the 2002 photographic lineup had different hair than the man she identified as her attacker. She said that they had “similarity either in cheekbone structure, the eyebrow structure, or general shape of the eyes.” She acknowledged that one of the men in the photographs was heavier than the range she had given for weight and that one was an “older gentleman.” On redirect examination, the victim **stated** that the drawings of her attacker's tattoos represented “[w]hat [she] could focus in on and see,” not necessarily what he had.

Lieutenant Warren Hamlin with the Knoxville Police Department testified that he was one of the officers who responded to the victim's 9–1–1 call around 5:00 a.m. on June 4, 2007. Lieutenant Hamlin said that while en route, they looked for anyone matching the description of “a white male, [wearing] blue jeans and a paisley shirt with tat[t]oos on his arms” but did not see anyone. Lieutenant Hamlin **stated** that when they arrived on the scene, the victim was very scared, frightened, and hesitant to let them inside. Lieutenant Hamlin recalled that once inside, they searched the house and obtained more information from the victim before she was transported to the hospital by ambulance. He remembered that Investigator Mike Hyde from the major crimes division and Specialist Art Bohanan from the crime lab responded to collect evidence. Lieutenant Hamlin noted that both men had since retired. Hamlin read Bohanan's forensic report, which the parties stipulated would have been Bohanan's testimony had he been present at trial. The report was as follows:

This document is dated 4 June of 1997, to Investigator M. Hyde from P.S. 3 Arthur Bohanan regarding 1064 of [the victim]. Number 97018517. The first paragraph, called in from home at 05:20. Arrived on scene ... at 06:05 meeting Sergeant Hamlin and Officer Rotmeyer at the scene. Victim had already gone to Fort Sanders Hospital. Made photos of the house, the bedroom, the bath area. Rough sketch made of the entire house. Point of entry was through unlocked front door. Collected clothing and bedding from the bed. A tube of Ruhl Gel was taken from the nightstand. Also a bottle of body lotion from the side rail of the bed. Both had been used on the victim, according to officers.

Sergeant Hamlin said the victim **stated** the suspect had plastic bags over the hands. The front door, storm door, door frame to the bedroom and bath all fingerprinted. Finding only two useable latents. These from the inside of the storm door. Possibly made by responding officers.

House secured by Officer Rotmeyer, who gave me the keys to take to the victim at Fort Sanders. Her car in the driveway had been entered from the front passenger's side. This is a red Volvo.... A print of the door, a small box, a McDonald's cup, eyeglasses, cards and items in the floorboard. Glove marks found. Phone was still in the glove box. Completed at the scene at 06:50.

Went to hospital, received a rape kit from the box at 07:05. No presence of sperm [was] seen from examination. Talked briefly to victim and her parents. Gave her the keys. She was to come to CID with her mother. Left there at 07:15. 07:30, came back to CID. Conferred with Hyde. Composite sketch will be made before he took a statement. **\*723** 07:40, the victim arrived with mother. Made composite sketch and she made sketches of the tat[t]oos on both arms of suspect.

The top page two, and the case number 97018517. Printed both items from the scene, finding no latents. Officer Tammy Hamlin brought a small blue table lamp back from the scene that had been touched. No useable latents developed, but could see where it had been touched. A glove like print. The two latents from the front door were searched through AFIS twice, finding no match.

15:00 asked to compare known prints of Michael Lett to latents from door. No match. Items confiscated as evidence: all were on the bed or nightstand. One white bed cover, one blue electric blanket, one green blanket, one pair of shorts bottom white with flowers, matching top recovered in the bathroom. One pair of blue pants, one pillow cover, one blue/green checked dress, one tube of Ruhl Gel (insect bite), one bottle body lotion, one rape evidence kit from Fort Sanders Hospital. And [initialed] by Art Bohanan.

Lieutenant Hamlin testified that the two latent prints lifted from the victim's door were examined and were determined to belong to the victim. Lieutenant Hamlin **stated** that the police now knew the defendant lived approximately six-tenths of a mile from the victim's house at the time of the rape. On cross-examination, Lieutenant Hamlin acknowledged that whoever committed the crime could have gone in a number of directions after leaving the victim's house and that the only thing they knew was that the victim thought that the suspect left on foot.

Barbara Morrison testified that in June 1997 she was working as a nurse in the emergency department at Fort Sanders Hospital, where she treated the victim after the rape. She said the hospital's standard procedure was to collect a rape kit when someone alleged to have been sexually assaulted. She testified that a completed rape kit is sealed, dated, and placed in a lockbox until the police pick it up. Upon seeing the victim in court, Morrison said that “[h]er face looks a little familiar.”

Detective Ed Stair testified that he had retired from police work but had been working with the Knoxville Police Department's cold case division in 2002 when he started reviewing the victim's rape case. Detective Stair recalled that after he developed the defendant as a suspect, he obtained a warrant to secure a blood sample from the defendant. Detective Stair said that he photographed the defendant's tattoos. Detective Stair **stated** that he witnessed blood being drawn from the defendant and hair samples collected from the defendant. Detective Stair said that he delivered the blood and hair samples to the Tennessee Bureau of Investigation (TBI) Crime Laboratory for genetic profiling.

Detective Stair testified that he located the victim, who was living in Macon, Georgia, in July 2002, and asked her to come to the Knoxville Police Department to view a photographic lineup. Detective Stair said he obtained six driver's license photographs from the Tennessee Department of Safety, which he assembled for the victim's viewing. Detective Stair recalled that he assembled the photographs on a table in the police department, three on top and three on bottom, and had them arranged before the victim arrived. Detective Stair remembered that the victim picked out the defendant's photograph within a couple of seconds and that he had her write the date, time, and her initials on the back of that photograph. Detective Stair said that he had the victim look at photographs of **\*724** the tattoos on the defendant's arms and that she identified “a couple of them being the ones that she had seen on [her attacker's] arms.” On cross-examination, Detective Stair acknowledged that he did not have the victim view the photographs sequentially.

Meelora Zerick, a safety examiner with the Tennessee Department of Safety, testified that she was a custodian of records and had access to driver's license applications. Zerick acknowledged that she was subpoenaed to produce records relating to the defendant from 1996 and 1997. Zerick **stated** that the defendant applied for and received an identification-only card on August 20, 1996. She noted that the defendant applied for and received a driver's license on August 26, 1997.

David Burns, previously with the Knoxville Police Department's crime laboratory, testified that he transported evidence from the victim's 1997 rape case to the TBI laboratory for comparison with a suspect in November 2003 at the request of Detective Stair. Melanie Phillips testified that she worked as a forensic technician in the TBI's Knoxville office in November 2003. She recalled that she received evidence from David Burns, assigned it a laboratory number, and placed it in a secure vault. Phillips **stated** that due to staffing shortages in the Knoxville office, Steve Scott transferred the evidence to the Nashville office where it was assigned to Oakley McKinney, a forensic scientist, and Mike Turbeville, a serologist.

Agent Oakley McKinney testified he worked at the TBI crime laboratory as a forensic scientist specializing in latent prints, and he was accepted as an expert in the field. Agent McKinney **stated** that he examined a piece of gray duct tape that had a “little bit of paper on the back” but that he did not find any latent prints on it.

Agent Mike Turbeville, accepted by the trial court as an expert in DNA forensic science and serology, testified that in early 2004, he examined the victim's clothing, pillowcases, mattress cover, and blankets for the presence of semen, but none was detected. Agent Turbeville **stated** that he analyzed the vaginal swabs taken from the victim and that although he detected the presence of human semen on two of the three swab packs, he found no sperm.

Agent Turbeville testified that he isolated DNA from the “non-sperm fraction” on the swabs and that he compared it to the victim's and defendant's genetic profiles. He explained that the DNA was a mixture of the victim's profile “for the most part” and a male minor contributor. He said that the defendant's profile was consistent with the sample at five out of thirteen loci and could not be excluded from the remaining eight loci.

On cross-examination, Agent Turbeville testified that he created a report called an electropherogram, which is essentially a line with peaks where the peaks indicate major contributors to the DNA. He said that the more DNA present, the higher the peak will be at that location. Agent Turbeville explained that sometimes “stutter peaks,” which are peaks on the chart that are not actually representative of DNA alleles, occur on the electropherogram.He noted that every person inherits one DNA allele from each parent at each locus. Agent Turbeville acknowledged that at one locus in particular, there was a possible stutter peak that would have been consistent with one of the defendant's alleles. However, he noted that he called that locus consistent with the defendant's DNA based, not on the presence of the stutter peak, but on a peak that was consistent with the defendant's other allele at that locus. Asked whether, at some of the other loci, certain stutter peaks could  **\*725** actually be alleles, Agent Turbeville said that it was “not impossible,” but he did not think they were alleles because “when you've got a lot of DNA ... and especially when you've got an individual [who is the] major contributor ... very substantially, and a minor contributor, it's typical to see these peaks here, in the stutter position.”

Asked on further cross-examination why two peaks on the chart at another locus appeared small, Agent Turbeville explained that those peaks appeared small compared to some of the larger peaks but they were still above the requisite threshold. With regard to another locus, Agent Turbeville agreed that the software showed one peak that was not consistent with either the victim or the defendant, but he said he thought the peak was “inconclusive” because “the software did call it and it was in the stutter position.” He noted that this particular peak was approximately fourteen percent of the height of the major peak and that TBI protocol was to call any peak that was twelve percent of the size of the major peak an allele, but he explained that they “can interpret this based on our experience ... from looking at these profiles over the years.” However, Agent Turbeville acknowledged that he included that particular peak on his chart of the alleles. On redirect examination, Agent Turbeville restated his opinion that the defendant could not be excluded as a contributor to the biological matter he tested. The defendant was convicted upon the foregoing evidence of two counts of aggravated rape.

**I. SUPPRESSION OF IDENTIFICATIONS**

[1](https://1.next.westlaw.com/Document/Iab48187d140e11deb6a3a099756c05b7/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af000000177d63b6d884d6aa399%3FpcidPrev%3D2f58f0384e354318bda5d0b6e2499f0f%26Nav%3DCASE%26fragmentIdentifier%3DIab48187d140e11deb6a3a099756c05b7%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=076fe120a513cf1fbb225cb3355e300c&list=CASE&rank=1&sessionScopeId=db57dc7ecf42d03229278314058df0e0bfb6ec8b96fe3dded19645dc755b32c3&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F12018382652)Before trial, the defendant filed a motion to suppress the in-court and out-of-court identifications of him and his tattoos, arguing that the victim had limited opportunity to view her attacker during the incident and that the identification procedure was unduly suggestive which led to an unreliable identification. The trial court conducted a hearing on the matter on November 7, 2006. At the hearing, Ed Stair testified that he was a retired detective with the Knoxville Police Department. Detective Stair **stated** that in 2002 he investigated five unsolved 1997 rape cases. He said he discovered a DNA match to the defendant in two of the rape cases and, in response, obtained a blood sample from the defendant and took photographs of his arms. Detective Stair recalled that one victim-the victim in this case-had previously helped create a composite drawing of her attacker's face and the tattoos on his arms. He noted the victim had given the following description of her attacker:

[H]e was a white male, age 35 to 45, 5′10″ to 5′11″, 170 to 180, medium build, two inch long brown curly hair parted on the right side, brown mustache, blue jeans, black belt, ... blue buttoned-down shirt with white design, and a watch with blue trim and black velcro band.

Detective Stair testified that he contacted the victim in July 2002 and asked her to come to the police department to view a photographic lineup. He said that he assembled a lineup, including the driver's license photograph of the defendant and other photographs he received from the sheriff's department and that the photographs were lying on a table when the victim entered the room. Detective Stair remembered that after one or two seconds, the victim identified the defendant as her attacker. He **stated** that he then showed the victim photographs of the defendant's tattoos, from which she immediately identified photographs of the tattoos she had drawn in 1997.

On cross-examination, Detective Stair testified that he thought the ages of the  **\*726** individuals in the photographs were “pretty close” to the thirty-five to forty-five age range and that the hair color of the individuals looked “about the same.” Detective Stair acknowledged that when he telephoned the victim he told her they had developed a suspect based on DNA matches in two other rape cases. He also acknowledged that the various rape victims from that time were familiar with each other from counseling groups and therapy sessions. Detective Stair agreed that he only showed the victim photographs of the defendant's tattoos. He recalled that the victim identified a peacock tattoo that went around the defendant's arm, and he acknowledged that the victim's drawing was not of a peacock. He said that the victim also identified another of the defendant's tattoos and that he then told her that the tattoos belonged to the man she identified, who was the same man identified by the DNA.

The victim testified at the suppression hearing that she was raped in her home on June 4, 1997, and that she subsequently helped create a computerized composite drawing of her attacker. She said she made freehand drawings of her attacker's tattoos and provided descriptions of the tattoos. The victim said she continued to live in Knoxville for approximately fourteen months after the attack, during which time she viewed lineups consisting of six to ten photographs on approximately nine to twelve occasions. She also **stated** that immediately after the attack, she looked at “dozens if not over a hundred different photos ... [and] books of tattoo images.”

The victim testified that after she moved to Georgia in 1998, she did not hear from the Knoxville Police Department until 2002, when Detective Stair contacted her. She said that Detective Stair told her there had been a DNA match in a rape case in Knoxville similar to [hers] “and was believed to be connected.” She **stated** she traveled to the Knoxville Police Department the next day and entered a room where 8–1/2 x 11–sized photographs were laid out on a desk. The victim recalled that she recognized her attacker's photograph instantly but “took an extra few seconds just to make sure and looked at each photograph carefully.” She remembered Detective Stair then handed her a stack of photographs of tattoos and said she “had a very strong reaction” to the photographs.

On cross-examination, the victim was asked about her opportunity to observe her attacker and his tattoos during the attack. She testified that she was asleep during the early morning of June 4, 1997, when she heard a noise at the front of her house followed by footsteps. She **stated** that she saw a figure standing in the doorway of her bedroom but was not able to see any of the individual's features at that time because she had just woken up and her eyes had not adjusted to the dark. She said that her room was dark but that there was a light on in the hallway.She related that the individual leapt on her bed and held her down, that at this point her eyes started to adjust to the light, and that she was able to get an image of the individual's hair and facial hair. The victim recalled that her attacker covered her face initially with his hand, but then with duct tape and a flannel pillowcase. She remembered that at some point, the duct tape came loose from her skin but that she could not see anything because she was in a face-up position with the pillowcase still over her head. The victim **stated**, however, that her attacker flipped her over and the pillow case fell down in a way that a gap was between her face and the edge of the pillow case, at which point she was able to bend back and look around.

**\*727** The victim testified that by this point her eyes had adjusted to the light and she could see her attacker's arms as he was grabbing various of her body parts. She said that once she saw his arms, she focused on his tattoos and turned her head side-to-side to see both arms. She **stated** that because her attacker did not seem bothered by her head movements, she completely turned her body around to the right side and stared at him. She estimated that she viewed his tattoos for a couple of minutes and his face anywhere from fifteen to thirty seconds. The victim testified she “remembered the overall shape with the circular center” of the tattoo on her attacker's right arm and “wasn't sure if perhaps it was a dragon or something exotic [.]” The victim acknowledged that she did not identify a dragon or mark a head on the diagram she drew of the tattoo on her attacker's left arm. She said she thought the tattoo was “that blue-black” color. The victim said that she went for overall shape in her drawing because it was “pretty distinctive.” She did not recall her attacker's tattoos depicting anything specific.

The victim testified that after she stared at her attacker's face for fifteen to thirty seconds, she was scared that it would become apparent what she was doing and that she knew she had what she needed. She acknowledged that she did not have any other opportunities to view her attacker. The victim agreed that even though she had viewed several lineups over the years, she did not view any from the time she moved to Georgia until 2002, when she received the call from Detective Stair. The victim acknowledged that she was acquainted with some of the other victims from related rape cases and that she had talked to some of those victims after she “had been up to Knoxville.”

The victim testified that when she arrived at the police station, she and Detective Stair “exchanged pleasantries” and went into the room to view the lineup. The victim remembered that the defendant's photograph was the top left-hand photograph in the array and acknowledged that it probably was the first image that caught her eye. However, she said she absolutely looked at the other photographs. The victim remembered describing her attacker's “curly hair and the mustache and the eyebrows, the bushy eyebrows and the cheekbones” to the police years earlier, but she did not recall ever having told the police she did not get a good look at her attacker's face. With regard to the individuals in the 2002 array, the victim said “[e]ach photograph had something that was similar ... whether it was eyebrows or the hair or a mustache that was similar in appearance.” She admitted that some of the individuals had features that indicated to her that it was not that person. When shown photographs from the lineup, the victim noted that some of the individuals had various dissimilarities to what she remembered of her attacker.

The victim testified that after she made her identification, Detective Stair thanked her and nodded and then asked her to look through a stack of tattoo photographs. She said that he did not tell her anything about the source of the photographs but that she wondered if they had come from the person identified from the DNA match. The victim **stated** that she recalled one, two, or more of the tattoos in the photographs. She said that after she picked out the tattoos that she remembered, she was told they belonged to the man she had identified from the lineup.

The trial court concluded that neither the photographic lineup nor the set of tattoo photographs were impermissibly  **\*728** suggestive. The court determined that there was not a likelihood of irreparable misidentification based on the identification procedures and denied the defendant's motion to suppress.

The defendant contends that the trial court erred in not suppressing the out-of-court and in-court identifications of him and his tattoos. He argues that the identification procedure was impermissibly suggestive because the victim was told that a suspect from related rape cases had been identified by DNA evidence; the defendant's photograph was in the top, left-hand corner of the lineup; and none of the other photographs accurately matched the victim's description of her attacker.

[2](https://1.next.westlaw.com/Document/Iab48187d140e11deb6a3a099756c05b7/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af000000177d63b6d884d6aa399%3FpcidPrev%3D2f58f0384e354318bda5d0b6e2499f0f%26Nav%3DCASE%26fragmentIdentifier%3DIab48187d140e11deb6a3a099756c05b7%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=076fe120a513cf1fbb225cb3355e300c&list=CASE&rank=1&sessionScopeId=db57dc7ecf42d03229278314058df0e0bfb6ec8b96fe3dded19645dc755b32c3&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F22018382652)[3](https://1.next.westlaw.com/Document/Iab48187d140e11deb6a3a099756c05b7/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af000000177d63b6d884d6aa399%3FpcidPrev%3D2f58f0384e354318bda5d0b6e2499f0f%26Nav%3DCASE%26fragmentIdentifier%3DIab48187d140e11deb6a3a099756c05b7%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=076fe120a513cf1fbb225cb3355e300c&list=CASE&rank=1&sessionScopeId=db57dc7ecf42d03229278314058df0e0bfb6ec8b96fe3dded19645dc755b32c3&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F32018382652)[4](https://1.next.westlaw.com/Document/Iab48187d140e11deb6a3a099756c05b7/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af000000177d63b6d884d6aa399%3FpcidPrev%3D2f58f0384e354318bda5d0b6e2499f0f%26Nav%3DCASE%26fragmentIdentifier%3DIab48187d140e11deb6a3a099756c05b7%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=076fe120a513cf1fbb225cb3355e300c&list=CASE&rank=1&sessionScopeId=db57dc7ecf42d03229278314058df0e0bfb6ec8b96fe3dded19645dc755b32c3&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F42018382652)[5](https://1.next.westlaw.com/Document/Iab48187d140e11deb6a3a099756c05b7/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af000000177d63b6d884d6aa399%3FpcidPrev%3D2f58f0384e354318bda5d0b6e2499f0f%26Nav%3DCASE%26fragmentIdentifier%3DIab48187d140e11deb6a3a099756c05b7%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=076fe120a513cf1fbb225cb3355e300c&list=CASE&rank=1&sessionScopeId=db57dc7ecf42d03229278314058df0e0bfb6ec8b96fe3dded19645dc755b32c3&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F52018382652)[6](https://1.next.westlaw.com/Document/Iab48187d140e11deb6a3a099756c05b7/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af000000177d63b6d884d6aa399%3FpcidPrev%3D2f58f0384e354318bda5d0b6e2499f0f%26Nav%3DCASE%26fragmentIdentifier%3DIab48187d140e11deb6a3a099756c05b7%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=076fe120a513cf1fbb225cb3355e300c&list=CASE&rank=1&sessionScopeId=db57dc7ecf42d03229278314058df0e0bfb6ec8b96fe3dded19645dc755b32c3&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F62018382652)On review, an appellate court may consider the evidence presented at the suppression hearing as well as at trial in determining whether the trial court properly denied a pretrial motion to suppress. [***State***v. Henning, 975 S.W.2d 290, 297–99 (Tenn.1998)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1998129639&pubNum=713&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&fi=co_pp_sp_713_297&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_297). A trial court's factual findings in a motion to suppress hearing are conclusive on appeal unless the evidence preponderates against them. [***State***v. Odom, 928 S.W.2d 18, 23 (Tenn.1996)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996170724&pubNum=713&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&fi=co_pp_sp_713_23&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_23); [***State***v. Jones, 802 S.W.2d 221, 223 (Tenn.Crim.App.1990)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991028617&pubNum=713&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&fi=co_pp_sp_713_223&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_223). Questions about the “credibility of the witnesses, the weight and value of the evidence, and resolution of conflicts in the evidence are matters entrusted to the trial judge as the trier of fact.” [Odom, 928 S.W.2d at 23.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996170724&pubNum=713&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&fi=co_pp_sp_713_23&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_23) The prevailing party is entitled to the strongest legitimate view of the evidence and all reasonable inferences drawn from that evidence. [***State***v. Hicks, 55 **S.W**.**3d**515, 521 (Tenn.2001)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001767070&pubNum=4644&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&fi=co_pp_sp_4644_521&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_4644_521). The application of the law to the facts as determined by the trial court is a question of law that is reviewed de novo on appeal. [***State***v. Yeargan, 958 S.W.2d 626, 629 (Tenn.1997)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997231341&pubNum=713&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&fi=co_pp_sp_713_629&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_629).

[7](https://1.next.westlaw.com/Document/Iab48187d140e11deb6a3a099756c05b7/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af000000177d63b6d884d6aa399%3FpcidPrev%3D2f58f0384e354318bda5d0b6e2499f0f%26Nav%3DCASE%26fragmentIdentifier%3DIab48187d140e11deb6a3a099756c05b7%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=076fe120a513cf1fbb225cb3355e300c&list=CASE&rank=1&sessionScopeId=db57dc7ecf42d03229278314058df0e0bfb6ec8b96fe3dded19645dc755b32c3&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F72018382652)In [Simmons v. United***States***, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1968131143&pubNum=708&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), the United **States** Supreme Court discussed the potential hazards of an identification procedure involving photographs as opposed to a lineup. However, the Court also recognized the use of photographs as an effective procedure “from the standpoint both of apprehending offenders and of sparing innocent suspects the ignominy of arrest by allowing eyewitnesses to exonerate them through scrutiny of photographs.” [Id. at 384, 88 S.Ct. 967.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1968131143&pubNum=708&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) It concluded that “convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside on that ground only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification.” [*Id.;*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1968131143&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))see, e.g.,[Sloan v.***State***, 584 S.W.2d 461 (Tenn.Crim.App.1978)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979146297&pubNum=713&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). The Court in [Simmons](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1968131143&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) noted that the potential for misidentification is increased when one photograph is “in some way emphasized” or “if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime.” [390 U.S. at 383, 88 S.Ct. 967](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1968131143&pubNum=708&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) (footnote omitted). Thus, “a photographic identification is admissible unless, based upon the totality of the circumstances, ‘the confrontation conducted ... was so unnecessarily suggestive and conducive to irreparable mistaken identification that [the accused] was denied due process of law.’ ” [***State***v. Hall, 976 S.W.2d 121, 153 (Tenn.1998)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1998198374&pubNum=713&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&fi=co_pp_sp_713_153&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_153) (quoting [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Id4c6e7209c1d11d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=94629c3e3a42478e8279cd0cc615f2d3&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[Stovall v. Denno, 388 U.S. 293, 301–02, 87 S.Ct. 1967, 18 L.Ed.2d 1199 (1967)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1967129550&pubNum=708&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))).

In this case, the defendant argues that his photograph was emphasized in the array because each of the other individuals was somewhat different from the description given by the victim and that his photograph was placed as the first in the array. Upon review of the photographs, we cannot conclude that the defendant's photograph **\*729** was “grossly dissimilar” to the others. See[***State***v. Edwards, 868 S.W.2d 682, 694 (Tenn.Crim.App.1993)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1994026970&pubNum=713&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&fi=co_pp_sp_713_694&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_694) (citing [United***States***v. Wade, 388 U.S. 218, 233, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1967129548&pubNum=708&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), for the proposition that “a lineup would be considered unduly suggestive only when the other participants were grossly dissimilar”). Interestingly, as noted by the trial court, the defendant's photograph itself was different from the victim's original composite drawing, given that he did not have a mustache and that his hair was a different length. Moreover, all of the photographs were of the same size and background, and all of the individuals were dressed in street attire. Nevertheless, we recognize that the photographic identification procedure may have arguably been suggestive because of Detective Stair's statement to the victim that there had been a DNA match in possibly related cases.

[8](https://1.next.westlaw.com/Document/Iab48187d140e11deb6a3a099756c05b7/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af000000177d63b6d884d6aa399%3FpcidPrev%3D2f58f0384e354318bda5d0b6e2499f0f%26Nav%3DCASE%26fragmentIdentifier%3DIab48187d140e11deb6a3a099756c05b7%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=076fe120a513cf1fbb225cb3355e300c&list=CASE&rank=1&sessionScopeId=db57dc7ecf42d03229278314058df0e0bfb6ec8b96fe3dded19645dc755b32c3&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F82018382652)However, even if the identification procedure were unnecessarily suggestive, suppression is only required when the totality of the circumstances shows that the identification was unreliable. See[Neil v. Biggers, 409 U.S. 188, 198–99, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127218&pubNum=708&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). In [Biggers,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127218&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) the United **States** Supreme Court set forth five factors to be considered when determining whether an identification is reliable and thus admissible: (1) the opportunity of the witness to view the criminal at the time of the crime, (2) the witness's degree of attention, (3) the accuracy of the witness's prior description of the criminal, (4) the level of certainty demonstrated by the witness at the confrontation, and (5) the length of time between the crime and the confrontation. [Id. at 200, 93 S.Ct. 375.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127218&pubNum=708&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) The court must consider the “totality of the circumstances” in determining whether the identification was reliable. [Id.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127218&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))

[9](https://1.next.westlaw.com/Document/Iab48187d140e11deb6a3a099756c05b7/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af000000177d63b6d884d6aa399%3FpcidPrev%3D2f58f0384e354318bda5d0b6e2499f0f%26Nav%3DCASE%26fragmentIdentifier%3DIab48187d140e11deb6a3a099756c05b7%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=076fe120a513cf1fbb225cb3355e300c&list=CASE&rank=1&sessionScopeId=db57dc7ecf42d03229278314058df0e0bfb6ec8b96fe3dded19645dc755b32c3&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F92018382652)A review of the five factors supports a conclusion that the victim's identification of the defendant was reliable and therefore admissible. First, although the victim's opportunity to view her attacker was limited because of the minimal lighting and the duct tape over her eyes, she testified that she was able to see her attacker's face through the pillowcase for fifteen to thirty seconds after the duct tape slid off and her eyes adjusted to the light. Second, the victim's degree of attention was very high. She testified that she knew she had to study her attacker in order to identify him if she survived. Third, the victim's description of her attacker was sufficiently detailed and accurate.Fourth, the victim testified that she instantly recognized her attacker, and at trial, she elaborated that she was “100 percent certain” of her identification. Detective Stair testified that the victim identified her attacker after one to two seconds. Fifth, although the five-year length of time between the incident and identification is long, the victim said she had looked through “[h]undreds” of photographs since the incident. Upon consideration of the [Biggers](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127218&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))factors and the totality of the circumstances, we conclude that the photographic identification of the defendant was reliable and that the trial court did not err in denying the defendant's motion to suppress in this regard.

[10](https://1.next.westlaw.com/Document/Iab48187d140e11deb6a3a099756c05b7/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af000000177d63b6d884d6aa399%3FpcidPrev%3D2f58f0384e354318bda5d0b6e2499f0f%26Nav%3DCASE%26fragmentIdentifier%3DIab48187d140e11deb6a3a099756c05b7%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=076fe120a513cf1fbb225cb3355e300c&list=CASE&rank=1&sessionScopeId=db57dc7ecf42d03229278314058df0e0bfb6ec8b96fe3dded19645dc755b32c3&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F102018382652)[11](https://1.next.westlaw.com/Document/Iab48187d140e11deb6a3a099756c05b7/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af000000177d63b6d884d6aa399%3FpcidPrev%3D2f58f0384e354318bda5d0b6e2499f0f%26Nav%3DCASE%26fragmentIdentifier%3DIab48187d140e11deb6a3a099756c05b7%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=076fe120a513cf1fbb225cb3355e300c&list=CASE&rank=1&sessionScopeId=db57dc7ecf42d03229278314058df0e0bfb6ec8b96fe3dded19645dc755b32c3&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F112018382652)With regard to the victim's identification of the defendant's tattoos, the defendant likewise argues that the identification procedure “was so impermissibly suggestive as to lead to a very substantial likelihood of irreparable misidentification.” The **State** noted at the hearing on the motion to suppress that the procedure used in this case of having the victim look through a stack of photographs of only one person's tattoos was arguably akin to a show-up. Show-up procedures  **\*730** are inherently suggestive. See[***State***v. Thomas, 780 S.W.2d 379, 381 (Tenn.Crim.App.1989)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989166529&pubNum=713&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&fi=co_pp_sp_713_381&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_381). The identification may, however, satisfy due process as reliable and admissible under the totality of the circumstances. [***State***v. Brown, 795 S.W.2d 689, 694 (Tenn.Crim.App.1990)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990128483&pubNum=713&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&fi=co_pp_sp_713_694&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_694).

We consider the five [Biggers](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127218&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) factors as applied to the identification of the defendant's tattoos. The victim testified that she observed her attacker's tattoos for a couple of minutes and “went into a very analytical survival mode ... staring at the tattoos.” She drew sketches of the tattoos showing the overall shapes but was not sure what specific images the tattoos depicted. Even though she did not note that one tattoo was of a peacock or that the wrap-around tattoo was connected with a skull and dragon head, the similarities between her drawings and the defendant's tattoos are apparent. The victim “had a pretty strong reaction” when shown the tattoos and was very clear as to which tattoos she recalled and did not recall. Finally, although the five-year time period between the incident and identification is a negative factor with regard to reliability, it should be noted that the victim estimated she had observed “[e]asily dozens” of tattoo photographs since the incident. Upon consideration of the [Biggers](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127218&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) factors and the totality of the circumstances, we conclude that the photographic identification of the defendant's tattoos was sufficiently reliable and that the trial court did not err in denying the defendant's motion to suppress in this regard. The defendant is not entitled to relief on this issue.

**II. PROSECUTORIAL MISCONDUCT**

[12](https://1.next.westlaw.com/Document/Iab48187d140e11deb6a3a099756c05b7/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af000000177d63b6d884d6aa399%3FpcidPrev%3D2f58f0384e354318bda5d0b6e2499f0f%26Nav%3DCASE%26fragmentIdentifier%3DIab48187d140e11deb6a3a099756c05b7%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=076fe120a513cf1fbb225cb3355e300c&list=CASE&rank=1&sessionScopeId=db57dc7ecf42d03229278314058df0e0bfb6ec8b96fe3dded19645dc755b32c3&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F122018382652)The defendant next contends that the trial court erred in failing to grant his motion for new trial when the **State** engaged in four types of prosecutorial misconduct during its closing argument. Citing several examples for each allegation of prosecutorial misconduct, the defendant argues that the **State** (1) improperly bolstered the victim's credibility, (2) misstated evidence from trial during rebuttal argument, (3) argued matters outside the record, and (4) inflamed the passions and prejudices of the jury. The **State** responds that the defendant has waived this issue by failing to object contemporaneously to the prosecutor's statements at trial or, in the alternative, that the prosecutor's statements did not affect the outcome of the case.

In his first group of claims of prosecutorial misconduct, the defendant asserts that the prosecutor improperly bolstered the victim's credibility. The defendant lists the prosecutor's use of the victim's testimony that the rape was a “life-defining moment,” his mention of his own life-defining moment, and the invitation to the jurors to recall their own life-defining moments. The defendant also claims the prosecutor bolstered the victim's testimony by saying the victim had an empathetic personality and had been concerned about the jurors' feelings during trial.

In his second group of claims of prosecutorial misconduct, the defendant argues that the prosecutor intentionally misstated evidence in its rebuttal when referring to the testimony of its expert witness and the color of the tattoo on the perpetrator's left wrist. For the expert witness testimony, the defendant argues the **State** misstated the evidence by saying the witness's testimony excluded the possibility that a third person's DNA was revealed through testing, i.e., that the twelve allele was from a source other than the defendant and the victim. On cross-examination, however, the expert witness acknowledged that the “twelve allele” was inconsistent with the DNA profiles of the defendant and the victim, although the expert witness **stated**  **\*731** it was “unlikely” that the profile had come from someone other than the defendant. Regarding the tattoo color, the defendant argues that the prosecutor misstated the evidence when he said the victim testified that one of the defendant's tattoos was two colors, blue and black, and not one color, “blue-black.”

For his third grouping of claimed prosecutorial misconduct, the defendant argues the prosecutor committed misconduct by arguing facts outside the record, specifically that the birth of his child was a life-defining moment and that the jurors have had their own life-defining moments; that the defendant was wearing “phony glasses” at trial; that the defendant was wearing the same “trophy” shirt at trial that the perpetrator had worn at the rape or at least the same style of shirt; and that the defendant could have obtained additional tattoos between 1997 and 2002, when his tattoos were photographed.

In his fourth grouping of claimed prosecutorial misconduct, the defendant argues that the prosecutor told the jury the defendant claimed the witnesses against him were lying and that this argument inflamed the passions of the jury. The defendant asserts that the defense was interrogating the witnesses to expose the possibility that the victim had been unable to see the perpetrator's face due to the lighting conditions, the duct tape over her eyes, and the pillowcase covering her head and that DNA testing allowed the possibility that another source of DNA existed in addition to the DNA of the defendant and the victim. He further argues that the prosecutor inflamed the jury's passions and prejudices by standing near the defendant and pointing a finger at him during closing argument.

[13](https://1.next.westlaw.com/Document/Iab48187d140e11deb6a3a099756c05b7/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af000000177d63b6d884d6aa399%3FpcidPrev%3D2f58f0384e354318bda5d0b6e2499f0f%26Nav%3DCASE%26fragmentIdentifier%3DIab48187d140e11deb6a3a099756c05b7%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=076fe120a513cf1fbb225cb3355e300c&list=CASE&rank=1&sessionScopeId=db57dc7ecf42d03229278314058df0e0bfb6ec8b96fe3dded19645dc755b32c3&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F132018382652)[14](https://1.next.westlaw.com/Document/Iab48187d140e11deb6a3a099756c05b7/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af000000177d63b6d884d6aa399%3FpcidPrev%3D2f58f0384e354318bda5d0b6e2499f0f%26Nav%3DCASE%26fragmentIdentifier%3DIab48187d140e11deb6a3a099756c05b7%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=076fe120a513cf1fbb225cb3355e300c&list=CASE&rank=1&sessionScopeId=db57dc7ecf42d03229278314058df0e0bfb6ec8b96fe3dded19645dc755b32c3&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F142018382652)[15](https://1.next.westlaw.com/Document/Iab48187d140e11deb6a3a099756c05b7/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af000000177d63b6d884d6aa399%3FpcidPrev%3D2f58f0384e354318bda5d0b6e2499f0f%26Nav%3DCASE%26fragmentIdentifier%3DIab48187d140e11deb6a3a099756c05b7%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=076fe120a513cf1fbb225cb3355e300c&list=CASE&rank=1&sessionScopeId=db57dc7ecf42d03229278314058df0e0bfb6ec8b96fe3dded19645dc755b32c3&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F152018382652)The Tennessee Supreme Court has recognized that “argument of counsel is a valuable privilege that should not be unduly restricted.” [Smith v.***State***, 527 S.W.2d 737, 739 (Tenn.1975)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1975135083&pubNum=713&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&fi=co_pp_sp_713_739&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_739). Attorneys have great leeway in arguing before a jury, and the trial court's broad discretion in controlling their arguments will be reversed only upon an abuse of discretion. [Terry v.***State***, 46 **S.W**.**3d** 147, 156 (Tenn.2001)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001340133&pubNum=4644&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&fi=co_pp_sp_4644_156&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_4644_156). However, closing argument must be “temperate, must be predicated on evidence introduced during the trial of the case, and must be pertinent to the issues being tried.” [Russell v.***State***, 532 S.W.2d 268, 271 (Tenn.1976)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1976116709&pubNum=713&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&fi=co_pp_sp_713_271&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_271). Prosecutorial misconduct does not constitute reversible error unless the outcome was affected to the defendant's prejudice. [***State***v. Bane, 57 **S.W**.**3d** 411, 425 (Tenn.2001)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001556717&pubNum=4644&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&fi=co_pp_sp_4644_425&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_4644_425).

 In [Judge v.***State***, 539 S.W.2d 340, 344 (Tenn.Crim.App.1976)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1976137141&pubNum=713&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&fi=co_pp_sp_713_344&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_344), this court set out the following considerations for determining whether the **State's** conduct could have improperly prejudiced the defendant and affected the verdict:

1. The conduct complained of viewed in context and in light of the facts and circumstances of the case.

2. The curative measures undertaken by the court and the prosecution.

3. The intent of the prosecutor in making the improper statement.

4. The cumulative effect of the improper conduct and any other errors in the record.

5. The relative strength or weakness of the case.

See also[***State***v. Buck, 670 S.W.2d 600, 609 (Tenn.1984)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984122615&pubNum=713&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&fi=co_pp_sp_713_609&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_609) (approving these factors in determining if the misconduct resulted in reversible error).

[16](https://1.next.westlaw.com/Document/Iab48187d140e11deb6a3a099756c05b7/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af000000177d63b6d884d6aa399%3FpcidPrev%3D2f58f0384e354318bda5d0b6e2499f0f%26Nav%3DCASE%26fragmentIdentifier%3DIab48187d140e11deb6a3a099756c05b7%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=076fe120a513cf1fbb225cb3355e300c&list=CASE&rank=1&sessionScopeId=db57dc7ecf42d03229278314058df0e0bfb6ec8b96fe3dded19645dc755b32c3&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F162018382652)As the **State** points out in its brief, the defendant failed to object at trial to any of the prosecutor's statements.

He did, however, raise allegations of prosecutorial misconduct in his motion for new trial, specifically that the **State** argued  **\*732** facts that were not in the trial evidence (the defendant's shirt and glasses), that the prosecutor stood next to the defendant, pointed his finger at him, and addressed the closing argument to the defendant, and that the **State** misstated the testimony about the twelfth allele. By not objecting contemporaneously to this conduct, he has waived our review of this issue. See T.R.A.P. 36(a); [Tenn. R.Crim. P. 52(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1006373&cite=TNRRCRPR52&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) (providing that relief is not required for a party who failed to take reasonably available action to prevent or nullify an error); see also[***State***v. Little, 854 S.W.2d 643, 651 (Tenn.Crim.App.1992)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1993114512&pubNum=713&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&fi=co_pp_sp_713_651&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_651) (failure to object to prosecutor's alleged misconduct during closing argument waives any later complaint). To determine whether the challenged remarks constitute plain error, we consider five factors. See[***State***v. Smith, 24 **S.W**.**3d** 274, 282 (Tenn.2000)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000392993&pubNum=4644&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&fi=co_pp_sp_4644_282&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_4644_282). Those factors are: “ ‘(a) the record must clearly establish what occurred in the trial court; (b) a clear and unequivocal rule of law must have been breached; (c) a substantial right of the accused must have been adversely affected; (d) the accused did not waive the issue for tactical reasons; and (e) consideration of the error is necessary to do substantial justice.’ ” [Id. at 282](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000392993&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) (quoting [***State***v. Adkisson, 899 S.W.2d 626, 641–42 (Tenn.Crim.App.1994)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995118764&pubNum=713&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&fi=co_pp_sp_713_641&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_641)). All five factors must be established before we will find plain error. See[Smith, 24 **S.W**.**3d** at 283.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000392993&pubNum=4644&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&fi=co_pp_sp_4644_283&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_4644_283) Ultimately, the error must have been “ ‘of such a great magnitude that it probably changed the outcome of the trial.’ ” [Adkisson, 899 S.W.2d at 642 (Tenn.Crim.App.1994)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995118764&pubNum=713&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&fi=co_pp_sp_713_642&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_642)(quoting [United***States***v. Kerley, 838 F.2d 932, 937 (7th Cir.1988)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988017142&pubNum=350&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&fi=co_pp_sp_350_937&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_350_937)).

We have reviewed each of the defendant's allegations of prosecutorial misconduct in the context of the entire argument and are not convinced of plain error. We conclude that none of the statements “probably changed the outcome of the trial,” and the defendant is not entitled to relief on this issue.

**III AND IV. SENTENCING**

The defendant raises two sentencing considerations. Appellate review of sentencing is de novo on the record with a presumption that the trial court's determinations are correct. [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=NA733E100E81011DF8F5297546E0FBC75&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=94629c3e3a42478e8279cd0cc615f2d3&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[T.C.A. § 40–35–401](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS40-35-401&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))(d). As the Sentencing Commission Comments to this section note, the burden is now on the defendant to show that the sentence is improper. This means that if the trial court followed the statutory sentencing procedure, made findings of fact that are adequately supported in the record, and gave due consideration and proper weight to the factors and principles that are relevant to sentencing under the 1989 Sentencing Act, we may not disturb the sentence even if a different result were preferred. [***State***v. Fletcher, 805 S.W.2d 785, 789 (Tenn.Crim.App.1991)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991057519&pubNum=713&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&fi=co_pp_sp_713_789&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_789).

[17](https://1.next.westlaw.com/Document/Iab48187d140e11deb6a3a099756c05b7/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af000000177d63b6d884d6aa399%3FpcidPrev%3D2f58f0384e354318bda5d0b6e2499f0f%26Nav%3DCASE%26fragmentIdentifier%3DIab48187d140e11deb6a3a099756c05b7%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=076fe120a513cf1fbb225cb3355e300c&list=CASE&rank=1&sessionScopeId=db57dc7ecf42d03229278314058df0e0bfb6ec8b96fe3dded19645dc755b32c3&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F172018382652)However, “the presumption of correctness which accompanies the trial court's action is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” [***State***v. Ashby, 823 S.W.2d 166, 169 (Tenn.1991)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992026207&pubNum=713&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&fi=co_pp_sp_713_169&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_169). In this respect, for the purpose of meaningful appellate review,

the trial court must place on the record its reasons for arriving at the final sentencing decision, identify the mitigating and enhancement factors found, **state** the specific facts supporting each enhancement factor found, and articulate how the mitigating and enhancement factors have been evaluated and balanced in determining the sentence. [T.C.A. § 40–35–210](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS40-35-210&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))(f) (1990).

[](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=If29c6696e7c511d9bf60c1d57ebc853e&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=94629c3e3a42478e8279cd0cc615f2d3&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[***State***v. Jones, 883 S.W.2d 597, 599 (Tenn.1994)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1994191722&pubNum=713&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&fi=co_pp_sp_713_599&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_599).

Also, in conducting a de novo review, we must consider (1) the evidence, if any,  **\*733** received at the trial and sentencing hearing, (2) the presentence report, (3) the principles of sentencing and arguments as to sentencing alternatives, (4) the nature and characteristics of the criminal conduct, (5) any mitigating or statutory enhancement factors, (6) any statement that the defendant made on his own behalf, and (7) the potential for rehabilitation or treatment. [T.C.A. §§ 40–35–102](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS40-35-102&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), –103, –210 (2003); see[Ashby, 823 S.W.2d at 168;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992026207&pubNum=713&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&fi=co_pp_sp_713_168&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_168) [***State***v. Moss, 727 S.W.2d 229 (Tenn.1986)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1987043102&pubNum=713&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

The trial court conducted a sentencing hearing on February 2, 2007, at which Christina Stanley testified to the facts and circumstances of a 1998 case involving the defendant. Stanley testified that on August 24, 1998, she was eighteen years old and lived with her husband on Fifth Street in Maryville, Tennessee. Stanley said that prior to that day, she and her husband had noticed that “a couple of things [had] moved” around their house and “things ... had been misplaced.” She specifically recalled there was a carton of cigarettes they could not locate. Stanley **stated** that she and her husband went to bed on the night of August 24, but she was awakened in the “late hours that night” by a man standing beside the bed with his hand in her underwear and “fingering” her. She said that she was “a little disoriented” at first and thought that it might have been her husband; however, she was able to see the man's face from the street light shining in the window and realized it was not her husband. Stanley recalled that she screamed, and the man ran out of the bedroom. She **stated** that she told her husband what had happened and he initially told her it was a dream, but they went into the living room and “noticed that it was not just a dream.” She said the contents of her purse were “strewn out on the floor,” the living room furniture had been moved “for a clear shot from the bedroom door to the front door,” the front screen door was propped open, and some items were missing, including a dish towel, flashlight, a butter knife, some money, her Social Security card, and her change purse. Stanley recalled that the items were later returned to her and that the missing carton of cigarettes was found in the “R.V. where [the defendant] was living.” Stanley **stated** the defendant had gained access into their house by prying open a window in the den area. Stanley identified the defendant in court as the man who entered her house in August 1998.

At the conclusion of the sentencing hearing, the court sentenced the defendant as a career offender to sixty years on each conviction. The court ordered that the sentences be served consecutively upon finding the defendant was a professional criminal, the defendant's record of criminal activity was extensive, and the defendant was a dangerous offender, for an effective sentence of 120 years in the Department of Correction. See [T.C.A. § 40–35–115](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS40-35-115&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))(b)(1), (2), and (4).

**A. Career Offender Status**

[18](https://1.next.westlaw.com/Document/Iab48187d140e11deb6a3a099756c05b7/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af000000177d63b6d884d6aa399%3FpcidPrev%3D2f58f0384e354318bda5d0b6e2499f0f%26Nav%3DCASE%26fragmentIdentifier%3DIab48187d140e11deb6a3a099756c05b7%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=076fe120a513cf1fbb225cb3355e300c&list=CASE&rank=1&sessionScopeId=db57dc7ecf42d03229278314058df0e0bfb6ec8b96fe3dded19645dc755b32c3&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F182018382652)The defendant argues that the trial court erred in classifying him as a career offender because his prior convictions were not found by the jury beyond a reasonable doubt. He acknowledges that the United **States**Supreme Court held in [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ice97e9c09c9611d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=94629c3e3a42478e8279cd0cc615f2d3&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[Almendarez–Torres v. United***States***, 523 U.S. 224, 239–47, 118 S.Ct. 1219, 140 L.Ed.2d 350 (1998)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1998075893&pubNum=708&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), that prior convictions could be found by a judge without the assistance of a jury.

 See also[Cunningham v. California, 549 U.S. 270, 282, 127 S.Ct. 856, 166 L.Ed.2d 856 (2007)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2011243890&pubNum=708&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) (**stating** that “[o]ther than a prior conviction, see*[](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ice97e9c09c9611d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=94629c3e3a42478e8279cd0cc615f2d3&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))*[*Almendarez–Torres v. United****States****,*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1998075893&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) we held in Apprendi [v. New Jersey ], ‘any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved  **\*734** beyond a reasonable doubt’ ”) (internal citations omitted). However, the defendant wishes to preserve the issue “in anticipation of a future change in the law, and for further federal court review.” This court is bound by United **States** Supreme Court precedent. Accordingly, the defendant's more than twenty prior felony convictions listed on the notice of intent to seek enhanced punishment and presentence report are, as noted by the trial court at sentencing, “[f]ar more than necessary to make him a career offender.” See [T.C.A. § 40–35–108](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS40-35-108&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). The defendant is not entitled to relief on this issue.

**B. Consecutive Sentencing**

[19](https://1.next.westlaw.com/Document/Iab48187d140e11deb6a3a099756c05b7/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af000000177d63b6d884d6aa399%3FpcidPrev%3D2f58f0384e354318bda5d0b6e2499f0f%26Nav%3DCASE%26fragmentIdentifier%3DIab48187d140e11deb6a3a099756c05b7%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=076fe120a513cf1fbb225cb3355e300c&list=CASE&rank=1&sessionScopeId=db57dc7ecf42d03229278314058df0e0bfb6ec8b96fe3dded19645dc755b32c3&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F192018382652)The defendant argues that the trial court erred in ordering that his sixty-year sentences be served consecutively because “[Tenn.Code Ann. § 40–35–115](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS40-35-115&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))(a) requires concurrent sentences unless there are additional findings of fact by a preponderance of evidence, and those additional facts were not found by a jury beyond a reasonable doubt, thereby violating [his] right to trial by jury and due process.” The defendant's argument relies on his assertion that [***State***v. Gomez, 239 **S.W**.**3d** 733 (Tenn.2007)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2013578131&pubNum=4644&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) (“[Gomez II](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2013578131&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) ”), extends to consecutive sentencing. In [Gomez II,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2013578131&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) our supreme court held that, in light of [Cunningham,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2011243890&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) the enhancement of a defendant's sentence based on facts not found by a jury violated a defendant's rights under the Sixth Amendment. [Gomez II, 239 **S.W**.**3d**at 740–41.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2013578131&pubNum=4644&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&fi=co_pp_sp_4644_740&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_4644_740) However, the court **stated**, “Our holding does not, however, affect the trial court's determinations regarding manner of service or the imposition of consecutive sentences.” [Id. at 743.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2013578131&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) Moreover, our supreme court held recently “that Apprendi and Blakely should be construed narrowly such that they do not apply to Tennessee's statutory scheme for imposing consecutive sentences.” [***State***v. Allen, 259 **S.W**.**3d** 671, 688 (Tenn.2008)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2016370351&pubNum=4644&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&fi=co_pp_sp_4644_688&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_4644_688); [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I05acbee9e24911ddb77d9846f86fae5c&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=94629c3e3a42478e8279cd0cc615f2d3&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[Oregon v. Ice, ––– U.S. ––––, 129 S.Ct. 711, 714–15, 172 L.Ed.2d 517 (**2009**)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2017879539&pubNum=708&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&fi=co_pp_sp_708_714&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_714) (holding 6th Amendment does not preclude judges from finding facts needed to impose consecutive sentences). The defendant's issue is without merit.

In addition, we conclude that consecutive sentencing was appropriate in this case. Consecutive sentencing is guided by [Tennessee Code Annotated section 40–35–115](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS40-35-115&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))(b), which **states** that the court may order sentences to run consecutively if it finds by a preponderance of the evidence that certain facts exist. If the court finds that the defendant is a “dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high” pursuant to [Code section 40–35–115](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS40-35-115&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))(b)(4), the court must also determine that “an extended sentence is necessary to protect the public against further criminal conduct by the defendant and that the consecutive sentences must reasonably relate to the severity of the offenses committed.” [***State***v. Wilkerson, 905 S.W.2d 933, 939 (Tenn.1995)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995186329&pubNum=713&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=RP&fi=co_pp_sp_713_939&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_939). Here, the trial court made extensive findings regarding consecutive sentencing, concluding that:

[The defendant] clearly is a man with such extensive criminal history that he may be found a professional criminal ... [a]nd that has been his major source of livelihood apparently[;] ... the defendant is an offender whose record of criminal activity is extensive[;] ... [and] there can be no question that there's a dangerous offender status.... No hesitation about not only committing the crime but committing it until you're good and well ready to go.... [The defendant's] convictions are all over this **state** ... in which homes have been invaded, victimization of individuals in most of these charges exists, whether it  **\*735** is by burglarizing a person's house, or stealing from someone, or physically attacking someone. And I find that the community and the citizens are surely endangered by the presence of [the defendant] on the streets.

See [T.C.A. § 40–35–115](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS40-35-115&originatingDoc=Iab48187d140e11deb6a3a099756c05b7&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))(b)(1), (2), and (4). The record fully supports the trial court's determinations, and we will not disturb the trial court's sentencing. The defendant is not entitled to relief on this issue.

**CONCLUSION**

Based on the foregoing and the record as a whole, we affirm the judgments of the trial court.

**March 4, 2021**

**Chapter 5 – The Right to Counsel**

**Chapter 17 – Sections 1 and 2**

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**Chapter 5 – The Right to Counsel**

**\*\*BETTS v. BRADY\*\***

United States Supreme Court  
316 U.S. 455 (1942)

#### Rule of Law

**Under the Due Process Clause of the Fourteenth Amendment, states are not required to appoint counsel for a criminal defendant unable to secure her own in all cases, provided that the trial is fundamentally fair.**

#### Facts

Betts (defendant) was charged with robbery. Betts could not afford counsel and requested that the state of Maryland appoint him an attorney. This request was denied, because the state only appointed counsel in rape and murder cases. Betts elected to have a non-jury trial. At trial, Betts chose not to testify. Betts did, however, call witnesses who testified that he was somewhere else when the robbery occurred. The main issue at trial was the veracity of the witnesses for the defense. Betts was convicted and sentenced to eight years in prison. Betts twice petitioned for habeas corpus, alleging the denial of his right to counsel violated the Fourteenth Amendment. Each time, the writ was granted, but relief was denied. Betts petitioned the United States Supreme Court for a writ of certiorari, which was granted.

#### Issue

Must a state provide counsel for any indigent defendant, regardless of the crime charged?

#### Holding and Reasoning (Roberts, J.)

No. At the state level, due process does not necessarily require that the appointment of counsel for any defendant that cannot obtain counsel on her own, regardless of the crime charged and the nature of the trial. The Due Process Clause of the Fourteenth Amendment does not specifically incorporate every right in the Sixth Amendment against the states. Nevertheless, a state’s denial of one of the guarantees contained in the first eight amendments may constitute a violation of the Fourteenth Amendment. In any given case, the totality of the circumstances must be judged to determine whether due process was violated. In *Powell v. Alabam*a, 287 U.S. 45 (1932), the Court held that “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." That case, however, involved a state’s refusal to appoint counsel, which was required by its own statute, to “ignorant and friendless” black youths for a capital offense. In English common law, prisoners were denied the right to consult with counsel for certain offenses. American colonies did away with these restrictions, usually by statute rather than constitutional provision. Only later did some state legislatures begin affirmatively requiring the appointment of counsel for defendants unable to secure their own, and even then, typically only in certain cases. This suggests that the right to have court-appointed counsel has not attained the status of a fundamental right. Thus, the Fourteenth Amendment’s Due Process Clause does not incorporate the right to appointed counsel against the states. In this case, Betts asks for a hard-and-fast rule that a state’s refusal to appoint counsel in every case constitutes a denial of the right to due process. In Maryland, however, defendants typically waive the right to a jury, and bench trials are more informal, with more oversight by the judge. Betts waived a jury trial, and the only issue is whether his alibi witnesses were believable. Betts was an adult, of ordinary intelligence, and had previously been through the court system. It does not appear that Betts was at a serious disadvantage due to his lack of counsel or that his trial offended “fundamental ideas of fairness and right.” Accordingly, Betts was afforded due process, even without appointment of counsel. The conviction is affirmed.

#### Dissent (Black, J.)

Although the majority does not agree, the Fourteenth Amendment made the Sixth Amendment applicable to the states. The right to assistance of counsel in a serious criminal trial is “fundamental.” *Powell*, *supra*. Even smart, educated laymen are at a disadvantage without an attorney. *Id*. It is impossible to determine whether a person is innocent if she was unable to adequately present her defense. Denying the right to counsel on the basis of poverty “shock[s]…the universal sense of justice” and denies equal justice under the law. Further, it is not necessary to hold that states must always provide counsel to indigent defendants in every case to overturn Betts conviction. Betts was poor and uneducated and on trial for the serious offense of robbery. Under these circumstances, the state court’s denial of Betts’s right to counsel violated his due process.

**Key Terms:**

**Fourteenth Amendment –** Provides that all persons born or naturalized in the United States are U.S. citizens. Also provides that no state shall: (1) abridge the privileges or immunities of a U.S. citizen; (2) deprive any person of life, liberty, or property, without due process of law; or (3) deny equal protection of the laws to anyone within its jurisdiction.

**Fourteenth Amendment Due Process** **Clause** - The provision set forth at Amendment XIV, Section 1 of the United States Constitution prohibiting states from depriving any person of life, liberty, or property by means that are arbitrary or fundamentally unfair.

**Right to Counsel** - Sixth Amendment guarantee that a defendant is entitled to be represented by an attorney during a criminal prosecution.

# Powell v. Alabama (Scottsboro Boys Trial)

#### United States Supreme Court 287 U.S. 45 (1932)

#### Rule of Law

**Due process requires that criminal defendants have the right to counsel both at trial and in the time leading up to trial when consultation and preparation take place.**

# Johnson v. Zerbst

#### United States Supreme Court 304 U.S. 458 (1938)

#### Rule of Law

**The Sixth Amendment guarantees the right of a criminal defendant to a lawyer's assistance, unless the defendant knowingly and intelligently waives that right.**

# \*\*GIDEON v. WAINWRIGHT\*\*

#### United States Supreme Court 372 U.S. 335 (1963)

#### Rule of Law

**The Fourteenth Amendment incorporates the Sixth Amendment right to counsel to the states.**

#### Facts

Gideon (defendant) was charged with a state felony. He asked the court to appoint him a lawyer but his request was denied. Under state law, the court could only appoint counsel in capital cases. Gideon represented himself at trial and was ultimately convicted by a jury. Gideon argues that he has a constitutional right to counsel in a state court. The United States Supreme Court granted certiorari.

#### Issue

Does the Fourteenth Amendment incorporate the Sixth Amendment right to counsel to the states?

#### Holding and Reasoning (Black, J.)

Yes. The Fourteenth Amendment incorporates the Sixth Amendment right to counsel to the states. The Fourteenth Amendment incorporates those provisions of the Bill of Rights that are “fundamental and essential to a fair trial.” The holding in *Betts v. Brady*, 316 U.S. 455 (1942), assumed that the state court’s refusal to appoint counsel did not violate such fundamental principles of fairness and that there was no due process violation. On reconsideration, however, it is clear that *Betts* should now be overruled. Not only is it not good law, but even when it was decided it was not consistent with precedent. *Powell v. Alabama*, 287 U.S. 45 (1932), held that the right to counsel is fundamental. At the time, the *Powell* holding was limited to its facts. However, what it said about the fundamental nature of the right to counsel must now be embraced. Defendants have the constitutional right to a fair trial and this requires having an advocate present who knows the intricacies of the legal system. Accordingly, the decision in *Betts* is now overruled.

#### Concurrence (Harlan, J.)

The Court properly overrules *Betts*. However, the Court is wrong when it criticizes the *Betts* decision as inconsistent with precedence. *Betts* held that courts may need to provide counsel in non-capital state cases but special circumstances had to be shown to demonstrate a denial of due process. This is the approach the Court took in *Powell*. The Court emphasized the reasons that due process was denied to the defendants (they were young, there was lots of public hostility, they could not read) and based on those facts the Court held that the state must provide counsel.

**Key Terms:**

**Fourteenth Amendment –** Provides that all persons born or naturalized in the United States are U.S. citizens. Also provides that no state shall: (1) abridge the privileges or immunities of a U.S. citizen; (2) deprive any person of life, liberty, or property, without due process of law; or (3) deny equal protection of the laws to anyone within its jurisdiction.

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

**Bill of Rights** - The first ten amendments to the U.S. Constitution.

**Betts v. Brady**

United States Supreme Court  
316 U.S. 455 (1942)

#### Rule of Law

**Under the Due Process Clause of the Fourteenth Amendment, states are not required to appoint counsel for a criminal defendant unable to secure her own in all cases, provided that the trial is fundamentally fair.**

# Powell v. Alabama (Scottsboro Boys Trial)

#### United States Supreme Court 287 U.S. 45 (1932)

#### Rule of Law

**Due process requires that criminal defendants have the right to counsel both at trial and in the time leading up to trial when consultation and preparation take place.**

# Johnson v. Zerbst

#### United States Supreme Court 304 U.S. 458 (1938)

#### Rule of Law

**The Sixth Amendment guarantees the right of a criminal defendant to a lawyer's assistance, unless the defendant knowingly and intelligently waives that right.**

# Palko v. Connecticut

#### United States Supreme Court 302 U.S. 319 (1937)

#### Rule of Law

**A state law allowing the prosecution to appeal the results of a criminal conviction by jury trial does not violate the Due Process Clause of the Fourteenth Amendment.**

#### Facts

Palko (defendant) was indicted for first-degree murder and convicted of the lesser-included offense of second-degree murder. The law in the state of Connecticut (plaintiff) allowed the prosecution to appeal any errors of law in a criminal trial, and the prosecution appealed the judgment. The state court of appeals found errors of law with respect to the exclusion of evidence and flawed jury instructions. The state court of appeals ordered a new trial. Palko objected to a retrial on double-jeopardy grounds. Palko was convicted at the new trial and appealed the conviction through the state courts. Palko’s conviction was upheld by the state courts, and he petitioned the United States Supreme Court for review.

#### Issue

Does a state law allowing the prosecution to appeal the results of a criminal conviction by jury trial violate the Due Process Clause of the Fourteenth Amendment?

#### Holding and Reasoning (Cardozo, J.)

No. A state law allowing the prosecution to appeal the results of a criminal conviction by jury trial does not violate the Due Process Clause of the Fourteenth Amendment. Palko takes the position that the protections of the Fifth Amendment (*e.g.*, the protection against double jeopardy) are incorporated into the Fourteenth Amendment and expands that relationship to assert that any act of the federal government that would violate the Bill of Rights is also unconstitutional if performed by a state. There is no rule supporting Palko’s proposition. Retrial at the request of the state if an error of law has been identified does not shock our society’s fundamental notions of fairness and justice. The Court need not consider what the result would be if the state had requested retrial of an error-free conviction. The goal of the state is to achieve an error-free trial. Palko would be entitled to demand a retrial as often as necessary to achieve an error-free judgment. The Connecticut law simply affords the same privilege to the state. The judgment of conviction is affirmed.

**Key Terms:**

**Fourteenth Amendment** - Provides that all persons born or naturalized in the United States are U.S. citizens. Also provides that no state shall: (1) abridge the privileges or immunities of a U.S. citizen; (2) deprive any person of life, liberty, or property, without due process of law; or (3) deny equal protection of the laws to anyone within its jurisdiction.

**Fifth Amendment** - An amendment added to the U.S. Constitution as part of the Bill of Rights that provides important protections from government actions, including a guarantee that no person will be required to answer for a capital crime unless first indicted by a grand jury; no one will suffer double jeopardy; no one must testify against himself or herself; no one will be deprived of life, liberty, or property without due process of law; and no property will be taken for public use without just compensation.

**Double Jeopardy Clause** - A portion of the Fifth Amendment to the United States Constitution incorporated in the Bill of Rights that prohibits the government from trying a person more than once for the same offense.

# \*\*ALABAMA v. SHELTON\*\*

#### United States Supreme Court 535 U.S. 654 (2002)

#### Rule of Law

**The right to counsel extends to defendants that have a suspended sentence which could lead to imprisonment.**

#### Facts

Shelton (defendant) represented himself at a bench trial and was convicted of third-degree assault. He was given a new trial before a jury, again represented himself, and was again convicted. The court warned Shelton about the perils of representing himself but never appointed counsel for him at the state’s expense. The court sentenced Shelton to 30 days in county prison but immediately suspended the sentence and gave him probation contingent on his payment of court costs. Shelton appealed and argued that because the court did not offer to appoint counsel for him at the state’s expense when there was a chance that he would have to serve the prison term, his Sixth Amendment right to counsel had been violated. The appellate court held that Shelton’s Sixth Amendment right had not been violated because a suspended sentence does not trigger the right to appointed counsel. The Supreme Court of Alabama reversed, holding that a suspended sentence does trigger the right to counsel. The court affirmed Sheldon’s conviction but invalidated the portion of his sentence that imposed prison time. The United States Supreme Court granted certiorari to settle the issue of whether a conditional or suspended sentence entitles the defendant to counsel under the Sixth Amendment.

#### Issue

Is a defendant who receives a conditional or suspended sentence with the possibility of jail time entitled to counsel under the Sixth Amendment?

#### Holding and Reasoning (Ginsburg, J.)

Yes. The Sixth Amendment does not allow a defendant who did not receive advice of counsel during prosecution to be deprived of his liberty or imprisoned. When the prison term within a suspended sentence is triggered, the defendant is imprisoned for the crime he was convicted of; not for violating the terms of his probation. This is exactly what the Sixth Amendment does not allow unless the defendant had counsel present during his prosecution. In situations where a suspended sentence may be imposed, the defendant deserves the appointment of counsel at the stage where his guilt or innocence is determined because the defendant will be imprisoned if he violates his probation. The judgment of the Supreme Court of Alabama is affirmed.

#### Dissent (Scalia, J.)

The issue before the Court is whether imposing a suspended sentence in a misdemeanor case triggers a defendant’s right to counsel guaranteed under the Sixth Amendment. Since imposing a suspended sentence does not restrain a defendant’s liberty, it does not trigger his Sixth Amendment right to counsel. If the state attempts to imprison a defendant who was given a suspended sentence, such as Shelton, only then should the Court examine whether the proper safeguards were in place when the sentence was imposed.

**Key Terms:**

**Suspended Sentence -** A sentence of jail time that will not be enforced if certain conditions are met during a probation period.

**Amicus Curiae -** A person, or group of persons, who is/are not a party to litigation, but submit a brief to assist the court in deciding the outcome of the litigation.

# Gideon v. Wainwright

#### United States Supreme Court 372 U.S. 335 (1963)

#### Rule of Law

**The Fourteenth Amendment incorporates the Sixth Amendment right to counsel to the states.**

# Argersinger v. Hamlin

#### United States Supreme Court 407 U.S. 25 (1972)

#### Rule of Law

**The Sixth Amendment right to counsel extends to defendants charged with any offense that carries a possible penalty of imprisonment.**

#### Facts

Argersinger (defendant) was brought to trial for carrying a concealed weapon. Under Florida law, the offense carries a possible penalty of up to six months in jail and $1,000 in fines. Argersinger was indigent, and no attorney was appointed. At trial, Argersinger was convicted and sentenced to 90 days incarceration. Argersinger petitioned for habeas corpus on the grounds that he had been denied his Sixth Amendment right to counsel.

#### Issue

Does the Sixth Amendment right to counsel extend to a defendant charged with a petty or misdemeanor offense?

#### Holding and Reasoning (Douglas, J.)

Yes. A criminal defendant charged with any offense punishable by imprisonment is entitled to an attorney under the Sixth Amendment. At common law in England, the right to counsel was guaranteed in misdemeanor cases but limited in felony cases. The Sixth Amendment to the United States Constitution expanded that right, and the language and subsequent case law do not support the notion that the Sixth Amendment revoked the right to counsel for misdemeanor offenses. The fact that offenses carrying a sentence of less than six months imprisonment may be tried before a judge instead of a jury does not mean that there is no right to counsel. An attorney ensures a defendant receives a fair trial. Indeed, the importance of an attorney in a criminal trial is evidenced by the almost universal use of attorneys by governments and criminal defendants with money. Prosecutions for minor offenses may involve complicated legal and constitutional issues. Further, an attorney can make sure that a defendant’s guilty plea is knowing and voluntary. Courts facing an extremely high number of misdemeanor prosecutions may be forced to favor speed and efficiency over justice and individualized attention. As a result, defendants charged with misdemeanors are five times more likely to have the charges dropped if they have an attorney. Thus, unless the defendant has made a full and voluntary waiver of the right, any defendant charged with a crime punishable by imprisonment has a right to counsel.

**Key Terms:**

**Right to Counsel** - Sixth Amendment guarantee that a defendant is entitled to be represented by an attorney during a criminal prosecution.

**Scott v. Illinois**

United States Supreme Court  
440 U.S. 367 (1979)

**Rule of Law**

**The Sixth and Fourteenth Amendments require that no indigent defendant be sentenced to a term of imprisonment unless the state has afforded him the right to the assistance of appointed counsel.**

**Facts**

Scott (defendant) was convicted of shoplifting in a bench trial and was fined $50. The maximum penalty for such an offense is a $500 fine or one year in jail, or both. Over Scott’s objection that the state was required to provide counsel for him, the intermediate appellate court and the state supreme court affirmed the conviction. The United States Supreme Court granted certiorari.

**Issue**

Do the Sixth and Fourteenth Amendments require that states provide defendants counsel whenever imprisonment is an authorized penalty?

**Holding and Reasoning (Rehnquist, J.)**

No. The Sixth and Fourteenth Amendments require only that indigent defendants be appointed counsel when imprisonment is actually imposed. There is doubt that the Sixth Amendment initially guaranteed more than simply the right of a defendant in criminal cases to employ counsel on his behalf. While precedence has extended the scope of this constitutional right, cases such as *Duncan v. Louisiana*, 391 U.S. 145 (1969), and *Baldwin v. New York*, 399 U.S. 66 (1970), have recognized the severity of imprisonment over other forms of punishment. (These cases established that a defendant has a right to trial by jury whenever he faces the possibility of at least six months imprisonment.) However, because the states deal with many more criminal cases than the federal courts, especially petty crimes, requiring counsel whenever a crime can result in imprisonment extends the right too far. Like the courts in Duncan and Baldwin, in *Argersinger v. Hamlin*, 407 U.S. 25 (1972), the Court made a distinction between imprisonment and other forms of punishment. *Argersinger*held that an indigent defendant cannot be imprisoned if he has not been offered the assistance of counsel by the state. Actual imprisonment remains the proper line defining the constitutional right to counsel. Accordingly, the judgment of the state supreme court is affirmed.

**Concurrence (Powell, J.)**

I am in agreement with the Court’s decision today because of stare decisis and the need for the Court to establish guidance for all lower courts. However, the *Argersinger* rule is not required under the constitution and the practical effects of the rule have serious consequences. Under the rule, a judge will need to decide, before he knows all the facts of the case, whether the defendant should face a term of imprisonment. He may be compelled to make such determinations based on budgetary concerns of the jurisdiction.

**Dissent (Brennan, J.)**

The Court’s analysis of *Argersinger* is wrong. Rather than establishing that actual imprisonment is the only test for determining the boundaries of the Sixth Amendment right to counsel, *Argersinger* established a two dimensional test. The right to counsel attaches whenever a defendant is sentenced to jail and whenever an offense is punishable by more than six months in jail. The authorized imprisonment standard keeps judges from needing to decide the punishment before they know the facts of the case. It also protects the rights of defendants in cases where their convictions carry serious stigma or other collateral consequences. Finally, the Court’s opinion suggests that the right to a jury trial is somehow more fundamental than the right to counsel and this simply is not true under the Constitution.

**Dissent (Blackmun, J.)**

An indigent defendant should be appointed counsel whenever he has a right to a jury trial.

**Key Terms:**

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

**Stare Decisis -** A legal principle under which legal precedents are adhered to and predictability is garnered.

# Nichols v. United States

#### United States Supreme Court 511 U.S. 738 (1994)

#### Rule of Law

**An uncounseled misdemeanor conviction can still be used to enhance a prison sentence when, after being given counsel, a defendant is convicted of a second crime.**

#### Facts

Nichols (defendant) was convicted of a federal drug-related offense. He had previously been convicted of DUI, a state misdemeanor, and was forced to pay a fine, but was not given any jail time. Nichols was not represented by counsel at the DUI proceeding. The trial court used Nichols’s misdemeanor DUI conviction to enhance his sentence for the drug charge. Nichols appealed, arguing that his DUI conviction could not be used to enhance his sentence because the DUI conviction was uncounseled.

#### Issue

Can an uncounseled misdemeanor conviction still be used to enhance a prison sentence when, after being given counsel, a defendant is convicted of a second crime?

#### Holding and Reasoning (Rehnquist, C.J.)

Yes. Under *Scott v. Illinois*, 440 U.S. 367 (1979), a defendant does not have a right to counsel where no prison was imposed. A “logical consequence” of *Scott* is that an uncounseled misdemeanor conviction where no prison term was imposed can be used to enhance a prison sentence when, after being given counsel, a defendant is convicted of a second crime. Here, because Nichols’s prior DUI conviction did not impose a prison term, the conviction and sentence were valid even though he did not have counsel during the proceeding. Accordingly, because Nichols was represented by counsel in this case, his valid, albeit uncounseled, DUI conviction was properly used to enhance his sentence.

#### Dissent (Blackmun, J.)

The majority’s application of *Scott* is incorrect. *Scott* is limited to mean that an uncounseled conviction deemed invalid is also invalid for purposes of enhancing a sentence in a second conviction.

**Key Terms:**

**Right to Counsel** - Sixth Amendment guarantee that a defendant is entitled to be represented by an attorney during a criminal prosecution.

**Gagnon v. Scarpelli**

United States Supreme Court  
411 U.S. 778 (1973)

**Rule of Law**

**A probationer or parolee does not have an absolute due process right to be afforded counsel at revocation hearings.**

**Facts**

Scarpelli (defendant) was convicted of armed robbery. His sentence was suspended and he was placed on probation. While on probation, he was arrested during the course of a burglary. His probation was revoked without a hearing. He appealed, arguing among other things that his due process right was violated because he was not afforded his right to counsel during his revocation process.

**Issue**

Does a probationer or parolee have an absolute due process right to be afforded counsel at revocation hearings?

**Holding and Reasoning (Powell, J.)**

No. A probationer or parolee does not have an absolute due process right to be afforded counsel at revocation hearings. A probationer or parolee may have a right to be afforded counsel at revocation hearings, but that right must be determined on a case by case basis. For example, a probationer likely should be afforded counsel if he claims that he did not commit the violation of the probation. In such instances, counsel would be helpful in resolving legal or factual disputes. In general, however, revocation proceedings are often very different from a court of law. Among other differences, such hearings are not necessarily adversary in nature, the state is represented by a parole officer, not a prosecutor, and the rules of evidence are not followed. Inserting the right to counsel in every one of these proceedings would make the process more adversarial, would make the decision-making process longer, and would add substantial financial costs to the state. In the case at bar, as an initial matter, Scarpelli should have been given a hearing prior to his revocation. In addition, the court determines that although the right to counsel is not absolute, upon remand, the lower court must make a determination as to whether Scarpelli should be afforded counsel. The lower court is reversed.

**Key Terms:**

**Right to Counsel** - Sixth Amendment guarantee that a defendant is entitled to be represented by an attorney during a criminal prosecution.

**Fourteenth Amendment Due Process** **Clause** - The provision set forth at Amendment XIV, Section 1 of the United States Constitution prohibiting states from depriving any person of life, liberty, or property by means that are arbitrary or fundamentally unfair.

**\*\*ROTHGERY v. GILLESPIE COUNTY, TX\*\***

United States Supreme Court  
554 U.S. 191 (2008)

#### Rule of Law

**The right to counsel attaches at a criminal defendant’s initial appearance before a judicial officer where he is told the charges against him and his liberty is subject to restriction.**

#### Facts

Rothgery (plaintiff) was arrested as a felon in possession of a weapon when police relied on an erroneous record showing Rothgery had previously been convicted of a felony. Rothgery was brought before a magistrate judge. The judge determined that there was probable cause for Rothgery’s arrest, told Rothgery the charges, set his bail, and sentenced him to jail. Rothgery was released on bond and made several requests for a lawyer but was not appointed one. He was later indicted and rearrested. Six months after his initial appearance before the magistrate judge, a lawyer was appointed for Rothgery. Rothgery’s lawyer gave the paperwork showing Rothgery was never convicted of a felony to the district attorney. The indictment against Rothgery was dismissed. Rothgery then brought a federal civil rights suit against Gillespie County, Texas (defendant), alleging that the county’s policy of denying appointed counsel to indigent defendants prior to indictment violated his right to counsel. The district court held that the right to counsel had not attached at the initial hearing because no prosecutor was assigned to Rothgery’s case and granted summary judgment for the county. The appellate court affirmed and the Supreme Court granted certiorari.

#### Issue

Does a criminal defendant have the right to counsel when he first appears before a judicial officer, learns of the charges, and has his freedom restricted even if no prosecutor has yet been assigned to his case?

#### Holding and Reasoning (Souter, J.)

Yes. The Sixth Amendment provides that a criminal defendant has the right to counsel when adversarial proceedings are brought against him. Counsel mistakenly argues that the right to counsel does not attach until a critical stage of the proceedings against the defendant occurs. The right to counsel attaches when the defendant is brought before a judicial officer, told the charges against him, and has his liberty restricted. Once the right to counsel has attached, counsel must be present at each critical stage of the proceedings against the defendant. The occurrence of a critical stage is irrelevant to when, exactly, the right to counsel attaches. Thus, the county’s argument is incorrect. When Rothgery initially appeared before the magistrate judge, was informed of the charges, and was subject to imprisonment, he had the right to counsel. The county violated his Sixth Amendment right by denying him counsel at that point in time. The judgment of the appellate court is vacated and the case is remanded for further proceedings.

#### Concurrence (Alito, J.)

The “attachment” of the defendant’s Sixth Amendment right does not mean that he is entitled to appointed counsel at that moment. Attachment signifies the moment that the defendant’s prosecution begins. The Court’s decision does not state that once attachment occurs, the defendant must be appointed counsel within a certain time period.

**Key Terms:**

**Adversarial Proceeding -** Any action whereby a party is put on notice of charges against him and that relief and/or the imposition of a sentence will be pursued.

**United States c. Gouveia**

104 S.Ct. 2292

Supreme Court of the **United** **States**

**UNITED STATES, Petitioner,**

**v.**

**William GOUVEIA et al.**

No. 83-128.

Argued March 20, **1984**.Decided May 29, **1984**.

**Synopsis**

On remand after prior appeal, [641 F.2d 785,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981112213&pubNum=350&originatingDoc=I2218144f9bf011d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))certiorari denied, [454 **U.S**. 902, 102 S.Ct. 409, 70 L.Ed.2d 221,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981242082&pubNum=708&originatingDoc=I2218144f9bf011d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) two federal prison inmates were convicted in the **United** **States** District Court for the Central District of California of murder. Four others were separately convicted. The Court of Appeals, Ninth Circuit, reversed and remanded, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I5f459a33940311d9a707f4371c9c34f0&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=13a7d1c58066432c9821eb21839a0963&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[704 F.2d 1116.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1983119676&pubNum=350&originatingDoc=I2218144f9bf011d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) After granting certiorari, the Supreme Court, Justice Rehnquist, held that: (1) right to appointment of counsel attaches only at or after institution of adversary judicial proceeding, and (2) in view of concerns protected by due process guarantee, prison inmates, suspected of having committed murder in prison, were not constitutionally entitled to appointment of counsel while they were in administrative segregation and before any adversary judicial proceedings had been initiated against them.

Judgment of Court of Appeals reversed, and case remanded.

Justice Stevens filed opinion concurring in the judgment, in which Justice Brennan joined.

Justice Marshall dissented and filed opinion.

# Kirby v. Illinois

#### United States Supreme Court 406 U.S. 682 (1972)

#### Rule of Law

**Under the Sixth Amendment, police may conduct an identification outside the presence of counsel before a suspect has been formally charged with a crime.**

# Michigan v. Jackson

#### United States Supreme Court 475 U.S. 625 (1986)

#### Rule of Law

**Under the Sixth Amendment, police may not initiate questioning outside the presence of counsel of a defendant who requested an attorney at arraignment.**

**Brewer v. Williams**

United States Supreme Court  
430 U.S. 387 (1977)

**Rule of Law**

**A defendant has not effectively waived his right to counsel if, at the advice of counsel, he continues to invoke his right to remain silent until he has the opportunity to confer with his attorney but then makes a statement after being subject to police interrogation.**

**Moore v. Illinois**

98 S.Ct. 458

Supreme Court of the United States

**James Raymond MOORE, Petitioner,**

**v.**

**State of ILLINOIS.**

No. 76-5344.

Argued Oct. 3, **1977**.Decided Dec. 12, **1977**.

**Synopsis**

**Illinois** prisoner sought writ of habeas corpus. The United States District Court for the Northern District of **Illinois**denied release. The Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ib6bec35690f611d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=7e193c6be96f46378cc32514cf5e6532&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[534 F.2d 331,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1976204147&pubNum=350&originatingDoc=Ic1e4f5be9c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed. Writ of certiorari was granted. The Supreme Court, Mr. Justice Powell, held that: (1) defendant's Sixth Amendment right to counsel was violated by a corporeal identification conducted after initiation of adversary judicial criminal proceedings and in the absence of counsel; (2) prosecution may not properly buttress its case-in-chief by introducing evidence of a pretrial identification made in violation of defendant's Sixth Amendment rights, even if it can prove that the pretrial identification had an independent basis and (3) violations would not require reversal if they could be shown to be harmless constitutional error.

Reversed and remanded.

Mr. Justice Rehnquist filed concurring opinion.

Mr. Justice Blackmun concurred in result and filed opinion.

# Gerstein v. Pugh

#### United States Supreme Court 420 U.S. 103 (1975)

#### Rule of Law

**A defendant charged with a crime by information may not be detained for an extended period of time without a judicial determination of probable cause.**

# \*\*DOUGLAS v. CALIFORNIA\*\*

#### United States Supreme Court 372 U.S. 353 (1963)

#### Rule of Law

**An indigent defendant has a right to have counsel appointed during the defendant's first appeal as a matter of right.**

#### Facts

Bennie Meyes and William Douglas (defendants) were charged with 13 different felonies. They were both indigent and were represented by one public defender. The attorney requested a continuance when the trial began, claiming he was not as prepared as he should have been given the number of charges against his clients. He also claimed there was a conflict of interest between his clients, and the court should appoint separate counsel for each of them. The motion was denied. Meyes and Douglas then dismissed their attorney and renewed the motions for a continuance and separate counsel. The motions were again denied. Meyes and Douglas were jointly tried and convicted of all 13 felonies. They each appealed as of right. Both Meyes and Douglas requested the assistance of counsel on appeal, but their requests were denied. The court of appeals affirmed their convictions. They then petitioned the state supreme court for discretionary review, but their petitions were denied. The United States Supreme Court granted certiorari.

#### Issue

Does an indigent defendant have a right to have counsel appointed during the defendant's first appeal as a matter of right?

#### Holding and Reasoning (Douglas, J.)

Yes. An indigent defendant has a right to have counsel appointed during the defendant's first appeal as a matter of right. Denying an indigent defendant the right to counsel during an appeal as of right is a violation of the Fourteenth Amendment. A rich defendant can effectively appeal his case with the help of counsel. He can present his case to the court, and the court can make a decision based on the merits. A poor defendant, on the other hand, will be prevented from effectively exercising his right to appeal and instead only has the right to a “meaningless ritual.” Here, therefore, Meyes and Douglas should have been appointed counsel for their appeal as of right. The judgment is vacated, and the case is remanded for further proceedings.

#### Dissent (Harlan, J.)

The Court’s opinion seems to rely on both the Equal Protection Clause and the Due Process Clause of the Fourteenth Amendment. However, neither clause supports the Court’s holding that defendants have a right to counsel during appeals as of right. First, the equal-protection analysis is not appropriate here. Although states cannot discriminate between the rich and the poor, they may adopt laws of general applicability that affect the poor more than the rich. In fact, most state policies that require citizens to make payments, from instate tuition to attend state universities to uniform sales taxes, hurt the poor more than the rich. The Equal Protection Clause does not require states to place the poor and the rich on equal levels. In addition, due process does not require that indigent defendants be appointed counsel during an appeal as of right. There is nothing in the record that indicates that the state system has resulted in injustice. Furthermore, appellate procedures are different from trial where the right to counsel is absolute. First, because appellate review is not required by the constitution, the question regarding state appellate procedure is whether it is so arbitrary and unreasonable to require invalidation. Second, far fewer legal questions arise on appeal than at trial. Finally, an appeal as of right guarantees the defendant a complete consideration of his case, whether or not he has an attorney present.

**Key Terms:**

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

**Fourteenth Amendment Due Process** **Clause** - The provision set forth at Amendment XIV, Section 1 of the United States Constitution prohibiting states from depriving any person of life, liberty, or property by means that are arbitrary or fundamentally unfair.

# Griffin v. California

#### United States Supreme Court 380 U.S. 609 (1965)

#### Rule of Law

**It is a violation of the Fifth Amendment for the prosecution to comment on the defendant’s silence or for the trial judge to instruct the jury that the defendant’s silence can be evidence of guilt.**

# Gideon v. Wainwright

#### United States Supreme Court 372 U.S. 335 (1963)

#### Rule of Law

**The Fourteenth Amendment incorporates the Sixth Amendment right to counsel to the states.**

**McKane v. Durston**

14 S.Ct. 913

Supreme Court of the United States

**McKANE**

**v.**

**DURSTON, Agent and Warden of Sing Sing Prison, in State of New York.**

No. 1,185.

May 14, 1894.

## Synopsis

Appeal from the circuit court of the United States for the southern district of New York.

This was an application by John Y. McKane for a writ of habeas corpus to F. H. Durston, agent and warden of Sing Sing prison, in the state of New York. The application was denied, and he appealed.

# Scott v. Illinois

#### United States Supreme Court 440 U.S. 367 (1979)

#### Rule of Law

**The Sixth and Fourteenth Amendments require that no indigent defendant be sentenced to a term of imprisonment unless the state has afforded him the right to the assistance of appointed counsel.**

# Mayer v. City of Chicago

#### United States Supreme Court 404 U.S. 189 (1971)

#### Rule of Law

**A state may not limit the provision of free transcripts only to felony defendants unless the state can show that a defendant will not be denied an effective appeal by the provision of some alternative to a transcript.**

#### Facts

Mayer (defendant) was convicted of city ordinance violations and ordered to pay fines. Mayer wanted to appeal and petitioned the trial court for free transcripts. The trial court denied the motion because Illinois law only provided free transcripts in felony cases. State law provided alternatives to transcripts in non-felony cases. Mayer moved the state supreme court for an order that he be provided free transcripts. The state supreme court denied his motion. Mayer petitioned the United States Supreme Court to challenge the constitutionality of the law limiting free transcripts to felony offenses.

#### Issue

May a state limit the provision of free transcripts only to felony defendants when the state cannot show that a defendant will not be denied an effective appeal by the provision of some alternative to a transcript?

#### Holding and Reasoning (Brennan, J.)

No. The state must provide an indigent defendant with a sufficiently complete record to enable an effective appeal. A complete transcript will not be required in all cases, but the state bears the burden of showing that an alternative will provide a sufficiently complete record. There is no rational relationship between financial capacity and a defendant’s guilt or innocence. That holds true irrespective of whether the conviction relates to a felony or non-felony offense. It is irrelevant that denying free transcripts in non-felony cases may serve the state’s interests in financial prudence and efficient court administration. All defendants must be afforded equal access to the justice system, regardless of ability to pay. The difference in penalties between felony and non-felony offenses does not justify discrimination on the basis of poverty. The state may not arbitrarily limit access to fair appellate review.

**Key Terms:**

**Ordinance -** A law or regulation enacted by a municipal government.

# \*\*ROSS v. MOFFITT\*\*

#### United States Supreme Court 417 U.S. 600 (1974)

#### Rule of Law

**An indigent defendant is not entitled to representation at state expense for discretionary appeals.**

#### Facts

Moffitt (defendant) was convicted of criminal charges in two separate cases. Moffitt was represented by a court-appointed attorney at trial. Moffitt appealed both convictions in the state appellate court and was represented on appeal by court-appointed counsel. Both convictions were upheld. The federal district court held that Moffitt was not entitled to representation at state expense for assistance with preparing his petitions for review by the state supreme court and the United States Supreme Court. The federal court of appeals reversed the district court decisions and held that Moffitt was entitled to representation at state expense.

#### Issue

Is an indigent defendant entitled to representation at state expense for discretionary appeals?

#### Holding and Reasoning (Rehnquist, J.)

No. An indigent defendant is not entitled to representation at state expense for discretionary appeals. Due process requires that the state provide representation to all defendants during trial proceedings. This rule aims to promote fairness between the individual and the state in a situation in which the state seeks to alter the legal relationship between the parties. By contrast, the state is not required to provide appellate review. When the state chooses to afford the opportunity for appellate review, equal protection demands that it afford equal opportunity for review to all defendants, irrespective of the defendant’s ability to pay the costs of appellate review. The state is not required to provide counsel at every step of the appellate process in order to provide meaningful access to the system. The state is simply prohibited from adopting arbitrary standards that exclude an individual from the opportunity to receive fair appellate review. When a defendant has been represented by counsel at both the trial level and upon the taking of an appeal of right, a sufficient record will have been established to enable review by a superior court. A defendant proceeding *pro se* before the superior court will be at a disadvantage relative to one who can afford representation, but that disadvantage is much less significant than it would be during a trial or during an initial appeal of right. In addition, the scope of review afforded by the state and federal supreme courts is discretionary. The supreme courts are not bound to review every case in which the appropriateness of a lower court judgment is called into question. The Supreme Court of North Carolina limits its review to issues of significant public interest and questions of conflict with prior supreme court decisions. The state supreme court has discretion to deny certiorari of any petition not presenting one of its criteria for review. This Court possesses the same discretionary authority and has consistently exercised a policy of denying appointed counsel for petitioners seeking certiorari. The judgment of the court of appeals is reversed.

#### Dissent (Douglas, J.)

I agree with the opinion of the court of appeals and its conclusion that the same principles of fairness that mandate the assistance of counsel at trial and initial appeal apply as well to discretionary appeals. A brief submitted for initial appeal might address conflicts of the trial court’s decision with prior supreme court decisions, but will likely not address issues relating to the public interest or other criteria for certiorari. The criteria supporting a grant of certiorari are not likely to be within the realm of a layperson’s knowledge. The attorney who represented a defendant at trial or appeal will have a good understanding of the issues involved and would not be overly challenged by the preparation of a petition for discretionary review. To deprive a defendant of ongoing representation when seeking discretionary review deprives the defendant of the assurance of fairness and equality afforded by representation during lower court proceedings.

**Key Terms:**

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

**Appeal of Right -** The opportunity to seek review of a lower court decision without first gaining approval of the reviewing court.

**Discretionary Appeal** - Review of a lower court decision that requires approval of the reviewing court.

# Douglas v. California

#### United States Supreme Court 372 U.S. 353 (1963)

#### Rule of Law

**An indigent defendant has a right to have counsel appointed during the defendant's first appeal as a matter of right.**

# Griffin v. California

#### United States Supreme Court 380 U.S. 609 (1965)

#### Rule of Law

**It is a violation of the Fifth Amendment for the prosecution to comment on the defendant’s silence or for the trial judge to instruct the jury that the defendant’s silence can be evidence of guilt.**

**McKane v. Durston**

14 S.Ct. 913

Supreme Court of the United States

**McKANE**

**v.**

**DURSTON, Agent and Warden of Sing Sing Prison, in State of New York.**

No. 1,185.

May 14, 1894.

## Synopsis

Appeal from the circuit court of the United States for the southern district of New York.

This was an application by John Y. McKane for a writ of habeas corpus to F. H. Durston, agent and warden of Sing Sing prison, in the state of New York. The application was denied, and he appealed.

# Wilson v. Lane

#### Supreme Court of Georgia 614 S.E.2d 88 (2005)

#### Rule of Law

**To prove lack of testamentary capacity, the party challenging the will must present proof showing that the testator’s condition prevented her from having a decided and rational desire as to the disposition of her property.**

# Ake v. Oklahoma

#### United States Supreme Court 470 U.S. 68 (1985)

#### Rule of Law

**When the sanity of a defendant is likely to be at issue in criminal proceedings, the Constitution requires the state to provide the services of a psychiatrist.**

#### Facts

Ake (defendant) was charged with murder and attempted murder. Because of his erratic behavior during court proceedings, the trial judge ordered a psychiatric evaluation. Based on the findings of the evaluation, Ake was committed to a psychiatric hospital. After receiving treatment and medication, Ake was deemed competent to stand trial. Ake’s attorney requested that the state provide funding for a psychiatric evaluation to assess Ake’s sanity at the time of the crime. The trial court declined to provide a state-subsidized evaluation. At trial, there was no expert witness who could testify as to Ake’s mental state during the commission of the crime. The jury was instructed that Ake bore the burden of proving that he could be found not guilty by reason of insanity. The jury found Ake guilty on all counts. At Ake’s sentencing hearing, doctors testified about his mental condition and his continuing danger to society. Ake had no expert witness to rebut the doctors’ testimony. Ake was sentenced to death. Ake appealed and argued that he should have been provided a court-appointed psychiatrist. The court of appeals affirmed Ake’s conviction and sentence. Ake petitioned the United States Supreme Court for review.

#### Issue

Does the Constitution require the state to provide the services of a psychiatrist when the sanity of a defendant is likely to be at issue in criminal proceedings?

#### Holding and Reasoning (Marshall, J.)

Yes. The Constitution requires the state to provide the services of a psychiatrist when the sanity of a defendant is likely to be at issue in criminal proceedings. The state must afford a fair opportunity for an individual to defend against criminal charges. The Fourteenth Amendment prohibits the state from depriving any individual of the opportunity to meaningfully participate in his own defense on the basis of poverty. A person charged with a crime has a fundamental interest in the preservation of his life or liberty. The state has a compelling interest in achieving the fair and accurate disposition of criminal cases. The state’s financial concerns related to the provision of psychiatric assistance are not substantial when compared against the state’s interest in criminal procedure and the individual’s liberty interests. When a defendant’s guilt or innocence depends upon his mental state, the services of a psychiatrist may be critical to his defense. Ultimately, the jury must decide whether a defendant’s mental condition relieves the defendant of culpability. A defendant’s inability to present his own psychiatric evidence poses a high risk of an erroneous jury assessment of the defendant’s mental state. The defendant must make a threshold showing that his mental state is likely to be a significant issue at trial. When a defendant makes that threshold showing, the state must provide access to a psychiatrist. The defendant does not have a constitutional right to choose a particular psychiatrist, but the state must ensure that the defendant receives the services of a competent professional. During the trial phase, Ake’s sole defense relied upon evidence of his mental state at the time of the offense. Ake’s mental state was clearly a significant issue at trial. In the absence of psychiatric assistance, Ake could not rebut the evidence of danger to society that was presented at his sentencing hearing. A defendant continues to have a compelling interest in fairness during the sentencing phase of criminal proceedings. The denial of psychiatric assistance deprived Ake of due process under the law. The judgment of conviction is reversed.

#### Concurrence (Burger, J.)

This case involves capital punishment and therefore demands heightened protections of the defendant’s due process rights. This opinion does not apply to non-capital cases.

**Key Terms:**

**Fourteenth Amendment Due Process** **Clause** - The provision set forth at Amendment XIV, Section 1 of the United States Constitution prohibiting states from depriving any person of life, liberty, or property by means that are arbitrary or fundamentally unfair.

**Evitts v. Lucey**

105 S.Ct. 830

Supreme Court of the United States

**Ralph W. EVITTS, Superintendent, Blackburn Correctional Complex and David L. Armstrong, Attorney General, Petitioners,**

**v.**

**Keith E. LUCEY.**

No. 83-1378.

Argued Oct. 10, 1984.Decided Jan. 21, 1985.Rehearing Denied March 18, 1985.See [470 U.S. 1065, 105 S.Ct. 1783](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&pubNum=708&cite=105SCT1783&originatingDoc=Ic1d2cd419c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

**Synopsis**

Petitioner brought writ of habeas corpus, seeking release following his conviction in Kentucky of trafficking in controlled substances. Following remand, [645 F.2d 547,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981114268&pubNum=350&originatingDoc=Ic1d2cd419c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) the United States District Court for the Eastern District of Kentucky, Bernard T. Moynahan, Jr., Chief Judge, granted the writ, and the state appealed. The Court of Appeals, [724 F.2d 560,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984102428&pubNum=350&originatingDoc=Ic1d2cd419c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed. The state's petition for writ of certiorari was granted. The Supreme Court, Justice Brennan, held that criminal defendant is entitled to effective assistance of counsel on first appeal as of right.

Affirmed.

Chief Justice Burger filed a dissenting statement.

Justice Rehnquist filed a dissenting opinion in which Chief Justice Burger joined.

**Bearden v. Georgia**

103 S.Ct. 2064

Supreme Court of the United States

**Danny R. BEARDEN, Petitioner**

**v.**

**GEORGIA.**

No. 81-6633.

Argued Jan. 11, 1983.Decided May 24, 1983.

**Synopsis**

Following revocation of probation by state trial court, probationer appealed. The [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ie1cd6d7002df11da83e7e9deff98dc6f&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[Georgia Court of Appeals, 288 S.E.2d 662, 161 Ga.App. 640,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1982109180&pubNum=711&originatingDoc=I3195e3989c2511d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed. The Supreme Court, Justice O'Connor, held that sentencing court could not properly revoke defendant's probation for failure to pay a fine and make restitution absent evidence and findings that he was somehow responsible for the failure and that alternative forms of punishment would be inadequate to meet the State's interest in punishment and deterrence.

Reversed and remanded.

Justice White concurred in the judgment and filed an opinion in which Chief Justice Burger, Justice Powell, and Justice Rehnquist joined.

**United States v. MacCollom**

96 S.Ct. 2086

Supreme Court of the **United** **States**

**UNITED STATES, Petitioner,**

**v.**

**Colin F. MacCOLLOM.**

No. 74-1487.

Argued March 29, **1976**.Decided June 10, **1976**.

## Synopsis

Action was brought by federal prisoner for injunctive and declaratory relief regarding his right to criminal trial transcript to assist in preparation of postconviction motion.

The **United** **States** District Court for the Western District of Washington, dismissed action, and prisoner appealed. The Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I76360a56906511d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=c03090e49a8e403ba41171f68a20d3b2&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[511 F.2d 1116,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1974113287&pubNum=350&originatingDoc=Id4c0f3aa9c1d11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) reversed, and the **United** **States** petitioned for writ of certiorari. Mr. Justice Rehnquist announced the judgment of the Supreme Court and delivered an opinion holding that right to free transcript is not a necessary concomitant of writ of habeas corpus; that conditions established by statute which provides for free transcript for indigent prisoner asserting postconviction claim when judge certifies that asserted claim is not frivolous and transcript is needed to decide issue are not arbitrary and unreasonable but rather comport with fair procedure; and that facts that transcript was available had prisoner chosen to appeal from his conviction and that transcript remained available on specified conditions to indigent prisoner collaterally attacking his conviction afforded prisoner adequate opportunity to attack his conviction.

Judgment of Court of Appeals reversed.

Mr. Justice Blackmun filed opinion concurring in judgment.

Mr. Justice Brennan filed dissenting opinion in which Mr. Justice Marshall joined.

Mr. Justice Stevens filed dissenting opinion in which Mr. Justice Brennan, Mr. Justice White, and Mr. Justice Marshall joined.

**Chapter 17 – Sections 1 and 2**

# \*\*STRICKLAND v. WASHINGTON\*\*

#### United States Supreme Court 466 U.S. 668 (1984)

#### Rule of Law

**To establish the ineffective assistance of counsel, a convicted defendant must show that his counsel’s performance was deficient because the lawyer did not act as a reasonably competent attorney, and that he was prejudiced by the deficiency because there is a reasonable probability that, but for his attorney’s unprofessional errors, the result of the proceeding would have been different.**

#### Facts

Washington (defendant) went on a ten-day crime spree during which he committed three groups of violent crimes, including multiple murders, kidnapping and theft. Until then, Washington claimed he had no significant criminal record. He eventually turned himself in to the police and gave a statement confessing to the third group of crimes, which included one murder. Washington was appointed an experienced criminal attorney. Against his lawyer’s advice, Washington later confessed to the first two murders. This caused Washington’s lawyer to feel a sense of hopelessness about his client’s case. Again ignoring his lawyer’s advice, Washington pleaded guilty to all the charges against him. Washington told the judge that when he committed the crimes he was under extreme stress because he was unable to support his family. Washington then rejected his lawyer’s advice that he request an advisory jury for his capital sentencing hearing. The trial judge found several aggravating circumstances with respect to each of the three murders and found the mitigating factors, presented by the defense, unpersuasive. Specifically, he found that Washington was not suffering from extreme emotional disturbance. The trial judge sentenced Washington to death on each of the three murder counts and to prison for the other crimes. The state supreme court upheld the convictions and the sentences. Washington filed a petition for collateral relief claiming ineffective assistance of counsel at the sentencing proceeding. He cited six instances of misconduct: (1) The lawyer did not move for a continuance to prepare for the sentencing hearing; (2) the lawyer did not interview and present character witnesses; (3) the lawyer did not request a psychiatric report; (4) the lawyer did not seek a pre-sentence investigation report; (5) the lawyer failed to present meaningful arguments to the sentencing judge and (6) the lawyer failed to examine the medical reports and cross-examine the prosecutions medical experts. Washington’s lawyer testified that he wanted to rely on the plea colloquy to establish Washington’s emotional stress and his background. He also said that he did not request a pre-sentence report because it would have established Washington’s criminal history to the court. Counsel also testified that his trial strategy was based in part on what he knew about the judge determining his client’s sentence. Finally, counsel believed there were mitigating circumstances that would keep the judge from imposing a capital sentence. The trial court did not grant a hearing and denied relief. Washington then filed a petition for a writ of habeas corpus. The federal district court agreed with the state trial court. The court concluded that while Washington’s lawyer had made mistakes, Washington suffered no prejudice as a result. The court of appeals reversed and remanded the case.

#### Issue

Has a defendant suffered from the ineffective assistance of counsel where the attorney’s conduct has fallen below the objective standard of reasonableness and the defendant has been prejudiced by this conduct?

#### Holding and Reasoning (O’Connor, J.)

Yes. A defendant has suffered from the ineffective assistance of counsel when the attorney has not acted as a reasonably competent attorney, and there is a reasonable probability that absent these errors the result of the proceeding would have been different. Addressing the first element, there is no set of rules that will establish whether an attorney acted reasonably. Instead, all of the facts, as they existed at the time counsel made his decision, must be considered. There is a strong presumption that an attorney has acted reasonably. Otherwise, any defendant, upon conviction, could challenge the sound trial strategy of his attorney since it would be easy for a court to decide that an unsuccessful act or omission was unreasonable. Addressing the second element, the purpose of Sixth Amendment right to counsel is to ensure a fair trial in order to justify reliance on the outcome of the proceedings. Therefore, any error on the part of counsel must be prejudicial to the defendant to constitute the ineffective assistance of counsel. The burden is on the defendant to prove that he was harmed by his attorney’s conduct and that there is a reasonable probability that absent the attorney’s errors, the outcome would have been different. In this case, there was no ineffective assistance of counsel. Counsel’s decisions were all based on professionally reasonable judgments. The record shows that Washington’s attorney made the strategic decision to argue mitigating circumstances due to severe emotional distress. Counsel’s decisions were all consistent with this case theory. Furthermore, the record does not indicate that the lawyer’s sense of hopelessness distorted his professional judgment. In addition, Washington was not prejudiced by his lawyer’s actions. There is no reasonable probability that the omitted evidence would have changed the outcome. The aggravating circumstances outweighed the mitigating factors to such an extent that any character testimony would not have changed the sentencing. Therefore, Washington was not denied his Sixth Amendment right to counsel and he received a fair trial.

#### Concurrence/Dissent (Brennan, J.)

The death penalty is cruel and unusual punishment and is forbidden by the Eighth and Fourteenth Amendments. Therefore, while the Court’s opinion is correct, Washington’s death sentence should be vacated and the case remanded.

#### Dissent (Marshall, J.)

Washington is entitled to a new sentencing proceeding. First, the Court’s two tiered rule is objectionable. Holding that counsel must act as a reasonably competent attorney is a vague and unhelpful standard. The Court has a duty to interpret the Constitution and under this mandate the Court should have developed detailed standards by which defense attorneys must abide. In addition, it is often difficult to determine whether a defendant has in fact been prejudiced by his counsel’s conduct. Finally, the Court suggests that the only purpose behind the constitutional right to the effective assistance of counsel is to ensure that innocent people are not convicted. However, the right ensures that convictions are obtained only through fundamentally fair procedures. Therefore, the Court’s prejudice standard violates defendants’ constitutional rights. Washington is also entitled to a new sentencing hearing because the Court’s opinion places too heavy a burden on defendants to prove ineffective assistance of counsel. While the burden rests on the defendants, the Court’s strong language suggests that this burden will rarely be met. In this case, Washington’s attorney conducted no investigation into possible character witnesses. While he may have still decided to keep character witnesses from testifying, this omission was unreasonable because he did not know what mitigating evidence he was excluding from the sentencing proceeding.

**Key Terms:**

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

**Eighth Amendment** - Prohibits the imposition of excessive bail, excessive fines, or cruel and unusual punishments on criminal defendants.

# Argersinger v. Hamlin

#### United States Supreme Court 407 U.S. 25 (1972)

#### Rule of Law

**The Sixth Amendment right to counsel extends to defendants charged with any offense that carries a possible penalty of imprisonment.**

# Gideon v. Wainwright

#### United States Supreme Court 372 U.S. 335 (1963)

#### Rule of Law

**The Fourteenth Amendment incorporates the Sixth Amendment right to counsel to the states.**

# McMann v. Richardson

#### United States Supreme Court 397 U.S. 759 (1970)

#### Rule of Law

**A defendant who alleges that he pleaded guilty because of a prior coerced confession is not, without more, entitled to a hearing on his petition for habeas corpus.**

#### Facts

Richardson (defendant) petitioned for a writ of habeas corpus. The Court of Appeals for the Second Circuit held that where defendants confess to a crime and agree to plead guilty solely because of these confessions, the plea is unintelligently made and vulnerable. The United States Supreme Court granted certiorari.

#### Issue

Is a defendant who had the assistance of a capable attorney entitled to a habeas corpus proceeding where he has pleaded guilty but later claims his plea was motivated by a prior coerced confession?

#### Holding and Reasoning (White, J.)

No. A counseled defendant is not entitled to a hearing on his petition for habeas corpus where he has pleaded guilty but later claims his plea was the result of a coerced confession. Such a defendant would exercise his right to trial if he believed there was a chance at acquittal. Furthermore, such a defendant believes that his confession is central to the prosecution’s case. Therefore, this case centers on whether the defendant believes his confession can be introduced at trial. A defendant who believes his confession is inadmissible will likely not accept a plea agreement. If he does decide to plead guilty, even while believing his confession is inadmissible, he is refusing to present his federal claims to the state court in the first instance. Later challenges to the constitutionality of his confession therefore seem unbelievable. A defendant who believes his confession is admissible at trial is more likely to plead guilty. Even if the confession is the only evidence against the defendant and is the sole reason the defendant accepts the plea, his plea is still voluntarily made. Furthermore, if the defendant later decides that his confession is actually inadmissible, the plea is still valid. Mistakenly assessing the prosecution’s case does not make a plea unintelligent. A guilty plea must be intelligently made. However, a counseled defendant is not entitled to a habeas hearing where competent counsel may have misjudged the admissibility of a prior confession.

# Geders v. United States

#### United States Supreme Court 425 U.S. 80 (1976)

#### Rule of Law

**The trial judge has broad powers with which to conduct proceedings, including the order in which parties adduce proof.**

#### Facts

[Information not provided in casebook excerpt]

#### Issue

Does the trial judge have discretion to determine the order in which parties adduce proof?

#### Holding and Reasoning (Berger, C.J.)

Yes. The trial judge has broad powers with which to conduct proceedings. This includes a determination as to the order in which parties adduce proof. Such procedural determinations will be reviewed only for abuse of discretion. This discretion is necessary to enable the trial judge to “meet situations as they arise” and “cope with complexities and contingencies inherent in the adversary process.”

**Key Terms:**

**Abuse of Discretion -** An adjudicator’s failure to make a decision in accordance with principles of soundness, reasonableness, or legality.

**Herring v. New York**

95 S.Ct. 2550

Supreme Court of the United States

**Clifford HERRING, Appellant,**

**v.**

**State of NEW YORK.**

No. 73—6587.

Argued Feb. 26, 1975.Decided June 30, 1975.

**Synopsis**

Defendant was convicted in the Supreme Court, Richmond County, New York, of attempted robbery in the third degree. The Supreme Court, Appellate Division, [43 A.D.2d 816, 351 N.Y.S.2d 368,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&pubNum=602&cite=351NYS2D368&originatingDoc=I5ab9789c9be911d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed and leave to appeal to the New York Court of Appeals was denied. An appeal was then brought to the United States Supreme Court and probable jurisdiction was noted. The Supreme Court, Mr. Justice Stewart, held that New York statute conferring upon every judge in a nonjury criminal trial the power to deny counsel the opportunity to make a summation of the evidence before the rendition of judgment denied defendant, whose counsel was denied right to be heard in summation, the assistance of counsel that the Constitution guarantees.

Judgment vacated and case remanded.

Mr. Justice Rehnquist filed a dissenting opinion in which Mr. Chief Justice Burger and Mr. Justice Blackmun joined.

# Brooks v. Tennessee

#### United States Supreme Court 406 U.S. 605 (1972)

#### Rule of Law

**A state law that requires a criminal defendant to take the stand before any other defense witness or forfeit the right to testify on his own behalf violates constitutional due process requirements and the privilege against self-incrimination.**

#### Facts

A law of the state of Tennessee (plaintiff) required a criminal defendant desiring to testify on his own behalf to do so before calling any other defense witnesses or forfeit the right to take the stand. Brooks (defendant) was on trial for armed robbery charges. Brooks moved the court to allow him to call other defense witnesses before deciding whether to take the stand. Even though the prosecution agreed to waive the requirement that Brooks testify first, the trial court refused to depart from the statutory requirement. Brooks presented two witnesses but did not take the stand himself. Brooks was convicted and his conviction was upheld in the state courts. Brooks petitioned the United States Supreme Court for review.

#### Issue

Does a state law that requires a criminal defendant to take the stand before any other defense witness or forfeit the right to testify on his own behalf violate constitutional due process requirements and the privilege against self-incrimination?

#### Holding and Reasoning (Brennan, J.)

Yes. A state law that requires a criminal defendant to take the stand before any other defense witness or forfeit the right to testify on his own behalf violates constitutional due process requirements and the privilege against self-incrimination. In the past, it was common practice to sequester witnesses during a criminal trial because it was believed that witnesses would tend to be influenced by the testimony of prior witnesses. In the American criminal justice system, the defendant has the right to be present at his own trial and cannot be sequestered from the testimony of other witnesses. The rule requiring a defendant to testify first developed as a mechanism for preventing the defendant from being influenced by the testimony of other defense witnesses. A criminal defendant faces considerable risks when choosing to take the stand and face impeachment and cross-examination by the prosecution. The defendant cannot know in advance whether his own witnesses will testify effectively on his behalf. In some cases, a defendant will need to call a prosecution witness in order to build his defense. Unless the state permits advance depositions of prosecution witnesses, the defendant cannot know ahead of time what effect hostile witness testimony may have on his defense. The Tennessee rule deprives the defendant of the ability to accurately assess whether his own testimony will be of value to his defense. The Tennessee statute penalizes a defendant for exercising his right to remain silent by imposing obstacles to the defendant’s ability to determine whether silence will be in his best interest. The state’s interest in preserving the veracity of a defendant’s testimony by eliminating any potential for prior influence does not justify imposing burdens on the right to remain silent. Our system rests the determination of witness credibility with the jury. The Tennessee statute acts to coerce the defendant into forfeiting his constitutional right to remain silent by depriving the defendant of all right to take the stand should he not choose to testify first. In similar fashion, the Tennessee statute violates the defendant’s due process rights. In *Ferguson v. Georgia*, 565 U.S. 570 (1961), we invalidated a statute that allowed an incompetent defendant to make an unsworn statement at trial but prohibited defense counsel from asking questions to elicit specific testimony.We concluded that the statute deprived the defendant of the “guiding hand of counsel” in violation of Fourteenth Amendment due process requirements. The Tennessee statute limits the ability of defense counsel to evaluate the full range of evidence and make tactical decisions about whether and when the defendant should take the stand. As such, the statute deprives the defendant of the guiding hand of counsel with respect to a critical element of trial strategy. The Tennessee statute violated Brooks’ constitutional rights by prohibiting him from taking the stand as a consequence of his refusal to testify first.

#### Dissent (Burger, C.J.)

It may be easier for defense counsel to decide whether a defendant should take the stand after having had the opportunity to consider all other evidence, but the Constitution does not prohibit states from adopting rules that burden the defense with the necessity of making that decision earlier. The Constitution merely prohibits compelling a defendant to be a witness against himself. Brooks was clearly not compelled to testify against his own interests, since he did not even take the stand. The jury was not allowed to draw negative inferences from Brooks’ silence. The choice of whether or not to testify is always difficult and the Constitution does not require the state to take measures to make that choice easier. The Court’s ruling amounts to an invalidation of any state rule of evidence that falls short of the most beneficial rule for the defense. The majority’s real reason for invalidating the Tennessee statute is that only two states follow the Tennessee rule. The Court should not interfere with the ability of the states to establish their own judicial procedures.

**Key Terms:**

**Due Process -** A constitutional guarantee that a law shall not be unreasonable, arbitrary, or capricious and that individuals will be given notice of legal proceedings conducted fairly with an opportunity for an individual to be heard before the government may impose sanctions on one’s life, liberty, or property.

**Ferguson v. Georgia**

81 S.Ct. 756

Supreme Court of the United States

**Billy FERGUSON, Appellant,**

**v.**

**STATE OF GEORGIA.**

No. 44.

Argued Nov. 14, 15, 1960.Decided March 27, **1961**.

## Synopsis

The Supreme Court of the [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I6a93ea8104a311da9439b076ef9ec4de&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=59966ef4757a4dd6a03cf5a521d8a80d&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[State of **Georgia**, 215 **Ga**. 117, 109 S.E.2d 44,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1959124684&pubNum=711&originatingDoc=Ia09c13359c9a11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed a murder conviction, and the defendant appealed. The United States Supreme Court, Mr. Justice Brennan, held that in effectuating statutory provisions for unsworn statements, **Georgia**, consistently with Fourteenth Amendment, could not, in context of statute making defendants incompetent to testify under oath on their own behalf, deny to defendant the right to have his counsel question him to elicit his unsworn statement.

Reversed and remanded.

# Cuyler v. Sullivan

#### United States Supreme Court  446 U.S. 335 (1980)

#### Rule of Law

**If a lawyer represents both a criminal defendant and a codefendant, but neither the defendant nor the lawyer objects to the multiple representation, the defendant is not denied the effective assistance of counsel unless the lawyer possessed an actual conflict that adversely affected the lawyer's performance.**

#### Facts

John Sullivan (defendant) was indicted along with two other defendants for murder. The defendants were all represented by the same lawyers. Neither Sullivan nor his lawyers objected to the multiple representation. Sullivan was the first defendant tried. After the prosecution’s case, the defense rested without presenting any evidence. Sullivan was convicted and sentenced to life while the other two defendants were acquitted. Sullivan filed a petition for collateral relief and argued that he received ineffective assistance of counsel because his lawyers’ representation of the other two defendants created a conflict of interest. One lawyer stated that he had encouraged Sullivan to testify, while the other lawyer stated that he did not want Sullivan’s defense to go on because it might have affected the other two defendants’ upcoming trials. Sullivan claimed he deferred to his lawyers’ advice, but there was evidence that he chose not to testify to avoid exposing an affair. The lower court made no decision on the conflict of interest claim, but found that Sullivan was adequately advised about not testifying. All other claims for relief were denied. The state supreme court affirmed Sullivan’s conviction and the denial of relief. Sullivan filed for a writ of habeas corpus and his petition was referred to a magistrate. The magistrate found that Sullivan’s lawyers had a conflict of interest, but the federal district court found that there had been no multiple representation. The court of appeals reversed. The Supreme Court granted certiorari.

#### Issue

Is the right to effective assistance of counsel automatically violated if a criminal defendant is represented at trial by a lawyer who also represents a codefendant and thus may have a conflict of interest?

#### Holding and Reasoning (Powell, J.)

No. In *Holloway v. Arkansas*, 435 U.S. 475 (1978), we held that state trial courts are required to investigate whether a conflict of interest exists where there is multiple representation and a party makes a timely objection to it. However, there is no requirement that state courts take it upon themselves to make this inquiry in every case if no party objects to the multiple representation. Lawyers are under an ethical obligation to avoid conflicts of interest. The lawyer representing the parties is also in the best position to determine whether a conflict exists. Therefore, trial courts may assume that where a lawyer represents multiple parties to a case, either no conflict exists or the parties have been informed of and accepted the risk. Unless a court knows or should know that there is a conflict, it is not required to look for one. In Sullivan’s case, there was no reason for the trial court to believe there was a conflict and no party made an objection. Therefore, the trial court had no duty to investigate whether there was a conflict in Sullivan’s case. If a party does not object to multiple representation at trial, he must show that there was an actual conflict of interest that impaired his representation to later make an ineffective assistance of counsel claim. The mere possibility of a conflict is not enough. The court of appeals granted Sullivan’s claim for collateral relief based on his showing that the multiple representation in his case created the possibility of a conflict of interest. This was not the correct standard. Accordingly, the court of appeals’ judgment is vacated and the case is remanded.

#### Dissent (Marshall, J)

When there is multiple representation, the trial court has a duty to warn defendants of the risks of conflict and to determine whether the defendants have made an informed choice to proceed with the multiple representation. Defendants who do not object to multiple representation at trial should not be required to show that an actual conflict existed and that it negatively impacted their representation in order to later make an ineffective assistance of counsel claim. If a defendant does not object to multiple representation at trial, he should only be required to show that there was an actual conflict.

**Key Terms:**

**Writ of Habeas Corpus** - Enables a detainee or prisoner to challenge the legality of his detention by the government.

# United States v. Cronic

#### United States Supreme Court 466 U.S. 648 (1984)

#### Rule of Law

**In the absence of a showing of particularized errors by defense counsel, a defendant claiming a violation of the Sixth Amendment right to the effective assistance of counsel must demonstrate that the totality of the circumstances supports a presumption of ineffective assistance.**

#### Facts

Cronic (defendant) was indicted on mail fraud charges related to a check-kiting scheme. The United States (plaintiff) spent four and one-half years investigating the case. Shortly before trial, Cronic’s attorney withdrew from representation. The court appointed a young real estate lawyer to represent Cronic. The appointed attorney had only 25 days to prepare for trial. Cronic’s co-defendants agreed to testify on behalf of the prosecution and Cronic was convicted on 11 of 13 counts. Cronic appealed and the federal court of appeals reversed the conviction upon the conclusion that Cronic’s Sixth Amendment right to counsel had been violated. The United States petitioned the Supreme Court for review.

#### Issue

In the absence of a showing of particularized errors by defense counsel, must a defendant claiming a violation of the Sixth Amendment right to the effective assistance of counsel demonstrate that the totality of the circumstances supports a presumption of ineffective assistance?

#### Holding and Reasoning (Stevens, J.)

Yes. In the absence of a showing of particularized errors by defense counsel, a defendant claiming a violation of the Sixth Amendment right to the effective assistance of counsel must demonstrate that the totality of the circumstances supports a presumption of ineffective assistance. The court of appeals made no finding that Cronic’s appointed counsel committed any errors or that his performance overall prejudiced Cronic’s defense. The court of appeals concluded that no such findings were necessary under circumstances that generally hinder the ability of counsel to prepare a defense. The court of appeals considered the time allowed to prepare for trial, the experience of Cronic’s attorney, the seriousness of the charges and the complexity of potential defenses, and the ability of Cronic’s attorney to access witnesses prior to trial. The Sixth Amendment right to counsel guarantees access to effective assistance of counsel. Effective assistance requires the involvement of counsel acting as an advocate for the defendant. When the adversarial process is effectively carried out, the defendant has received the effective assistance of counsel. Only when defense counsel is so ineffective as to deprive a trial of its adversarial character has the right to counsel been violated. The Sixth Amendment is generally not implicated when a defendant has received a fair trial. We presume that defense counsel is competent and place the burden upon the defendant to demonstrate that he has been deprived of effective assistance. In some cases, circumstances will amount to a complete deprivation of counsel irrespective of the skill of a defense attorney. For example, in *Powell v. Alabama*, 287 U.S. 45 (1932), we found ineffective assistance of counsel when the court appealed to the local bar for representation six days prior to trial and no attorney stepped forward until an out-of-state attorney appeared on the day of trial. Under those circumstances, it was so unlikely that defense counsel could have performed effectively that the Court found the trial inherently unfair. Similar circumstances will support a presumption of ineffective assistance of counsel. In the absence of circumstances that give rise to such a presumption, a claim of ineffective assistance must be supported by evidence related to the actual performance of counsel. The question in this case is whether the factors considered by the court of appeals present circumstances that would support the presumption of ineffectiveness. The court of appeals gave substantial weight to the disparity between the government’s preparation time and the defense’s preparation time. As a practical matter, the time the government spent preparing the evidence of complex financial transactions actually simplified the role of defense counsel. In addition, Cronic’s defense theory was relatively simple. His defense did not turn on the authenticity of the illegal transactions, but upon his intent to commit fraud. The fact that Cronic’s attorney was youthful might be relevant to evaluating his performance, but that fact alone does not support a presumption of ineffective assistance. Similarly, considerations of the seriousness of the charges, the complexity of the defense, and counsel’s access to witnesses may bear upon an evaluation of counsel’s performance but they do not inherently establish a lack of effective representation. The factors considered by the court of appeals do not establish that Cronic’s attorney failed to effectively perform as an advocate in the adversarial process. Only by illustrating particular errors can Cronic make a case for ineffective assistance in violation of his Sixth Amendment rights. The judgment of the court of appeals is reversed. We remand to the court of appeals for further proceedings if Cronic wishes to raise specific points of error.

**Key Terms:**

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

# United States v. Agurs

#### United States Supreme Court 427 U.S. 97 (1976)

#### Rule of Law

**A prosecutor’s failure to provide information to defense counsel will not deprive a defendant of a fair trial unless specific information was requested by defense counsel or if the withheld information contained perjured testimony.**

#### Facts

Agurs (defendant) and James Sewell went to a motel to engage in sexual intercourse. A short time after entering the room, motel employees heard Agurs screaming for help. After forcing their way into the room, the motel employees saw Sewell on top of Agurs struggling for possession of a large bowie knife that Agurs was holding. Sewell was transported to a hospital where he later died from several stab wounds. Agurs was indicted for second-degree murder. At trial, evidence showed that after engaging in sexual intercourse, Sewell briefly left the room. Upon his return, Sewell believed that Agurs had taken approximately $360 from his pants’ pocket. Agurs claimed that Sewell attacked her and she attempted to fight him off by stabbing him in self-defense. Agurs was convicted. Three months later, Agurs’ defense counsel filed a motion for a new trial claiming the prosecutor failed to disclose key evidence related to Sewell’s criminal record and violent tendencies. The trial court denied the motion. The court of appeals reversed, holding that the undisclosed information required a new trial because the jury may have returned a different verdict had the information been admitted. The U.S. Supreme Court granted certiorari to review.

#### Issue

Will a prosecutor’s failure to provide information to defense counsel deprive a defendant of a fair trial if specific information was requested by defense counsel or if the withheld information contained perjured testimony?

#### Holding and Reasoning (Stevens, J.)

Yes. In *Brady v. Maryland*, 373 U.S. 83 (1963), the Court held that a State violates a defendant’s right to due process if it withholds evidence that is favorable to the defense and material to his guilt or innocence. In *Brady*, defense counsel had requested specific statements made by Brady’s accomplice. The Court held that the undisclosed statements were “material” and thus deprived Brady of a fair trial. Here, defense counsel did not request information pertaining to Sewell’s criminal history because he was unaware that it existed. In *Mooney v. Holohan*, 294 U.S. 103 (1935), the Court held that if the undisclosed evidence included perjured testimony, and that the prosecution knew, or should have known, of the perjury, the defendant’s right to due process had been violated. Here, there is no evidence of perjured testimony. As the trial court noted, there are situations in which evidence is obviously of such substantial value to the defense that fundamental fairness warrants disclosure even without a specific request by defense counsel. On the other hand, a prosecutor should not be required to hand over his entire file to defense counsel every time he is uncertain whether a particular piece of information is worthy of disclosure. Similarly, a trial judge should not order a new trial every time he is unable to characterize a prosecutor’s non-disclosure as being “material” or unfair to the defendant. Therefore, if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. To determine whether such reasonable doubt exists, the entire record must be examined. Here, the district court thoroughly analyzed the record and noted that Sewell’s prior criminal record did not contradict any of the evidence provided by the prosecutor and likely would not have resulted in a different verdict. The judgment of the court of appeals is reversed.

#### Dissent (Marshall, J.)

One of the most basic tenets of fairness in a criminal trial is that all available evidence tending to show a defendant’s guilt or innocence must be fully aired to a jury. While the prosecutor must ensure that justice is done, the only true way to do that is to disclose all relevant evidence in his possession.

**United States v. Valenzuela-Bernal**

102 S.Ct. 3440

Supreme Court of the United States

**UNITED STATES, Petitioner**

**v.**

**Ricardo VALENZUELA–BERNAL.**

No. 81–450.

Argued April 20, 1982.Decided July 2, 1982.

## Synopsis

Defendant was convicted in the United States District Court for the Southern District of California of transporting an illegal alien and he appealed. The Court of Appeals for the Ninth Circuit, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ia1623905927811d9bdd1cfdd544ca3a4&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[647 F.2d 72](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981121729&pubNum=0000350&originatingDoc=Ia09f47819c9a11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), reversed. The Supreme Court, Justice Rehnquist, held that: (1) defendant seeking to show denial of due process or denial of Sixth Amendment right of confrontation because of the deportation of an alien witness must make some plausible explanation of the assistance that he would have received from the testimony of the deported witnesses; (2) responsibility of the Executive Branch to faithfully execute the immigration policy of the country justifies prompt deportation of illegal alien witnesses upon a good-faith determination that they possess no evidence favorable to the defendant; and (3) sanctions will be warranted for deportation of alien witnesses only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact.

Reversed.

Justice Blackmun and Justice O'Connor filed opinions concurring in the judgment.

Justice Brennan filed a dissenting opinion in which Justice Marshall joined.

# United States v. Gonzalez-Lopez

#### United States Supreme Court 548 U.S. 140 (2006)

#### Rule of Law

**If a trial court errs by denying a defendant’s choice of counsel, the court must reverse the defendant’s conviction without harmless error analysis.**

#### Facts

Gonzalez-Lopez (Lopez) (defendant) was charged with conspiracy to distribute marijuana. His family hired an attorney named John Fahle to represent him. Lopez later hired another attorney, Joseph Low, to represent him and told Fahl that he wanted Low to be his only attorney. Low filed for admission pro hac vice but the court denied his request. Low filed for admission a second time and was again denied without comment. Another attorney, Dickhaus, represented Lopez at trial. Dickhaus requested that Low be allowed to sit at counsel’s table. The court denied this request and ordered Low not to have contact with Dickhaus during the trial. Lopez was found guilty. Lopez appealed. The appellate court reversed Lopez’s conviction and held that the denial of Low’s requests for admission violated Lopez’s right to paid counsel of his choice guaranteed by the Sixth Amendment. The court held that the violation of Lopez’s Sixth Amendment right was not subject to harmless error analysis. The United States (plaintiff) appealed to the United States Supreme Court.

#### Issue

If a trial court errs by denying a defendant’s choice of counsel, must the court reverse the defendant’s conviction without harmless error analysis?

#### Holding and Reasoning (Scalia, J.)

Yes. The Sixth Amendment guarantees the defendant’s right to be represented by counsel of his choice. The government argues that a defendant’s Sixth Amendment right is not violated unless the defendant has been prejudiced. The government points to cases where we have stated that the right to counsel guaranteed by the Sixth Amendment is designed to ensure that the defendant receives a fair trial. The government argues that that a defendant’s trial is not unfair unless he is prejudiced. Although the purpose of the Sixth Amendment’s guarantee of the right to counsel is to ensure that a defendant receives a fair trial, that does not mean that the rights included in the Sixth Amendment can be ignored as long as the trial, taken altogether, is fair. The Sixth Amendment guarantees a defendant’s right to counsel of choice and that right is violated when the defendant is not allowed to be represented by the lawyer of his choice. No additional showing of prejudice is required to prove that the violation occurred. Furthermore, no harmless error analysis is needed in this case. When a court erroneously denies a defendant’s choice of counsel, the court commits a structural error which is not subject to harmless error analysis. The choice of attorney affects countless variables because every attorney would pursue different strategies. It is impossible to know what the result would have been if the defendant had been represented by the attorney he wanted. There is no way to know what decisions Lopez’s chosen counsel would have made and how that would have impacted his trial. What may have happened is too speculative, making harmless error analysis futile. Lopez’s Sixth Amendment right to counsel of choice was violated and that violation requires no harmless error analysis. The reversal of his conviction by the appellate court is affirmed and Lopez’s case is remanded.

#### Dissent (Alito, J.)

A defendant who is erroneously denied his choice of counsel should not be entitled to an automatic reversal of his conviction. The Court misinterprets the Sixth Amendment’s guarantee regarding the defendant’s right to choice of counsel. The Sixth Amendment protects the defendant’s right to have the quality of assistance that his choice of counsel would have provided. Erroneous denial of defendant’s choice of counsel only violates the Sixth Amendment when the assistance he receives as a result of the denial is less effective than the assistance he would have had with his choice of counsel. Even if the Sixth Amendment did protect the defendant’s choice of counsel as the majority sees it, there still must be a harmless error analysis.

**Key Terms:**

**Pro hac vice -** Temporary permission to practice law before a court in which an attorney does not currently hold licensure.

# Wheat v. United States

#### United States Supreme Court 486 U.S. 153 (1988)

#### Rule of Law

**A defendant does not have an unqualified right under the Sixth Amendment to the attorney of his choice if the attorney has represented other defendants charged in the same criminal conspiracy.**

#### Facts

Wheat (defendant) and a number of coconspirators were charged with the operation of a drug conspiracy. Eugene Iredale represented two of the coconspirators, Bravo and Gomez-Barajas. Iredale did not represent Wheat, but two days before Wheat’s trial, Wheat moved that he be represented by Iredale. The prosecution objected to Iredale’s representation. Gomez-Barajas had reached a plea agreement, although the agreement had not yet been approved by the court. The district court denied Wheat’s request based on a conflict of interest. Wheat was convicted. The United States Court of Appeals for the Ninth Circuit affirmed. The United States Supreme Court granted certiorari.

#### Issue

Does a defendant have an unqualified right under the Sixth Amendment to the attorney of his choice if the attorney has represented other defendants charged in the same criminal conspiracy?

#### Holding and Reasoning (Rehnquist, C.J.)

No. A defendant does not have an unqualified right under the Sixth Amendment to the attorney of his choice if the attorney has represented other defendants charged in the same criminal conspiracy. Although defendants have an option to waive any potential conflict of interest, courts may deny that waiver. Courts must ensure trials “are conducted within the ethical standards of the profession” and appear fair to outside observers. And trial courts must be given wide latitude to determine that a defendant’s chosen counsel should be disqualified for a conflict of interest. In the case at bar, the district court did not commit an error by denying Wheat’s request to be represented by Iredale. Although Wheat was willing to waive any potential conflict of interest, the district court was within its discretion to deny that waiver. The prosecution could easily have called both Bravo and Gomez-Barajas as witnesses in Wheat’s trial. Iredale would not have been able to ethically cross-examine those witnesses because of his representation of them independent of Wheat’s trial. Accordingly, the district court did not err in finding that denial of Wheat’s request to be represented by Iredale was not a violation of Wheat’s Sixth Amendment right to counsel. The judgment of the district court is affirmed.

#### Dissent (Marshall, J.)

The Court affords too much weight to the district court’s determination that waiver of conflict of interest was inappropriate; in fact, the Court never offers the standard of review it used. Simply put, a trial court does not have wide latitude to eradicate a defendant’s Sixth Amendment right to the attorney of his choice. Moreover, even with substantial deference to the district court, reversal is appropriate. All parties knew that Bravo did not know Wheat and could not have given any beneficial testimony as a government witness against Wheat. Moreover, the district court could have added Iredale to Wheat’s existing defense team, allowing a different attorney to cross-examine the witnesses that may have presented a conflict. As for Gomez-Barajas, Iredale’s representation of him was essentially over as he had entered a plea agreement. The Court reasons that this agreement may have been rejected, thus leaving Iredale as Gomez-Barajas’s counsel, but this was improper speculation.

#### Dissent (Stevens, J.)

The Court inappropriately fails to afford proper weight to Wheat’s informed and voluntary waiver of the potential conflict of interest.

**Key Terms:**

**Sixth Amendment Right to Counsel** - Right of a person accused of a crime to have the help of an attorney throughout any criminal prosecution.

**Conflict of Interest -** A genuine or perceived incompatibility between the interests of two clients—including former clients—of an attorney, in which case the attorney may not represent one or both in a matter that would be adverse to one of them, without their consent.

# United States v. Bagley

#### United States Supreme Court 473 U.S. 667 (1985)

#### Rule of Law

**Under *Brady*, the prosecution’s failure to turn over favorable evidence only requires a new trial if a reasonable probability exists that the outcome would have been different if the evidence was turned over.**

#### Facts

Bagley (defendant) was indicted on drug and weapons charges. Before trial, Bagley sought discovery of the prosecution’s witnesses and any deals made in exchange for testimony. In response, the prosecution provided affidavits from two key witnesses stating that no deals had been made. The witnesses testified, and Bagley was convicted of the drugs charges and acquitted of the weapons charges. Later, Bagley filed Freedom of Information Act requests and received contracts that the two witnesses had signed agreeing to testify in exchange for $300. Bagley claimed that the government had violated his due process rights by withholding evidence that the defense could have utilized to impeach the witnesses. The district court held that the evidence was not material because the outcome would have been the same. The court of appeals reversed, holding that Bagley was entitled to automatic reversal under *Brady v. Maryland*, 373 U.S. 83 (1964). The United States Supreme Court granted certiorari.

#### Issue

Under *Brady*, is the prosecution’s failure to turn over evidence that could impeach its key witnesses grounds for automatic reversal?

#### Holding and Reasoning (Blackmun, J.)

No. A defendant is only entitled to a new trial if the prosecution withheld material evidence. Under *Brady*, due process requires the prosecution to turn over favorable evidence upon request if that evidence is material to culpability or sentencing. This departure from a purely adversarial process preserves the defendant’s right to a fair trial. Impeachment evidence, like exculpatory evidence, must be turned over under the *Brady*rule. The issue is what standard should be applied to determine whether evidence is material. The Court in *United States v. Agurs*, 427 U.S. 97 (1976), suggested that the standard should be most rigid if the prosecutor presents or allows perjured testimony, less rigid if the prosecutor fails to turn over evidence after no request or a general request, and most favorable to the defense if the prosecutor does not turn over evidence specifically requested. In light of *Agurs*, the Court in *Strickland v. Washington*, 466 U.S. 668 (1984), articulated the reasonable probability test that the Court now adopts for determining materiality. Evidence is material if a reasonable probability exists that the outcome of the case might have been different had the evidence been turned over. A reasonable probability is defined as “a probability sufficient to undermine the confidence in the outcome.” Failure to turn over specifically requested evidence is more likely to give rise to the assumption that evidence is material. The prosecution’s actions in this case likely led Bagley’s attorney to believe that the witnesses could not be impeached. Thus, the case is reversed and remanded for consideration of whether the evidence was material under the reasonable probability standard.

#### Concurrence (White, J.)

Bagley is only entitled to a new trial if it can be proven that the prosecution withheld material evidence. The reasonable probability test for determining materiality articulated by the majority adequately addresses all such cases, and there is no need to address the nature of the defendant’s request. The conviction should be reversed.

#### Dissent (Marshall, J.)

The prosecution failed to turn over evidence that could impeach its key witnesses. Since this is more than harmless error, the appellate court should be affirmed. The Court’s rule erodes the due process protections of *Brady*. Protecting the innocent is just as important as punishing the guilty, and it is impossible to know what piece of evidence will sway a jury. Defendants do not have the knowledge or the resources available to the prosecution. Although the Court is not willing to do away with the adversarial process, it has recognized the need to require prosecutors to turn over favorable material evidence to the defense. Prosecutors are asked to secure convictions and serve justice, and those difficult and often conflicting demands can lead to understandable failures to turn over favorable evidence. A simple rule requiring disclosure of all favorable evidence would be easily applied by prosecutors while furthering truth and due process. The Court’s rule that only evidence deemed material under the reasonable probability standard must be turned over is complicated and invites speculation by prosecutors. Failure to turn over favorable evidence should result in a new trial unless the prosecution can prove that the failure was harmless error.

**Key Terms:**

**Harmless Error** - A ruling by a trial judge, which is later held to be mistaken by a higher court, but is not so prejudicial to the defendant as to warrant the reversal of a conviction.

**Reasonable Probability Test -** Standard for determining whether evidence is material under *Brady*; under the test, evidence is material if a reasonable probability, or a probability large enough to call the outcome into question, exists that the outcome of the case might have been different if the evidence was turned over to the defense.

# \*\*HARRINGTON v. RICHTER\*\*

#### United States Supreme Court 562 U.S. 86 (2011)

#### Rule of Law

**Assistance of counsel is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial.**

#### Facts

Richter (defendant) and Christian Branscombe were charged with the murder of Patrick Klein and the attempted murder of Joshua Johnson, among other charges. At trial, the prosecution claimed that Klein was shot and killed lying on a living room couch. The defense asserted that Klein and Johnson had been shot in self defense and that Klein was shot in a bedroom doorway, and was moved to the couch later. At the scene of the crime there was a pool of blood in the bedroom doorway. The prosecution called blood evidence experts to testify regarding the blood. One expert testified that given the blood patterns on Klein’s face, it was unlikely that he had been moved to the couch. The other expert testified that a blood sample taken from the pool of blood at the doorway could be Johnson’s blood, but not Klein’s. Richter’s attorney cross-examined these experts and brought out certain weaknesses in their testimony. The jury convicted Richter. The California Court of Appeals affirmed. The California Supreme Court denied a petition for review. Subsequently, Richter petitioned the California Supreme Court for a writ of habeas corpus. Specifically, Richter claimed that his attorney’s assistance was ineffective because the attorney did not consult blood evidence experts in the preparing Richter’s defense. The California Supreme Court denied Richter’s petition. Richter then filed a petition for habeas corpus in federal district court. The district court denied the petition and the United States Court of Appeals for the Ninth Circuit (Ninth Circuit) affirmed. The Ninth Circuit, however, granted a rehearing and reversed.

#### Issue

Is assistance of counsel constitutionally ineffective if the defendant is still afforded a fair trial?

#### Holding and Reasoning (Kennedy, J.)

No. Assistance of counsel is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial. Indeed, the Sixth Amendment and *Strickland v. Washington*, 466 U.S. 668 (1984), guarantee a reasonably competent attorney, not an attorney whose defense strategy and execution was flawless. *Strickland* gives significant deference to the strategic decisions that an attorney makes throughout the course of a trial. On top of that, the Court must give deference to a state court’s application of *Strickland*, making it very difficult to overturn a state court that found that counsel was effective under *Strickland*. Here, the California Supreme Court’s application of *Strickland* was reasonable. Specifically, it was reasonable to conclude that an attorney’s defense strategy in this case would not include the use of blood evidence experts. The attorney may not have believed Richter’s account of the incident, and if the attorney pushed the issue of the pool of blood by the doorway, the strategy easily could have backfired in that additional evidence or testimony could have been produced that hurt Richter’s case. The attorney chose to poke holes in the prosecution’s expert witnesses’ testimony, rather than affirmatively prove that Richter’s version of the events was accurate. This strategy was not unreasonable. The California Supreme Court’s holding that Richter’s attorney provided sufficient assistance of counsel was reasonable. The Ninth Circuit is reversed.

#### Concurrence (Ginsburg, J.)

Richter’s attorney’s failure to consult blood evidence experts was not up to the required standards of the Sixth Amendment. However, the attorney’s ineffectiveness was not so significant as to deny Richter a fair trial.

**Key Terms:**

**Ineffective Assistance of Counsel -** Representation by an attorney that is so unreasonable as to deny the defendant the right to a fair trial.

**Right to Effective Assistance of Counsel -** The right to counsel guaranteed by the Sixth Amendment to the U.S. Constitution and some state laws.

# Strickland v. Washington

#### United States Supreme Court 466 U.S. 668 (1984)

#### Rule of Law

**To establish the ineffective assistance of counsel, a convicted defendant must show that his counsel’s performance was deficient because the lawyer did not act as a reasonably competent attorney, and that he was prejudiced by the deficiency because there is a reasonable probability that, but for his attorney’s unprofessional errors, the result of the proceeding would have been different.**

# Bobby v. Van Hook

#### United States Supreme Court 558 U.S. 4 (2009)

#### Rule of Law

**Professional standards are useful guides as to what reasonableness entails only to the extent they describe the professional norms prevailing when the professional representation took place.**

#### Facts

Van Hook (defendant) went to trial for murder in 1985 and was convicted. The United States Court of Appeals for the Sixth Circuit (Sixth Circuit) reversed, finding that Van Hook’s attorney provided ineffective assistance of counsel. Specifically, the Sixth Circuit determined that Van Hook’s attorney’s investigation into potentially helpful evidence did not meet the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (ABA Guidelines). The ABA Guidelines were published in 2003. The United States Supreme Court granted certiorari.

#### Issue

Can professional standards be used as guides as to what reasonableness entails if they were not the professional norms prevailing when the professional representation took place?

#### Holding and Reasoning (Per Curiam)

No. Professional standards are useful guides as to what reasonableness entails only to the extent they describe the professional norms prevailing when the professional representation took place. Put another way, an attorney cannot be expected to adhere to professional guidelines that are not in place until much later. In this case, the ABA Guidelines were not in place during the attorney’s representation of Van Hook. In fact, they were not published until 18 years later. Accordingly, the attorney’s representation cannot be deemed ineffective based on the ABA Guidelines. The Court withholds judgment as to whether the representation was ineffective on other grounds. The Sixth Circuit is reversed.

#### Concurrence (Alito, J.)

It is the duty of the courts to determine whether an attorney’s counsel was effective under the Sixth Amendment. The ABA Guidelines should not “be given a privileged position in making that determination.”

**Key Terms:**

**Ineffective Assistance of Counsel -** Representation by an attorney that is so unreasonable as to deny the defendant the right to a fair trial.

**Right to Effective Assistance of Counsel -** The right to counsel guaranteed by the Sixth Amendment to the U.S. Constitution and some state laws.

# Wiggins v. Smith

#### United States Supreme Court 539 U.S. 510 (2003)

#### Rule of Law

**A defense attorney’s failure to investigate, which supports his decision not to introduce mitigating evidence of his client’s background, represents ineffective assistance of counsel under the Sixth Amendment.**

#### Facts

Wiggins (defendant) was indicted for the murder of an elderly woman in 1988. The state indicated that it would seek the death penalty against him. Two public defenders were appointed to serve as counsel for Wiggins. Choosing to be tried before a judge, Wiggins was found guilty of first-degree murder, robbery and two counts of theft after a four-day trial. During the penalty phase, one of Wiggins’s attorneys, during her opening statement, mentioned to the jury that it would, among other things, hear evidence that Wiggins had a “difficult life.” During the course of the trial, however, defense counsel did not introduce anything about Wiggins’s life history. The jury returned a death sentence. Wiggins, having retained different counsel, sought post-conviction relief and argued that his attorneys were constitutionally ineffective because they did not introduce mitigating factors that would have shown his highly dysfunctional background. He presented the testimony of one social worker who described terrible abuse, both sexual and physical, suffered at the hands of his mother, foster parents, and several others. One of Wiggins’s original attorneys mentioned that he did not remember hiring a forensic social worker to help with Wiggins’s troubled background, even though the state provided funds for such a purpose. He said that he and the other attorney wanted to adopt a different trial strategy and try to dispute Wiggins’s direct responsibility for the murder. The state courts agreed with the attorneys and did not find ineffective assistance of counsel. On habeas review the district court granted the writ, saying that for a strategic decision to be reasonable, it must be “based upon information the attorney has made after conducting a reasonable investigation.” The United States Court of Appeals for the Fourth Circuit, however, agreed with the state court. The United States Supreme Court granted certiorari.

#### Issue

Does a defense attorney’s failure to investigate, which supports his decision not to introduce mitigating evidence of his client’s background, represent ineffective assistance of counsel under the Sixth Amendment?

#### Holding and Reasoning (O’Connor, J.)

Yes. A defense attorney’s failure to investigate, which supports his decision not to introduce mitigating evidence of his client’s background, represents ineffective assistance of counsel under the Sixth Amendment. We must first consider the two-prong rule articulated in *Strickland v. Washington*, 466 U.S. 668 (1984). In order to prove ineffective assistance of counsel, the defendant must first show that counsel’s performance was deficient, according to an objective standard. Next, the defendant must show that this deficient performance affected the outcome of the trial. In the present case, we must consider whether Wiggins’s counsel’s performance was “reasonable under prevailing professional norms.” Counsel had available information from a psychologist, a written pre-sentence report (PSI), and records from Baltimore’s Department of Social Services (DSS). The last two items contained ample evidence of Wiggins’s tortured personal life. Despite having this information, counsel decided not to expand their investigation and to look further in the hope of discovering more mitigating information. This decision definitely falls far short of the professional standards that prevailed in Maryland at the time in question. Also, Wiggins’s first two attorneys failed to follow up on the evidence contained in the DSS and PSI. Had they done so they might have been able to make a more informed choice about the defenses available to Wiggins, especially since his past showed no other incidents of violent behavior. The evidence known to the two attorneys would have led a reasonable attorney to investigate further, but they did not. Nor can their failure to investigate further be considered a smart tactical move. The two attorneys simply chose to end their investigation at a critical stage in the proceedings and irreparably harmed their client’s chances at trial. Of course, we do not mean to intrude on an attorney’s independence in constructing his or her own trial strategy. She does not have to introduce every piece of possibly mitigating information that she finds. She does, however, have an obligation to investigate further, if a reasonable attorney in her shoes, who is already in possession of such evidence, would do so. The requirements for habeas relief under 28 U.S.C. § 2254(d) are satisfied. We now move to the second *Strickland* standard: Did the deficient performance prejudice the actual result? We have no doubt that the mitigating evidence in this case was powerful and might have influenced a jury. Wiggins was raised by an alcoholic, abusive mother, and he experienced physical torment, sexual abuse, and repeated rape during his various stays in different foster homes. A reasonable attorney would have used this evidence, even if he decided it best to adopt a different strategy, such as focusing on the question of his direct responsibility for the murder. In fact, a competent attorney could have and should have used both strategies. If Wiggins’s jury had heard of the terrible abuse, it is reasonably probable that it would have returned a different sentence. Accordingly, we reverse the judgment of the Fourth Circuit and remand.

#### Dissent (Scalia, J.)

The Court today says that counsel’s admission of possibly mitigating information was not complete. Counsel, however, testified under oath that he was aware of the aspects of his client’s history that the Court says he overlooked. The court disbelieves his testimony. In addition, even if this were true, this would not establish that the state court of appeals was unreasonable in believing it and finding that counsel adequately investigated Wiggins’s past history.

**Key Terms:**

**Mitigating Circumstances -** Facts that may be considered as extenuating or reducing the degree of moral culpability. Although not a justification or excuse for the offense in question, the circumstances or evidence will be considered in fairness to a party.

# Yarborough, Warden v. Gentry

#### United States Supreme Court 540 U.S. 1 (2003)

#### Rule of Law

**A closing statement made by defense counsel does not violate the Sixth Amendment right to effective counsel even if that statement is deficient in some respects, and deference should not be taken away from state courts’ judgment concerning this matter.**

#### Facts

Gentry (defendant) was convicted of assault with a deadly weapon for stabbing his girlfriend. Gentry claimed that the accident was accidental. The girlfriend testified for the prosecution and said she could not remember the details of the attack, but she was then presented with testimony from a preliminary hearing, at which she claims she did remember that Gentry had his hand around her throat. A security guard gave somewhat inconsistent testimony about seeing Gentry attack the girlfriend. Gentry himself testified and said that he had been convicted only once before, which was a false statement. He admitted that he did not know that a plea bargain counted as a conviction. The prosecutor gave a closing statement in which she accused Gentry of telling the jury a “pack of lies.” The defense followed with its closing statement, which was somewhat disconnected and disjointed in nature, but made the general point that since the jury, like the defense and prosecution, was not at the scene of the crime, everything mentioned in court was only speculation, and no one could truly tell who was lying and who was telling the truth. The jury convicted Gentry. Gentry argued that the defense’s closing statement deprived him of effective assistance of counsel. The California Court of Appeal rejected that claim, and the Supreme Court of California denied review. Gentry’s petition for habeas relief was denied by the district court, but the United States Court of Appeals for the Ninth Circuit reversed. The United States Supreme Court granted certiorari.

#### Issue

Does a closing statement made by defense counsel violate the Sixth Amendment right to effective counsel if that statement is deficient in some respects, and should deference be taken away from state courts’ judgment concerning this matter?

#### Holding and Reasoning (Per curiam)

No. A closing statement made by defense counsel does not violate the Sixth Amendment right to effective counsel even if that statement is deficient in some respects, and deference should not be taken away from state courts’ judgment concerning this matter. Even though the defense counsel is clearly no Clarence Darrow, we do not find that his closing statement was constitutionally ineffective. Closing statements are designed to sharpen and clarify the issues that are important for the trier of fact, the jury. How to frame a closing statement is open to many reasonable avenues, and that choice is left to the attorney. For that reason, we wish to defer to state courts, which are responsible for this matter. Defense counsel’s closing statement was perhaps not excellent and might have made other points to support Gentry’s case, but the closing statement did hammer home an important theme: the jury must decide whom to believe, since it, the prosecutor and the defense were not present at the scene of the crime. Everything the jury heard was therefore speculation. The closing statement focused on a small number of key points, rather than on every conceivable defense available to Gentry. We cannot say that this strategy was not a good one. It is up to the attorney to decide what represents the best strategy for her client. The Ninth Circuit contends that the defense should have mentioned some other points in the closing argument, but some of those, such as the depth of the girlfriend’s knife wound, might have ended up backfiring for Gentry. If, for example, defense had mentioned the shallow nature of the wound, the prosecution might have responded that while the wound was not deep, it was still severe enough to lacerate her stomach and require two hours of surgery. Mentioning the knife wound might have thus ended up making matters worse for Gentry. Also, the Ninth Circuit mentioned that defense counsel did not urge the jury to reach a non-guilty verdict, but we do not think that this low-key rhetorical approach was ineffective, given the prosecution’s overconfident performance. Finally, the Ninth Circuit criticized defense counsel for not arguing that the government had failed to prove guilt beyond a reasonable doubt, the standard in criminal cases. Defense did not tell the jury that the existence of reasonable doubt would require the jury to acquit, but defense could rely on a judge’s instruction to accomplish the same thing. Other rhetorical devices used by the defense in the closing statement were not inapt and could have been effective, even though the jury voted to convict. We give the defense attorney wide latitude in arguing her case and framing her closing statements, and we believe that state courts have the primary responsibility for supervising defense counsel. For all these reasons, we hold that the defense’s closing statement on Gentry’s behalf was not constitutionally ineffective. We reverse the decision of the Ninth Circuit.

**Key Terms:**

**Right to Effective Assistance of Counsel -** The right to counsel guaranteed by the Sixth Amendment to the U.S. Constitution and some state laws.

**Murray v. Carrier**

106 S.Ct. 2639

Supreme Court of the United States

**Edward W. MURRAY, Director, Virginia Department of Corrections, Petitioner**

**v.**

**Clifford W. CARRIER.**

No. 84–1554.

Argued Jan. 21, 1986.Decided June 26, 1986.

**Synopsis**

Petitioner filed petition for writ of habeas corpus. The United States District Court for the Eastern District of Virginia dismissed case, and petitioner appealed. The Court of Appeals for the Fourth Circuit, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic8d8194f944511d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[724 F.2d 396,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984100682&pubNum=350&originatingDoc=I2355394c9c1e11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))reversed and remanded. On rehearing en banc, the Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Iece936e594a211d9a707f4371c9c34f0&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[754 F.2d 520,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985107376&pubNum=350&originatingDoc=I2355394c9c1e11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) adopted panel majority's decision, and certiorari was granted. The Supreme Court, Justice O'Connor, held that petition for habeas review of procedurally defaulted discovery claim was subject to dismissal for failure to establish cause for default.

Reversed and remanded.

Justice Stevens filed opinion concurring in judgment, in which Justice Blackmun joined.

Justice Brennan filed dissenting opinion in which Justice Marshall joined, [106 S.Ct. 2678](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986133104&pubNum=0000708&originatingDoc=I2355394c9c1e11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

Opinion on remand, [802 F.2d 111](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&pubNum=0000350&cite=802FE2D111&originatingDoc=I2355394c9c1e11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

**Procedural Posture(s):** On Appeal.

# \*\*LAFLER v. COOPER\*\*

#### United States Supreme Court 566 U.S. 156 (2012)

#### Rule of Law

**The Sixth Amendment guarantees effective assistance of counsel during the plea-bargaining process even if the defendant ultimately receives a fair trial.**

#### Facts

Anthony Cooper (defendant) was charged with assault with intent to murder and other offenses after he pointed a gun at Kali Mundy’s head and fired. The bullet missed, and Mundy fled. Cooper ran after Mundy firing the gun repeatedly, hitting Mundy several times. On two occasions, the prosecution offered to dismiss two of the charges and to recommend a sentence of 51 to 85 months in prison on the remaining two counts in exchange for a plea of guilty. Cooper initially agreed to accept the plea offer but later rejected it on both occasions after his attorney convinced him that the prosecution would not be successful at trial. Cooper was convicted on all four counts and sentenced to serve 185 to 360 months in prison. Cooper subsequently filed a petition for a writ of habeas corpus in federal court against Blaine Lafler, warden of the Michigan correctional facility where Cooper was housed. In his petition, Cooper renewed his claim that his defense counsel was deficient in violation of the Sixth Amendment. The district court conditionally granted the writ and ordered the original plea bargain offered to Cooper to be applied. The court of appeals affirmed, and the United States Supreme Court granted certiorari.

#### Issue

Does the Sixth Amendment guarantee effective assistance of counsel during the plea-bargaining process even if the defendant ultimately receives a fair trial?

#### Holding and Reasoning (Kennedy, J.)

Yes. Criminal defendants have a Sixth Amendment right to counsel during the plea-bargaining process. Under *Strickland v. Washington*, 466 U.S. 668 (1984), a defendant can show this right has been violated by demonstrating that, but for counsel's deficient performance, the outcome of the case would have been different. In other words, if a plea bargain has been offered by the prosecution, a defendant has the right to effective assistance of counsel in considering whether to accept it. If defense counsel is deficient in advising the defendant, prejudice can be shown if the loss of the plea offer resulted in a more serious conviction or sentence than otherwise would have been imposed. Lafler argues that *Strickland*prejudice cannot be established if the defendant nevertheless gets a fair trial. However, *Strickland* recognizes that a fair trial does not occur if defense counsel’s deficiencies flow throughout the entire process, from pre-trial proceedings to post-trial motions. In this case, Cooper’s attorney advised him not to accept the plea bargain offered by the prosecution even though Cooper was willing to accept it. It is conceded that Cooper’s counsel was deficient in advising Cooper to reject the plea deal. As a result, Cooper received a more serious sentence. Thus, Cooper was clearly prejudiced by his attorney’s deficiencies. The appropriate remedy is for the prosecution to reoffer the original plea bargain. Once accepted by Cooper, the trial court may then exercise discretion to either vacate Cooper’s conviction and accept the plea or leave the conviction undisturbed. The judgment of the court of appeals is vacated, and the matter is remanded for further proceedings consistent with the opinion.

#### Dissent (Alito, J.)

Cooper received a trial that was free of constitutional errors, and there is thus no basis for granting him habeas relief. The majority's Sixth Amendment analysis is unsound, as highlighted by its discussion of the appropriate remedy in the case of ineffective assistance of counsel during the plea-bargaining process. If a defendant rejects a favorable plea deal because of counsel's bad advice, the only logical remedy is to give the defendant the benefit of the favorable deal. However, because this could lead to serious injustice, the majority turns away from this logical remedy and instead concludes that the appropriate remedy is in the lower courts' discretion. This is dangerous, because requiring the prosecution to renew an old plea offer could constitute an abuse of discretion in cases in which (1) new evidence of the defendant's culpability has surfaced after the defendant initially rejected the plea offer, or (2) the defendant's rejection of the plea offer has resulted in a substantial expenditure of prosecutorial or judicial resources.

#### Dissent (Scalia, J.)

There was no constitutional violation because Cooper was properly and fairly tried, convicted, and sentenced. The majority improperly elevates the process of plea bargaining from a necessary evil to a constitutional entitlement.

**Key Terms:**

**Right to Effective Assistance of Counsel -** The right to counsel guaranteed by the Sixth Amendment to the U.S. Constitution and some state laws.

**Writ of Habeas Corpus** - Enables a detainee or prisoner to challenge the legality of his detention by the government.

# Missouri v. Frye

#### United States Supreme Court 132 S.Ct. 1399 (2012)

#### Rule of Law

**The Sixth Amendment requires defense counsel to communicate to a defendant formal plea offers from the prosecution.**

#### Facts

Galin Frye (defendant) was charged with driving with a revoked license. Because he had been convicted for the same offense on three other occasions, Frye was indicted for a Class D felony that carried a maximum of four years in prison. The prosecutor sent a letter to Frye’s counsel offering a choice of two plea bargains, one being a three-year sentence but with a recommendation that Frye only serve 10 days in jail and the other reducing the charge to a misdemeanor and 90 days to serve in jail. However, the letter stated that the plea offers expired within a few weeks. Frye’s attorney never communicated the plea bargain offers to him and the offers lapsed. Eventually, Frye pled guilty to the offense without a plea bargain offer. The trial court sentenced Frye to three years in prison. Frye subsequently filed for post-conviction relief in state court alleging that his attorney’s failure to communicate the plea offers to him denied him effective assistance of counsel in violation of the Sixth Amendment. The trial court denied Frye’s motion for relief. The court of appeals reversed and held that Frye met the requirements for a showing of a Sixth Amendment violation under *Strickland v. Washington*, 466 U.S. 668 (1984). The U.S. Supreme Court granted certiorari to review.

#### Issue

Does the Sixth Amendment require defense counsel to communicate to a defendant formal plea offers from the prosecution?

#### Holding and Reasoning (Kennedy, J.)

Yes. In *Strickland*, the Court held that (1) a defense counsel’s performance must be deficient and (2) the deficiency must have prejudiced the defendant in order to find that the defendant did not receive a fair trial as guaranteed by the Constitution. In addition to the Court’s holding in *Strickland*, the Missouri Court of Appeals relied on *Hill v. Lockhart*, 474 U.S. 52 (1985), and *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), when it concluded that Frye’s attorney was ineffective because he failed to communicate the prosecution’s formal plea offers to Frye. In those decisions, the Court makes clear that defense counsel has a duty to communicate to a criminal defendant plea offers provided by the prosecution. Here, the State argues that a criminal defendant has no right to a plea offer. *Weatherford v. Bursey*, 429 U.S. 545 (1977). Nevertheless, plea offers and deals are integral to the criminal justice system. There are more plea offers accepted by criminal defendants than there are trials. To show that he has been prejudiced from ineffective assistance of counsel due to an un-communicated plea offer, a defendant must demonstrate a reasonable probability he would have accepted the prosecution’s plea offer had it actually been communicated to him. Additionally, the defendant must show a reasonable probability that the plea offer would have been accepted by the trial court without the prosecution first revoking the offer. Under *Hill*¸ a defendant must demonstrate that but for defense counsel’s errors, the defendant would not have pled guilty and instead would have gone to trial. The same logic may be applied to acceptance of plea offers. While the Missouri Court of Appeals correctly held that Frye’s attorney was deficient by failing to communicate the plea offer to Frye it did not articulate the correct standard for prejudice. Although there is a strong likelihood that Frye would have accepted the plea offer provided by the prosecution, it is less certain that the trial court would have permitted the plea offer to become final. The judgment of the Missouri Court of Appeals is reversed and the matter is remanded for further determination utilizing the correct standard for prejudice.

#### Dissent (Scalia, J.)

The Court mistakenly believes that defense counsel’s failure to inform Frye of the plea offers somehow deprived Frye of some substantive or procedural right. In doing so, the majority uses a crystal ball process whereby the Court must first determine whether the defendant would have accepted the plea that was offered. Then, the Court must determine whether the prosecution would have withdrawn the offer at some point. Finally, the Court must somehow figure out whether the trial court would have accepted the plea offer as provided by the prosecution and accepted by the defendant. Such a process is overly burdensome and too speculative to implement.

**Key Terms:**

**Right to Effective Assistance of Counsel -** The right to counsel guaranteed by the Sixth Amendment to the U.S. Constitution and some state laws.

# Strickland v. Washington

#### United States Supreme Court 466 U.S. 668 (1984)

#### Rule of Law

**To establish the ineffective assistance of counsel, a convicted defendant must show that his counsel’s performance was deficient because the lawyer did not act as a reasonably competent attorney, and that he was prejudiced by the deficiency because there is a reasonable probability that, but for his attorney’s unprofessional errors, the result of the proceeding would have been different.**

# Hill v. Lockhart

#### United States Supreme Court 474 U.S. 52 (1985)

#### Rule of Law

**A guilty plea will only be deemed involuntary on the basis of ineffective assistance of counsel if the defendant can show actual prejudice.**

#### Facts

William Lloyd Hill (defendant) was charged with first-degree murder and theft, which carries a sentence of five to 50 years or life imprisonment under Arkansas law. Hill’s attorney secured a plea deal in which Hill would plead guilty in exchange for the prosecutor’s recommendation of concurrent sentences of 35 years for murder and 10 years for theft. Hill signed an agreement that the guilty plea was knowing and voluntary, that there was no coercion, and that Hill understood his rights and wanted to plead guilty. At the hearing, Hill again stated that the plea was voluntary. The judge and Hill’s attorney told Hill that he would not be eligible for parole until serving 1/3 of the sentence. Because Hill was a second offender, Hill would not actually be eligible for parole until serving ½ of the sentence. On the basis of the attorney’s mistake as to parole eligibility, Hill filed a habeas corpus petition in federal court claiming that his plea was involuntary due to ineffective assistance of counsel. The district court denied the petition. The United States Supreme Court granted certiorari.

#### Issue

Is a guilty plea voluntary and constitutionally valid if the defendant’s attorney misinformed him about parole eligibility?

#### Holding and Reasoning (Rehnquist, J.)

Yes. In order for a guilty plea to be set aside as involuntary on the basis of ineffective assistance of counsel, the defendant must show actual prejudice. To make such a showing, the defendant must prove that a reasonable probability exists that the defendant would not have pled guilty if the attorney had not erred. A guilty plea must be knowing and voluntary. The Constitution does not require defendants to be advised of parole eligibility in order for pleas to be voluntary. Rather, Hill claims that the plea in this case was involuntary because the attorney provided incorrect information about eligibility. When a defendant pleads guilty based upon the advice of his attorney, the plea will be considered voluntary if the attorney’s advice “was within the range of competence demanded of attorneys in criminal cases.” An error is not enough; the defendant must prove that the error was prejudicial. Most convictions result from guilty pleas, and creating new bases for setting aside those pleas undermines judicial economy and certainty in justice. In this case, Hill does not claim that parole eligibility was a key factor in his entering the plea agreement or that he would have pled not guilty and gone to trial if he had been accurately informed of Arkansas’s parole laws. Because Hill did not made the required showing of prejudice, the ruling of the district court is affirmed.

**Key Terms:**

**Due Process -** A constitutional guarantee that a law shall not be unreasonable, arbitrary, or capricious and that individuals will be given notice of legal proceedings conducted fairly with an opportunity for an individual to be heard before the government may impose sanctions on one’s life, liberty, or property.

**Guilty Plea -** A defendant’s official confession to the crime and waiver of the right to trial by jury.

# United States v. Wade

#### United States Supreme Court 388 U.S. 218 (1967)

**Rule of Law**

**A post-indictment witness identification of a criminal suspect, conducted without notice to and in the absence of the suspect's counsel, violates the Sixth Amendment right to the assistance of counsel.**

**Glover v. United States**

121 S.Ct. 696

Supreme Court of the **United** **States**

**Paul L. GLOVER, Petitioner,**

**v.**

**UNITED STATES.**

No. 99–8576.

Argued Nov. 27, 2000.Decided Jan. 9, **2001**.

**Synopsis**

Petitioner convicted of labor racketeering, money laundering, and tax evasion filed motion to correct sentence, asserting that his counsel's failure to argue for grouping of certain offenses under Sentencing Guidelines constituted ineffective assistance. The **United** **States** District Court for the Northern District of Illinois, [Holderman](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0127067601&originatingDoc=I319372949c2511d9bdd1cfdd544ca3a4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I319372949c2511d9bdd1cfdd544ca3a4), District Judge, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ifd719392567d11d9bf30d7fdf51b6bd4&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=1ec62a775f36452089b57b4ab8e58b95&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[1998 WL 611451,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1998190680&pubNum=999&originatingDoc=I319372949c2511d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) denied motion. Petitioner appealed. The Seventh Circuit Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I4bef25b794ac11d9bc61beebb95be672&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=1ec62a775f36452089b57b4ab8e58b95&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[182 F.3d 921, 1999 WL 511523,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999171101&pubNum=506&originatingDoc=I319372949c2511d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed. Certiorari was granted.

The Supreme Court, Justice [Kennedy](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0243105201&originatingDoc=I319372949c2511d9bdd1cfdd544ca3a4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I319372949c2511d9bdd1cfdd544ca3a4), held that increase in prison sentence of from 6 to 21 months constituted prejudice required for establishing ineffective assistance, assuming that increase resulted from error in Sentencing Guidelines determination, abrogating *[](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I2623731c96fd11d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=1ec62a775f36452089b57b4ab8e58b95&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))*[*Durrive v.****United******States***](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1993175744&originatingDoc=I319372949c2511d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and *[](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic2f11b42941711d9bc61beebb95be672&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=1ec62a775f36452089b57b4ab8e58b95&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))*[*Martin v.****United******States***](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997077212&originatingDoc=I319372949c2511d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

Reversed and remanded.

**Lockhart v. Fretwell**

113 S.Ct. 838

Supreme Court of the United States

**A.L. LOCKHART, Director, Arkansas Department of Correction, Petitioner**

**v.**

**Bobby Ray FRETWELL.**

No. 91–1393.

Argued Nov. 3, 1992.Decided Jan. 25, 1993.

## Synopsis

After the Arkansas Supreme Court, [289 Ark. 91, 708 S.W.2d 630,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986126144&pubNum=713&originatingDoc=I823194839c7e11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed petitioner's capital murder conviction, petitioner filed state habeas corpus challenge. The Arkansas Supreme Court, [292 Ark. 96, 728 S.W.2d 180,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1987053558&pubNum=713&originatingDoc=I823194839c7e11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) rejected petitioner's claim, and petitioner sought federal habeas corpus relief. The United States District Court for the Eastern District of Arkansas, [739 F.Supp. 1334,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990103314&pubNum=345&originatingDoc=I823194839c7e11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) granted petition and conditionally vacated death sentence. Appeal was taken. The Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Idce4a03c94c111d9a707f4371c9c34f0&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[946 F.2d 571,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991159912&pubNum=350&originatingDoc=I823194839c7e11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed and remanded, ordering the District Court to sentence the petitioner to life imprisonment without possibility of parole. Appeal was taken. The United States Supreme Court, [Rehnquist](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0238463201&originatingDoc=I823194839c7e11d9bdd1cfdd544ca3a4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I823194839c7e11d9bdd1cfdd544ca3a4), Chief Justice, held that: (1) defense counsel's failure to make [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I73cb08d98cb711d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[Collins](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985105609&originatingDoc=I823194839c7e11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))objection during sentencing proceeding did not constitute “prejudice” within meaning of Stricklandtest; (2) prejudice component of Stricklandtest focuses on question of whether deficient performance renders trial unreliable or proceeding unfair; and (3) retroactivity rule of [Teague](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989027119&originatingDoc=I823194839c7e11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))does not apply to claims raised by federal habeas petitioner.

Reversed.

Justice [O'Connor](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0209675601&originatingDoc=I823194839c7e11d9bdd1cfdd544ca3a4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I823194839c7e11d9bdd1cfdd544ca3a4) concurred and filed an opinion.

Justice [Thomas](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I823194839c7e11d9bdd1cfdd544ca3a4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I823194839c7e11d9bdd1cfdd544ca3a4) concurred and filed an opinion.

Justice [Stevens](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0156277701&originatingDoc=I823194839c7e11d9bdd1cfdd544ca3a4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I823194839c7e11d9bdd1cfdd544ca3a4) dissented and filed an opinion in which Justice [Blackmun](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0264439801&originatingDoc=I823194839c7e11d9bdd1cfdd544ca3a4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I823194839c7e11d9bdd1cfdd544ca3a4) joined.

# Nix v. Whiteside

#### United States Supreme Court 475 U.S. 157 (1986)

#### Rule of Law

**While counsel must take all reasonable and lawful means to attain the objectives of the client, counsel may not assist the client in presenting false evidence or otherwise violating the law.**

#### Facts

Whiteside (defendant) was convicted of murder. For his trial, he was appointed a lawyer, Robinson. As they were preparing for trial, Whiteside and his friends who were present during the stabbing all told Robinson that they saw the victim reaching for something, though they could not see what. Robinson’s defense strategy was self-defense because Whiteside reasonably believed that the victim was reaching for a gun. However, a week before trial, Whiteside told Robinson that the thing the victim had been reaching for was metallic. When Robinson questioned him further, Whiteside said that if he did not testify that he saw a gun he would be “dead.” Robinson assured Whiteside that all they needed to prove was reasonable belief the victim had a gun. Robinson went on to say that if Whiteside testified to seeing something metallic, this would be perjury and Robinson would have to tell the court. Whiteside did testify at trial but did not perjure himself. The jury found Whiteside guilty of murder. Whiteside moved for a new trial claiming he had been deprived of a fair trial when Robinson told him not to testify to seeing something metallic. The trial court denied the motion. The Eighth Circuit Court of Appeals however held that Robinson’s threat to violate attorney-client privilege violated the standards of effective representation.

#### Issue

Is a defendant denied the effective assistance of counsel when counsel informs him that if he commits perjury, counsel is obligated to disclose this information to the court?

#### Holding and Reasoning (Burger, C.J.)

No. There is no ineffective assistance of counsel when counsel informs a defendant that he must disclose perjury to the court because an attorney cannot allow a client to give false testimony. The Model Code of Professional responsibility, the Model Rules of Professional Conduct, and the American Bar Association require such disclosure. The state Code of Professional Responsibility allows withdrawal of representation when a client threatens to commit perjury. Furthermore, precedence supports this almost universal standard [*Strickland v. Washington*, 466 U.S. 668 (1984)]. Therefore, Robinson’s actions were in line with accepted norms of professional conduct and did not deprive Whiteside of his Sixth Amendment right to counsel. Robinson continued to present the self-defense argument to the jury. His admonition merely prevented Whiteside from perjuring himself. Accordingly, there was no ineffective assistance of counsel.

#### Concurrence (Brennan, J.)

The Court has no authority to establish rules of ethics to govern lawyers practicing in state courts.

#### Concurrence (Stevens, J.)

It is clear that Whiteside was not prejudiced by Robinson’s actions. However, while it may be clear in this case that Whiteside’s threatened change of testimony would have perjured him, not all cases will be so clear. After thinking about his testimony, a witness may honestly remember something new. Furthermore, there was no actual perjury in this case. Therefore, this case can be decided without the broader holding of what an attorney should do after his client gives testimony that he does not believe.

**Key Terms:**

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

# Williams v. Taylor

#### United States Supreme Court 529 U.S. 362 (2000)

#### Rule of Law

**A defendant is entitled to habeas relief pursuant to AEDPA § 2254(d)(1) if a state court’s ruling was contrary to or unreasonably applied clearly established federal law set out by the Supreme Court.**

#### Facts

Terry Williams (defendant) was convicted and sentenced to death. The Virginia Supreme Court affirmed. Williams petitioned the Danville Circuit Court for relief for ineffective assistance of counsel. The judge found Williams’ attorneys did not offer mitigating evidence at sentencing or give “reasonable, professional competent assistance of counsel” required by *Strickland v. Washington*, 466 U.S. 668 (1984), but the Virginia Supreme Court denied rehearing. Williams requested federal habeas relief under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 28 U.S.C. § 2254. The court found the death sentence invalid, but the United States Court of Appeals for the Fourth Circuit reversed, holding § 2254(d)(1) forbids relief unless the state court construed or applied the law in a way that is unreasonable to all reasonable jurists. The United States Supreme Court granted certiorari.

#### Issue

Does a state court’s refusal to grant relief for the violation of a defendant’s constitutional right to effective assistance of counsel entitle the defendant to federal habeas corpus relief pursuant to AEDPA § 2254(d)(1).

#### Holding and Reasoning (Stevens, J.)

Yes. Williams’ right to assistance of counsel under *Strickland* was denied, and the state court’s denial of a sentencing rehearing “was contrary to, or involved an unreasonable application of, clearly established Federal law” under § 2254(d)(1). *Strickland* was “clearly established law.” The state judge correctly applied the *Strickland* test and found a “reasonable probability” that Williams may not have been sentenced to death if his attorneys presented the evidence. The state court’s ruling conflicted with or unreasonably applied a plain rule of federal law. (2) (O’Connor, J.) Justice Stevens interprets the 1996 amendment to the AEDPA as having no effect on the law of habeas corpus. Every clause must be given effect. Relief is available if the state court ruling is (1) contrary to or (2) unreasonably applies federal law. “Contrary” means “diametrically different.” A ruling that contradicts federal law entitles a defendant to relief. The “unreasonable application” clause covers decisions that unreasonably apply federal law, but the circuit’s inclusion of cases where a state court unreasonably extends a rule is hard to apply. This case does not require resolution of that issue. An “unreasonable application” is one the federal court finds “objectively unreasonable.” There is no reasonable jurist requirement. A “clearly established rule” is a holding of this Court. *Teague*has little relevance. Section 2254(d)(1) limits federal courts’ ability to grant habeas relief to cases where the state court’s ruling contradicts a clearly established Supreme Court holding or unreasonably applies the right precedent to the facts.

#### Concurrence (O’Connor, J.)

Before 1996, federal courts resolved all questions of law and fact independently with no duty to defer to the state court’s decisions. Thus, Justice Stevens’s interpretation would be correct. The state court’s ruling here was contrary to and unreasonably applied the plain rule of this Court.

#### Concurrence (Stevens, J. (Part II))

The circuit court interpreted § 2254(d)(1) to bar habeas relief unless the state court’s ruling contradicts a Supreme Court decision or would be “objectively unreasonable” to all reasonable jurists. Congress did not require reasonableness or give priority to state court constructions of federal law. Reasonable jurists disagree. Federal courts have constitutional authority to interpret federal law. Section 2254(d)(1) requires (1) a “clearly established law” and (2) a state court ruling that contradicts or unreasonably applies that law. Under *Teague v. Lane*, 489 U.S. 288 (1989), relief cannot be retroactively granted under a new law. The AEDPA limited the scope to Supreme Court decisions. The meaning of the “contrary to” requirement is unclear. Courts conclude this requires de novo review for questions of law and reasonability review for mixed fact/law questions, but this is hard to apply. The statute does not give the standard but does not require deference to state courts. Ultimately, federal courts must carefully review state court rulings and grant relief for unconstitutional sentences.

#### Concurrence/Dissent (Rehnquist, C.J.)

The majority opinion interpreting § 2254(d)(1) is correct, but Williams’s claim should be denied. This Court in *Strickland* set out the plain rule for ineffective assistance counsel claims, but the Virginia court’s ruling did not contradict or unreasonably apply *Strickland*. Williams’ right to assistance of counsel was not violated.

**Key Terms:**

**Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) -** Federal statute that limits the ability of federal courts to grant habeas corpus relief and provides for the designation of certain entities as foreign terrorist organizations to which various domestic sanctions may apply.

# Kimmelman v. Morrison

#### United States Supreme Court 477 U.S. 365 (1986)

#### Rule of Law

**The restriction on federal habeas review of exclusionary rule claims does not extend to ineffective assistance of counsel claims based on the attorney’s failure to utilize the exclusionary rule.**

#### Facts

Morrison (defendant) was convicted of rape. He appealed on the grounds that his attorney’s assistance was constitutionally ineffective. Specifically, Morrison stated that his attorney failed to exclude from evidence an inculpating bed sheet that was the product of a violation of Morrison’s Fourth Amendment rights. In response, the state claimed that because Fourth Amendment exclusionary rule claims are not cognizable in federal habeas proceedings under *Stone v. Powell*, 428 U.S. 465 (1976), Morrison’s claim of ineffective assistance of counsel was not cognizable either because it was based on the attorney’s failure to utilize the exclusionary rule. The United States Supreme Court granted certiorari.

#### Issue

Does the restriction on federal habeas review of exclusionary rule claims extend to ineffective assistance of counsel claims based on the attorney’s failure to utilize the exclusionary rule?

#### Holding and Reasoning (Brennan, J.)

No. Under *Stone*, exclusionary rule claims are not cognizable in federal habeas proceedings. This restriction, however, does not extend to ineffective assistance of counsel claims based on the attorney’s failure to utilize the exclusionary rule. *Stone*reasoned that an exclusionary rule violation does not violate a personal constitutional right. Here, on the other hand, the right to effective counsel is a fundamental, personal constitutional right under the Sixth Amendment. Accordingly, federal habeas review of Morrison’s ineffective assistance of counsel claim is cognizable even though the claim is based on the attorney’s failure to properly utilize the exclusionary rule. The case is remanded for a determination of whether the attorney’s failures met the prejudice prong of *Strickland v. Washington*, 466 U.S. 668 (1984).

#### Concurrence (Powell, J.)

The majority is correct that an ineffective assistance of counsel claim is cognizable, even in light *Stone*. However, under the prejudice prong in *Strickland*, the “admission of illegally seized but reliable evidence” does not constitute prejudice against a defendant and does not render a trial fundamentally unfair.

**Key Terms:**

**Exclusionary Rule** - A rule that excludes or suppresses evidence in a criminal proceeding where that evidence was obtained in violation of an individual’s constitutional rights.

**Ineffective Assistance of Counsel -** Representation by an attorney that is so unreasonable as to deny the defendant the right to a fair trial.

**Right to Effective Assistance of Counsel -** The right to counsel guaranteed by the Sixth Amendment to the U.S. Constitution and some state laws.

# United States v. Gonzalez-Lopez

#### United States Supreme Court 548 U.S. 140 (2006)

#### Rule of Law

**If a trial court errs by denying a defendant’s choice of counsel, the court must reverse the defendant’s conviction without harmless error analysis.**

# Padilla v. Kentucky

#### United States Supreme Court 559 U.S. 356 (2010)

#### Rule of Law

**The Sixth Amendment’s requirement of effective assistance of counsel requires an attorney to provide accurate advice concerning the potential deportation consequences of a noncitizen defendant’s guilty plea to a crime.**

#### Facts

Jose Padilla (plaintiff), a native of Honduras, had been a permanent resident of the United States for more than 40 years when he pled guilty to, and was convicted of, a marijuana offense in Kentucky. As a result, Padilla was subject to mandatory deportation under Section 237(a)(2)(B)(i) of the Immigration and Nationality Act (INA). In his petition for post-conviction relief to the Kentucky Supreme Court, Padilla claimed that his trial attorney was ineffective and failed to advise him of the deportation consequences for pleading guilty to the crime. Instead, Padilla said his attorney told him that he did not have to worry about immigration status since he had been in the United States for so long. The Kentucky Supreme Court rejected Padilla’s Sixth Amendment ineffectiveness of assistance of counsel claim on the ground that the advice he sought from his attorney about the risk of deportation concerned only collateral matters and did not directly relate to the crime he had been charged with. Padilla appealed. The U.S. Supreme Court granted certiorari to review.

#### Issue

Does the Sixth Amendment’s requirement of effective assistance of counsel require an attorney to provide accurate advice concerning the potential deportation consequences of a noncitizen defendant’s guilty plea to a crime?

#### Holding and Reasoning (Stevens, J.)

Yes. Under the 1917 version of the federal Immigration and Nationality Act (INA), a sentencing judge was afforded with the discretion to recommend that a convicted alien not be deported. However, through subsequent implementation of several amendments to the INA, there is no longer any discretion or authority to grant relief from deportation. Thus, the importance of providing accurate legal advice to noncitizens accused of crimes has never been more important because their ability to remain in the United States depends upon it. Before deciding whether to plead guilty to a crime, a defendant is entitled to the effective assistance of competent counsel. *McMann v. Richardson*, 397 U.S. 759 (1970); *Strickland v. Washington*, 466 U.S. 668 (1984). While deportation is a serious penalty, it is not a criminal sanction. Nevertheless, given recent changes in the INA that have made deportation mandatory upon conviction of certain crimes, it is now more difficult than ever to separate the “civil” sanction of deportation from the “criminal” penalty. As a result, the Court’s holding in *McMann*and *Strickland* applies to Padilla’s claim that he has a Sixth Amendment right to effective assistance of counsel when his decision to plead guilty to a crime may affect his status in the United States. In *Strickland*, the Court first determined whether the attorney’s representation “fell below an objective standard of reasonableness.” *Strickland* *v. Washington*, 466 U.S. at 688. The Court then asked whether “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. Here, the relevant provisions of the INA explicitly state that deportation is required if an alien is convicted of a marijuana offense. Counsel for Padilla could have easily determined that Padilla’s plea would result in his removal from the United States. Instead, Padilla’s counsel provided him with false assurance that he did not need to worry about deportation. Padilla has sufficiently alleged that his counsel was constitutionally deficient. Whether he is entitled to relief will depend on whether he can demonstrate prejudice as a result of the deficiency. The judgment of the Kentucky Supreme Court is reversed and the matter is remanded for further proceedings consistent with the opinion.

#### Concurrence (Alito, J.)

The Court correctly holds that the Sixth Amendment’s right to effective assistance of counsel applies to advising a noncitizen client regarding potential deportation consequences resulting from a criminal conviction. However, there remains a likelihood that incomplete legal advice may be given to noncitizen criminal defendants when counsel, who is not an immigration law specialist, does not go far enough to investigate the potential deportation consequences related to the crime charged. When a criminal defense attorney is aware that a client is an alien, the attorney should advise the client that a criminal conviction may have adverse consequences under the immigration laws and that the client should consult an immigration specialist if the client wants advice on the subject.

#### Dissent (Scalia, J.)

The Court incorrectly broadens the Sixth Amendment to require counsel to advise clients on collateral issues unrelated to the particular aspects of a criminal proceeding. Here, Padilla’s advice from counsel regarding deportation was not germane to his prosecution.

**Key Terms:**

**Right to Effective Assistance of Counsel -** The right to counsel guaranteed by the Sixth Amendment to the U.S. Constitution and some state laws.

# United States v. Cronic

#### United States Supreme Court 466 U.S. 648 (1984)

#### Rule of Law

**In the absence of a showing of particularized errors by defense counsel, a defendant claiming a violation of the Sixth Amendment right to the effective assistance of counsel must demonstrate that the totality of the circumstances supports a presumption of ineffective assistance.**

# Stone v. Powell

#### United States Supreme Court 428 U.S. 465 (1976)

#### Rule of Law

**Federal district courts should not hear habeas corpus petitions based on claims that illegally obtained evidence was admitted at trial if there has been a full and fair review at the state level.**

# Harrington v. Richter

#### United States Supreme Court 562 U.S. 86 (2011)

#### Rule of Law

**Assistance of counsel is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial.**

# \*\*WEAVER v. MASSACHUSETTS\*\*

#### United States Supreme Court 137 S. Ct. 1899 (2017)

#### Rule of Law

**Ineffective assistance of counsel raised on collateral review is a structural error requiring a new trial only if the defendant shows prejudice or fundamental unfairness.**

#### Facts

A witness saw a young man with a pistol drop a hat as he fled the scene of a shooting. Police linked DNA on the hat to sixteen-year-old Kentel Weaver (defendant) and charged him with murder. The court called 60 to 100 potential jurors but had seating for only 50 or 60, so it excluded the public from the courtroom during voir dire, including Weaver’s mother and her minister. The United States Supreme Court had not yet issued *Presley v. Georgia*, 558 U.S. 209 (2010), clarifying that public-trial rights include jury selection. Weaver’s counsel did not object or advise Weaver about the issue. The jury convicted Weaver and sentenced him to life imprisonment. Weaver requested a new trial based on ineffective assistance of counsel. The court found violation of the public-trial right and ineffective assistance of counsel but no resulting prejudice to Weaver’s case. After the state supreme court affirmed, Weaver appealed to the U.S. Supreme Court.

#### Issue

Is ineffective assistance of counsel raised on collateral review a structural error requiring a new trial only if the defendant shows prejudice or fundamental unfairness?

#### Holding and Reasoning (Kennedy, J.)

Yes. Ineffective assistance of counsel raised on collateral review is a structural error requiring a new trial only if the defendant shows prejudice or fundamental unfairness. The Court ruled in *Chapman v. California*, 386 U.S. 18 (1967),that constitutional errors in criminal trials do not require reversal if harmless. However, certain errors called “structural” cannot be shown harmless and require reversal without showing prejudice. Structural errors violate rights other than those that protect against wrongful conviction, cause harm intrinsically difficult to measure, and render trial fundamentally unfair. Excluding the public is structural error, but it is not always fundamentally unfair. One exception is when a judge makes factual findings requiring a closed courtroom. A structural error properly raised on direct appeal requires automatic reversal, with no showing that the error changed the outcome required. However, under *Strickland v. Washington*, 466 U.S. 668 (1984), an error not preserved at trial and raised on collateral review as ineffective assistance of counsel requires showing deficient performance and prejudice. *Strickland* defines prejudice as “a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” The proponent must show either a reasonable probability of a different outcome or a public-trial violation so egregious that it made the trial fundamentally unfair. The defendant bears a heightened burden on collateral review because counsel’s failure to object prevented the trial court from having the opportunity to immediately address it. Direct appeal of errors preserved at trial is more efficient than collateral review and allows appellate courts to instruct trial courts after review of a full record. Collateral review also threatens the finality of jury verdicts and allows appellants to avoid the rule that unpreserved errors are waived, so courts must examine ineffective-assistance claims scrupulously. Here, Weaver arguably established ineffective assistance but not prejudice or a reasonable probability that the jury would have acquitted had his mother and her minister been allowed in the courtroom. Nor has Weaver shown that ineffective assistance rendered his trial fundamentally unfair. The exclusion occurred only for two days of jury selection, when no other error or misconduct occurred. Therefore, Weaver cannot show prejudice entitling him to a new trial. The Court accordingly affirms the judgment denying Weaver’s request for a new trial.

#### Concurrence (Alito, J.)

Counsel cannot be ineffective unless it somehow prejudiced the defense. A defendant may establish prejudice that satisfies *Strickland* either by showing ineffective assistance changed the outcome of the trial or was so egregious that it amounted to denial of counsel. The key is whether the error undermined the reliability of trial, not whether it was structural. An attorney error cannot prejudice the defense unless it changed the outcome at trial.

#### Concurrence (Thomas, J.)

The ruling that the right to a public trial extends to jury selection may conflict with the original understanding of that right and should be reconsidered. The majority’s discussion of fundamental fairness is unnecessary. *Strickland* held that a defendant may establish prejudice by showing that ineffective assistance amounted to denial of the right to counsel or changed the outcome of trial, not by showing that counsel’s errors rendered the trial fundamentally unfair.

#### Dissent (Breyer, J.)

A defendant who establishes that ineffective assistance of counsel produced a structural error should not have to show that the error changed the outcome of trial. All structural errors require reversal, not just those that result in fundamental unfairness. The key is that structural errors create harm difficult to assess, making actual prejudice extremely difficult to show. That principle applies especially to the public-trial right because showing that a trial would have turned out differently had it been public is virtually impossible. Courts should not interpret *Strickland* to require a showing of actual prejudice for structural errors.

**Key Terms:**

**Voir Dire -** attorney questions a potential juror to assess the person’s suitability for sitting on the jury. Voir dire also may be used to qualify a witness as an expert during trial, or to explore certain aspects of a witness’s testimony out of the jury’s presence.

**Collateral Review (or Attack) -** A proceeding initiated in order to challenge the integrity of a previous judgment.

**Structural -** Error An error in a criminal trial that affects the entire framework of a trial, not just the trial process, and requires automatic reversal with no harmless-error review. Examples include a biased judge or denying the right to counsel.

# Presley v. Georgia

#### United States Supreme Court 558 U.S. 209 (2010)

#### Rule of Law

**Courts must find an overriding and compelling interest and consider all reasonable alternatives before excluding the public from trial or pretrial proceedings.**

#### Facts

The trial judge presiding over Eric Presley’s (defendant’s) case excluded the only spectator, Presley’s uncle, from the courtroom. The judge explained, “[t]here just isn’t space. . . . Each of these rows will be occupied by jurors. And his uncle cannot sit and intermingle with members of the jury panel.” The court denied Presley’s request for a new trial following his conviction, and the state appellate courts affirmed. Presley appealed to the United States Supreme Court.

#### Issue

Must courts find an overriding and compelling interest and consider all reasonable alternatives before excluding the public from trial or pretrial proceedings?

#### Holding and Reasoning (Per curiam)

Yes. Courts must find an overriding and compelling interest and consider all reasonable alternatives before excluding the public from trial or pretrial proceedings. The Sixth Amendment to the United States Constitution guarantees a right to a speedy and public trial to the accused. The public may also assert a right to attend trials under the First Amendment. Supreme Court case law recognizes that those rights extend beyond the evidentiary proof stage of trial to include pretrial hearings and jury selection. Exceptions arise rarely, requiring an overriding interest in closing the courtroom that outweighs the interests served by open trials. Under *Waller v. Georgia*,476 U.S. 39 (1984), the proponent must show that allowing the public will likely prejudice that overriding interest, the closure must not be any broader than necessary, and the court must make findings sufficient to support closure. Trial courts must make reasonable efforts to accommodate the public. Here, the record does not show reasonable efforts. Without knowing the courtroom specifics, possible solutions include reserving one or more rows of seats for the public, dividing the pool of potential jurors, or instructing jurors not to talk to any spectators. The judge also did not identify an overriding interest that required excluding the public. Moreover, even if the judge had good reason to close the courtroom, the judge did not consider any reasonable alternatives. The Court accordingly reverses and grants Presley a new trial.

**Key Terms:**

**First Amendment** - Guarantees that the government will not abridge freedoms of the press, religion, and speech; the right to peacefully assemble; and the right to petition the government to remedy grievances.

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

# Chapman v. California

#### United States Supreme Court 386 U.S. 18 (1967)

#### Rule of Law

**In order for a federal constitutional error to be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.**

# Arizona v. Fulminante

#### United States Supreme Court 499 U.S. 279 (1991)

#### Rule of Law

**The harmless-error doctrine applies to coerced confessions wrongly introduced as evidence at trial.**

#### Facts

Fulminante (defendant) was a suspect in the murder of his 11-year-old stepdaughter in Arizona. About two years after the murder, Fulminante was convicted in New Jersey of illegally possessing a firearm and was serving his sentence in a New York prison. He became friends with another inmate, Sarivola, who was a paid informant for the FBI. After hearing rumors that Fulminante was suspected of killing a girl in Arizona, Sarivola set out to obtain a confession from him. Sarivola offered to protect Fulminante from the other inmates who were starting to harass him due to the rumors of him molesting a young girl. However, Sarivola told Fulminante that he had to disclose the whole truth before Sarivola could properly protect him. As a result, Fulminante eventually confided in Sarivola and confessed to the murder in extreme detail. A few months later, Fulminante was released from jail. Sarivola and his wife drove Fulminante to Pennsylvania and on the way, Fulminante made another detailed confession to Sarivola’s wife. Fulminante was indicted in Arizona for the first-degree murder of his stepdaughter. Before trial, Fulminante moved to suppress the two confessions. The trial court denied the motion, finding that both confessions were voluntary. Fulminante was convicted of murder and sentenced to death. On appeal, the state supreme court initially found that Fulminante’s confession to Sarivola was coerced but that it amounted to harmless error. Fulminante filed a motion for reconsideration. The state supreme court then held that under the precedent of the United States Supreme Court, in cases involving coerced confessions, the harmless-error analysis could not be used. The state supreme court reversed Fulminante’s conviction and ordered a new trial in which Fulminante’s confession to Sarivola would be excluded. The United States Supreme Court granted the State of Arizona's petition for certiorari.

#### Issue

Does the harmless-error doctrine apply in cases involving coerced confessions?

#### Holding and Reasoning (White, J.)

Yes. The harmless-error doctrine applies in cases involving coerced confessions. As an initial matter, a finding of a coerced confession may be made if an accused person faces a credible threat of physical violence by an agent of the government. Here, Fulminante confessed to Sarivola, a government agent, because he was afraid of violence from the other inmates unless Sarivola protected him. Because Fulminante was motivated by a credible threat of physical violence, his confession was coerced. For a conviction to be upheld in spite of the admission of a coerced confession, the state must prove that the admission of the confession was harmless error. In other words, the state must show that admitting the confession did not contribute to the conviction. In this case, the state has failed to meet this burden. First, the record indicates that the prosecution’s case depended on the jury believing both confessions. Second, the jury could have reasonably believed that the two confessions reinforced and corroborated each other. If the value the jurors gave the second confession was dependent on the presence of the first confession to Sarivola, then the admission of the first confession wrongly prejudiced the jury against the defendant. Finally, the admission of Fulminante’s confession to Sarivola led to the admission of other damaging and prejudicial evidence. Accordingly, the judgment of the state supreme court reversing Fulminante's conviction is affirmed.

#### Concurrence (Kennedy, J.)

The harmless-error analysis should apply to cases involving coerced confessions, but in this case Fulminante’s initial confession was not coerced. However, the majority holds that the confession was coerced, and with this understanding, it is clear that the admission of the confession into evidence was not harmless error. A confession is such a powerful piece of evidence that the jury could not help but consider it more convincing than the other evidence proffered by the state. Therefore, the Court is right to affirm the judgment of the state supreme court.

#### Dissent (Rehnquist, C.J.)

The harmless-error doctrine applies in cases involving coerced confessions. In this case, the confession was not coerced. Fulminante stipulated that he never expressed fear of the other inmates, nor did he seek protection from Sarivola. However, even assuming that the confession was coerced, the admission of Fulminante’s first confession was harmless in light of the physical evidence, the other evidence admitted at trial, and the second confession, which was untainted and contained more detail than the first. Therefore, the final judgment of the state supreme court should be reversed.

#### Dissent (White, J.)

The judgment of the state supreme court should be affirmed on the grounds that the harmless-error doctrine does not apply where a coerced confession is wrongly admitted into evidence at trial. Court precedent indicates that the Court has long rejected the application of the harmless-error doctrine to cases involving coerced confessions in violation of the Due Process Clause of the Fourteenth Amendment. Under *Chapman v. California*, 386 U.S. 18 (1967), the right of a defendant to keep a coerced confession out of evidence is so fundamental that the harmless-error doctrine cannot apply. First, coerced confessions are fundamentally different from other types of evidence that may be wrongly admitted at trial where the harmless-error doctrine applies. They can be untrustworthy, and confessions in general are inconsistent with the accusatorial system that exists in the United States. Under the accusatorial system, it is the job of the state to make convictions through independent investigation. However, confessions wrongly enable the state to convict a defendant with the defendant’s own help. In addition, a confession is so powerful that a jury cannot be expected to ignore it if instructed to do so. Second, the majority tries to distinguish between structural defects in the trial process and simple errors that occur during trial. This approach is flawed because classifying errors is not as easy as the Court suggests. Furthermore, the nature of the right is what matters, and it is a violation of due process to introduce a coerced confession at trial, regardless of the effect it may have on the proceedings. [**Editor's note**: Justice White wrote two parts of the three-part majority opinion, and Chief Justice Rehnquist wrote the third part. Justice White dissented from the portion of the majority opinion authored by Chief Justice Rehnquist, which concerned whether the harmless-error doctrine applies to coerced confessions.]

**Key Terms:**

**Fourteenth Amendment Due Process** **Clause** - The provision set forth at Amendment XIV, Section 1 of the United States Constitution prohibiting states from depriving any person of life, liberty, or property by means that are arbitrary or fundamentally unfair.

**Harmless Error** - A ruling by a trial judge, which is later held to be mistaken by a higher court, but is not so prejudicial to the defendant as to warrant the reversal of a conviction.

# McKaskle v. Wiggins

#### United States Supreme Court 465 U.S. 168 (1984)

#### Rule of Law

**A pro se defendant’s Sixth Amendment rights are not violated when a judge appoints a standby counsel.**

#### Facts

Carl Wiggins (defendant) was convicted of robbery and sentenced to life in prison, but because of a faulty indictment, Wiggins's conviction was set aside, and he was granted a new trial. Two months before his second trial began, Wiggins filed a request for the court to appoint him counsel. The court appointed an attorney to represent him. A month later, Wiggins filed another request for counsel to be appointed, and the court appointed him another attorney. However, during pretrial proceedings for the second trial, Wiggins said he would be defending himself pro se and asked that counsel not be allowed to interfere with his presentations to the court. Throughout Wiggins's trial, he kept changing his mind about whether he wanted the assistance of his standby counsel. At times, Wiggins said he wanted no assistance, but at other times, Wiggins consulted with his counsel and allowed them to question witnesses and make statements on his behalf. The jury convicted Wiggins, and he moved for a new trial, arguing that his standby counsel had unfairly interfered with his presentation of his defense. After exhausting his state appeals and state habeas corpus review, Wiggins filed a federal habeas corpus petition. The district court denied his petition, but the appellate court reversed, concluding that Wiggins's Sixth Amendment right to represent himself was violated by his standby counsels' interference in the proceedings. The United States Supreme Court granted certiorari.

#### Issue

Does a judge’s appointment of a standby counsel violate a pro se defendant’s Sixth Amendment rights?

#### Holding and Reasoning (O’Connor, J.)

No. A pro se defendant’s Sixth Amendment rights are not violated when a judge appoints a standby counsel. However, once appointed, there are limits on when and how much the standby counsel may participate. Specifically, (1) the pro se defendant must retain actual control over his case, and (2) the standby counsel’s participation must not alter the jury’s perception that the pro se defendant is actually representing himself. Here, Wiggins was allowed to decide for himself when and how standby counsel would be involved in the trial. Given how frequently Wiggins changed his mind about whether to allow counsel to assist him, it is difficult to assess how much of his standby counsels' participation in the trial was against his wishes. However, none of counsels' conduct affected Wiggins's control over his own defense or altered the jury's perception that Wiggins was representing himself. Accordingly, counsels' involvement in Wiggins's trial was kept to reasonable limits, and Wiggins's rights were not violated. The appellate court's judgment is reversed.

#### Dissent (White, J.)

The limits that the majority places on a standby counsel’s role are not sufficient to protect the pro se defendant’s autonomic interests. First, the actual control limit is “more apparent than real” because the standby counsel has discretion to offer basically any argument to which the pro se defendant does not object. Second, it is unclear under the jury perception limit how a court would determine when a standby counsel’s participation alters the jury’s perception. Moreover, this limit disregards the pro se defendant’s own perception.

**Key Terms:**

**Pro Se Representation -** Representing oneself without the assistance of counsel.

**Standby Counsel -** A court-appointed counsel available to help a pro se defendant with basic issues such as courtroom rules and protocol.

# Faretta v. California

#### United States Supreme Court 422 U.S. 806 (1975)

#### Rule of Law

**The right to defend is personal and defendants have the constitutional right to represent themselves at trial if they so choose.**

# United States v. Gonzalez-Lopez

#### United States Supreme Court 548 U.S. 140 (2006)

#### Rule of Law

**If a trial court errs by denying a defendant’s choice of counsel, the court must reverse the defendant’s conviction without harmless error analysis.**

# Chapman v. California

#### United States Supreme Court 386 U.S. 18 (1967)

#### Rule of Law

**In order for a federal constitutional error to be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.**

**Waller v. Georgia**

104 S.Ct. 2210

Supreme Court of the United States

**Guy WALLER, Petitioner,**

**v.**

**GEORGIA.**

**Clarence COLE et al., Petitioner,**

**v.**

**GEORGIA.**

Nos. 83-321, 83-322.

Argued March 27, 1984.Decided May 21, 1984.

**Synopsis**

Defendants were convicted in the State Court, Fulton County, Osgood O. Williams, J., of commercial gambling and communicating gambling information, in violation of the Racketeer Influenced and Corrupt Organizations Act, and they appealed. The Georgia Supreme Court, Clarke, J., affirmed at [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I0dbbc72102e411da9439b076ef9ec4de&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[251 Ga. 124, 303 S.E.2d 437.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1983126340&pubNum=711&originatingDoc=I236629399c1e11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) On certiorari, the Supreme Court, Justice Powell held that: (1) closure of entire suppression hearing was plainly unjustified and violated defendant's Sixth Amendment public-trial guarantee, and (2) new trial would be required only if new, public suppression hearing would result in suppression of material evidence not suppressed at first trial, or in some other material change in positions of the parties.

Reversed and remanded.

# Neder v. United States

#### United States Supreme Court 527 U.S. 1 (1999)

#### Rule of Law

**A jury instruction omitting an element of a crime may constitute harmless error if the element was undisputed and supported by overwhelming evidence.**

#### Facts

A federal court tried Ellis Neder (defendant) for tax fraud based on his failure to report loan proceeds as income on tax returns. The judge improperly instructed the jury that it did not have to consider the materiality of the false statements on the returns to convict, reasoning that materiality “is not a question for the jury to decide.” Neder appealed to the United States Supreme Court, arguing that the erroneous instruction amounted to a structural error requiring reversal, regardless of whether the error was harmless.

#### Issue

May a jury instruction omitting an element of a crime constitute harmless error if the element was undisputed and supported by overwhelming evidence?

#### Holding and Reasoning (Rehnquist, C.J.)

Yes. A jury instruction omitting an element of a crime may constitute harmless error if the element was undisputed and supported by overwhelming evidence. Courts apply a categorical approach to whether errors are structural or subject to harmless-error review, not a case-specific approach. The Supreme Court precedent recognized that “most constitutional errors can be harmless” provided the defendant had counsel and an impartial judge in *Rose v. Clark*, 478 U.S. 570 (1986). Structural errors requiring automatic reversal arise only in extremely rare cases. By nature, structural errors affect the entire framework of a trial, rendering it fundamentally unfair. They are not merely errors in the trial process. Examples include a biased trial judge or depriving a criminal defendant of counsel. A jury instruction that omits an element of the offense does not necessarily make the entire trial process unfair and unreliable. An instruction that incorrectly describes or omits a single element, or that requires the jury to make a conclusive presumption if certain facts are found true, prevents the jury from making just one particular finding otherwise necessary to convict. If a judge finds that one particular finding could not possibly have changed the trial outcome, no reversal is required. In comparison, a defective instruction as to reasonable doubt undermines all the findings the jury makes, making it a structural error requiring automatic reversal. Here, the judge instructed the jury incorrectly only as to one element of the crime charged: materiality. A jury could not reasonably find Neder’s failure to report substantial amounts of income on his tax returns immaterial. Neder did not dispute that the omissions were material. Instead, Neder argued that he believed the loan proceeds were not reportable as income because he intended to repay the loans and because his accountant and attorney told him not to report the proceeds as income. That made the materiality element both uncontested and supported by overwhelming evidence. Therefore, the erroneous instruction could not possibly have contributed to the verdict. The Court accordingly affirms Neder’s conviction.

#### Dissent (Scalia, J.)

Allowing Neder’s conviction to stand substitutes the trial court’s judgment for the jury’s. The Constitution reserves to the people the right to determine an accused’s guilt. Here, the trial judge took the materiality question away from the jury. The majority here likewise makes the materiality determination itself. Treating an erroneous instruction as to one element of a crime differently from an instruction as to every element makes no sense. Courts should find such errors harmless only if the facts necessarily found by the jury—not the court—supply the omitted element some other way.

**Key Terms:**

**Harmless Error** - A ruling by a trial judge, which is later held to be mistaken by a higher court, but is not so prejudicial to the defendant as to warrant the reversal of a conviction.

**Trial Error -** An error that occurs when a case is presented to the jury; as opposed to a structural error which affects the entire structure of a trial, such as denial of the right to counsel.

**Structural** - Error An error in a criminal trial that affects the entire framework of a trial, not just the trial process, and requires automatic reversal with no harmless-error review. Examples include a biased judge or denying the right to counsel.

# Strickland v. Washington

#### United States Supreme Court 466 U.S. 668 (1984)

#### Rule of Law

**To establish the ineffective assistance of counsel, a convicted defendant must show that his counsel’s performance was deficient because the lawyer did not act as a reasonably competent attorney, and that he was prejudiced by the deficiency because there is a reasonable probability that, but for his attorney’s unprofessional errors, the result of the proceeding would have been different.**

**Sullivan v. Louisiana**

113 S.Ct. 2078

Supreme Court of the United States

**John SULLIVAN, Petitioner,**

**v.**

**LOUISIANA.**

No. 92–5129.

Argued March 29, 1993.Decided June 1, 1993.

**Synopsis**

Defendant was convicted in the Louisiana Criminal District Court, Parish of Orleans, of first-degree murder, and sentenced to death. On his appeal, the Louisiana Supreme Court, [559 So.2d 1356,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990061085&pubNum=735&originatingDoc=Iaf79fcc29c7e11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) remanded for evidentiary hearing. On remand, the Criminal District Court ruled against defendant, and he again appealed. The Louisiana Supreme Court, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Iae017d790c3a11d9bc18e8274af85244&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[596 So.2d 177,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992052623&pubNum=735&originatingDoc=Iaf79fcc29c7e11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed conviction, but vacated sentence and remanded for new sentencing hearing. Defendant petitioned for certiorari. The Supreme Court, Justice [Scalia](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254763301&originatingDoc=Iaf79fcc29c7e11d9bdd1cfdd544ca3a4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Iaf79fcc29c7e11d9bdd1cfdd544ca3a4), held that constitutionally deficient reasonable-doubt instruction required reversal of conviction.

Reversed and remanded.

Chief Justice [Rehnquist](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0238463201&originatingDoc=Iaf79fcc29c7e11d9bdd1cfdd544ca3a4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Iaf79fcc29c7e11d9bdd1cfdd544ca3a4) filed a concurring opinion.

**Tumey v. Ohio**

47 S.Ct. 437

Supreme Court of the United States.

**TUMEY**

**v.**

**STATE OF OHIO.**

No. 527.

Argued Nov. 29, 30, 1926.Decided March 7, 1927.

**Synopsis**

In Error to the Supreme Court of Ohio.

Ed Tumey was convicted before the mayor of the village of North College Hill, Ohio, of unlawfully possessing intoxicating liquor. Judgment of court of common pleas [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Iaaf979cccf2b11d983e7e9deff98dc6f&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[(25 Ohio Nisi Prius (N. S.) 580),](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1925002466&pubNum=2632&originatingDoc=Icdec8a8d9cc211d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) reversing judgment of conviction, was reversed by the Court of Appeals (23 Ohio Law Reporter, 634), and a petition in error as of right to the state Supreme Court was dismissed, for the reason that no debatable constitutional question was involved, and defendant brings error. Judgment reversed, and cause remanded.

# Vasquez v. Hillery

#### United States Supreme Court 474 U.S. 254 (1986)

#### Rule of Law

**The mandatory remedy for racial discrimination in grand jury selection is reversal of any subsequent criminal conviction.**

#### Facts

Hillery (defendant) was an African-American indicted on murder charges by a grand jury. Hillery asserted that African-Americans had been intentionally excluded from the grand jury and moved to quash the indictment. The trial court denied his motion and Hillery was subsequently convicted. Hillary spent 16 years appealing his conviction in the state courts. When Hillery exhausted his state court appeals, he petitioned the federal district court for a writ of habeas corpus. The district court granted the writ. Vasquez (plaintiff), the warden of San Quentin Prison, petitioned the Supreme Court for review of the district court’s decision.

#### Issue

Is reversal of any subsequent criminal conviction the mandatory remedy for racial discrimination in grand jury selection?

#### Holding and Reasoning (Marshall, J.)

Yes. Reversal of any subsequent criminal conviction is the mandatory remedy for racial discrimination in grand jury selection. The intentional exclusion of members of a defendant’s racial group from a grand jury violates equal protection requirements. Since 1880, this Court has consistently held that a criminal conviction must be vacated whenever racial discrimination has tainted grand jury selection. Vasquez asks the Court to dispense with this venerable doctrine. Vasquez asserts that racial discrimination is no longer an issue with grand jury selection in Kings County, California. Vasquez argues that the discriminatory grand jury selection in Hillery’s case amounted to harmless error. In addition, Vasquez asserts that any unfairness in the grand jury process was negated by Hillery’s receipt of a fair jury trial, at which Hillery was found guilty. Finally, Vasquez argues that forcing the state to conduct a new trial many years after the original conviction is an unfair penalty when the constitutional violation had no effect on the fairness of the original trial. The longstanding remedy of reversal is the only effective remedy for the serious constitutional violation worked by discriminatory grand jury selection. A grand jury has broad discretion to determine the charges for which a defendant will be tried. As such, discrimination in grand jury selection directly affects whether or not a defendant will face trial and the charges to which the defendant must answer. In the face of unconstitutional discrimination in the charging process, we cannot afford a presumption of fairness, nor can we assess the harm of error. The fact that a defendant is subsequently convicted of charges issued by a tainted grand jury does not lead to the conclusion that the grand jury was not impermissibly biased in its charging decision. Vasquez presents no evidence to convince the Court that the societal concerns underlying our doctrine of mandatory reversal are any less relevant today than they were in 1880. The district court ruling is affirmed.

#### Dissent (Powell, J.)

This Court generally ignores constitutional violations that result in harmless error. The burden falls to the defendant to demonstrate prejudice resulting from a constitutional trespass. The only exception to the rule has been in cases of grand jury discrimination. The rationale proposed for the exception has been that grand jury discrimination casts doubt on the integrity of the judicial process. The same can be said of any constitutional violation. Not every constitutional violation deprives the defendant of a fair trial. The record demonstrates that the composition of the grand jury did not deprive Hillery of a fair trial. The majority stands on precedent mandating reversal, but reversal is not a constitutional requirement. The Court should be addressing the question of the appropriate remedy for the error under the particular facts of Hillery’s case. The fact that Hillery was subsequently convicted on the charges issued by the grand jury demonstrates the validity of the grand jury’s indictment decision. There is no evidence that the grand jury’s charging decision was based on Hillery’s race or that grand juries in Kings County ever treated white defendants differently under a similar weight of evidence. Hillery did not even raise his discrimination claim until 16 years after his conviction. The cost to the state of reversing the conviction exceeds the deterrent effect of the majority rule. There is no dispute that racial discrimination in grand jury selections has been eliminated in Kings County. There is no dispute that a grand jury representative of the population demographics of Kings County at the time of Hillery’s indictment would have contained only one African-American member. The majority decision offers little deterrent benefit. By contrast, the state must now face the daunting task of attempting to reconstruct a case originally tried 23 years ago.

**Key Terms:**

**Grand Jury -** A group of individuals convened for the purpose of reviewing evidence in criminal proceedings and deciding whether to issue an indictment.

**Indictment -** A formal statement of criminal charges issued by a grand jury, or the process of determining charges to be presented for prosecution.

# Batson v. Kentucky

#### United States Supreme Court 476 U.S. 79 (1986)

#### Rule of Law

**The Equal Protection Clause of the Fourteenth Amendment prohibits prosecutors from using peremptory challenges to remove prospective jurors based on their race.**

#### Facts

James Batson (defendant), an African American, was indicted for burglary and receipt of stolen goods. During voir dire, the prosecutor used his peremptory challenges to strike all the African Americans on the venire. As a result, the jury was made up entirely of white jurors. Batson moved to discharge the jury before it was sworn, claiming that the removal of all the African Americans violated his rights under the Equal Protection Clause of the Fourteenth Amendment. The trial judge denied the request, and Batson was convicted on both counts. The Kentucky Supreme Court affirmed Batson's conviction, and the United States Supreme Court granted certiorari.

#### Issue

Does the Equal Protection Clause of the Fourteenth Amendment prohibit prosecutors from using peremptory challenges to remove prospective jurors based on their race?

#### Holding and Reasoning (Powell, J.)

Yes. The Equal Protection Clause is violated where the prosecution excludes African American veniremen from the jury based on nothing more than a presumed bias in favor of an African American defendant. Therefore, when the defendant makes a prima facie showing of discrimination during the peremptory challenge, the prosecution may be compelled to articulate a neutral explanation for why it challenges a particular veniremen. The right to peremptory challenges is not a constitutional one, so there is no real difficulty in limiting its reach. Furthermore, the holding in *Swain v. Alabama*, 380 U.S. 202 (1965), has already established that peremptory challenges are subject to the principles of equal protection. Cases since *Swain* have established the standard for proving a prima facie case of purposeful discrimination. First, the defendant must show that he is a member of a specific racial group and that the prosecution has exercised its peremptory challenges to remove the veniremen who are of the same racial group. Then the defendant may rely on the fact that peremptory challenges are a practice that allows people to discriminate. Finally, the defendant must show that in light of all the surrounding circumstances, the prosecutor used the practice to exclude veniremen on account of their race. This inquiry need only involve evidence of the prosecutor’s peremptory challenges at the defendant’s own trial and need not establish a pattern of racial discrimination in prior cases. Once the defendant makes this prima facie showing, the burden shifts to the prosecution to justify its challenges with a neutral explanation. In this case, Batson made a timely objection to the prosecutor’s use of peremptory challenges. The judge did not ask the prosecution to explain its objection, so the case must be remanded. Accordingly, the conviction is reversed.

#### Concurrence (Marshall, J.)

The Court’s holding is correct but is only a first step towards ending racial discrimination in jury selection. To accomplish this goal, peremptory challenges, for both the defense and the prosecution, must be eliminated entirely. The rule established by the Court is not sufficient to end discrimination because it enables defendants to challenge blatant examples of discrimination, but not the more subtle kinds. Furthermore, it is difficult for a court to assess a prosecutor’s motives and decide what neutral explanations are acceptable. Finally, the prosecutor or the judge could harbor conscious or unconscious racism. This could justify a seemingly neutral explanation for excluding a potential juror, but the objectionable characteristic could be something the prosecutor never would have noticed with a white venireman.

#### Concurrence (White, J.)

The practice of using peremptory challenges to exclude African Americans from juries in cases with African American defendants remains widespread, so the Court's decision correctly allows an inquiry into prosecutors' use of peremptory challenges. However, the Court's decision should not be given retroactive effect on criminal cases in which the trial began prior to the announcement of the decision.

#### Dissent (Burger, C.J.)

Peremptory challenges have been used as part of the jury process in this country for nearly 200 years, and they are part of a common-law tradition spanning several centuries. Despite that history, the Court has decided to set aside the use of peremptory challenges on equal-protection grounds, even though Batson expressly declined to make an equal-protection argument before the Kentucky Supreme Court or this Court. The state has a substantial, and perhaps even compelling, interest in using peremptory challenges to ensure the fairness of jury trials, and the Court is wrong to limit their use.

#### Dissent (Rehnquist, J.)

The Court misapplies the Equal Protection Clause because there is nothing unequal about the state excluding African Americans from jury when the defendant is African American. This technique is applied across the board and when a defendant falls into another group or class, the state excludes potential jurors having membership in that particular group. Group affiliations have long been recognized as a legitimate basis for exercising peremptory challenges.

**Key Terms:**

**Peremptory Challenge -** During voir dire, the defense and the prosecution may each reject a certain number of potential jurors without having to give any reason.

**Venire -** The group of prospective jurors that the jury is then chosen from.

# Harrington v. Richter

#### United States Supreme Court 562 U.S. 86 (2011)

#### Rule of Law

**Assistance of counsel is constitutionally ineffective only if it so undermined the proper functioning of the adversarial process that the defendant was denied a fair trial.**

# United States v. Cronic

#### United States Supreme Court 466 U.S. 648 (1984)

#### Rule of Law

**In the absence of a showing of particularized errors by defense counsel, a defendant claiming a violation of the Sixth Amendment right to the effective assistance of counsel must demonstrate that the totality of the circumstances supports a presumption of ineffective assistance.**

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**March 11, 2021**

**Chapter 17 – Sections 4 & 5 (Skip Section 3)**

**Chapter 13 – Duty To Disclose**

**Tenn. R. Crim. P. Rule 16**

**Johnson v. State, 38 S.W.3d 912 (Tenn. 2001)**

**State v. Ferguson, 2 S.W.3d 912 (Tenn. 1999)**

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**Chapter 17 – Sections 4 & 5**

**\*\*MCCOY v. LOUISIANA\*\***

United States Supreme Court  
138 S. Ct. 1500 (2018)

**Rule of Law**

**Conceding guilt over a client’s objection violates the right to assistance of counsel and constitutes structural error reversible without showing prejudice.**

**Facts**

Robert McCoy (defendant) insisted that he did not murder his estranged wife’s family, despite overwhelming evidence against him. The prosecution (plaintiff) charged him with three first-degree murders and sought the death penalty. Appointed counsel requested a sanity assessment, and McCoy was found competent to stand trial. After McCoy rejected the counsel assigned to him, his parents retained attorney Larry English to represent him. English decided that the jury would inevitably impose the death penalty unless McCoy conceded guilt. When McCoy learned that English planned to concede guilt, he tried to fire English, but the court refused to allow English to withdraw just two weeks before trial. When English told the jury that McCoy had killed the three victims in opening statements, McCoy protested that English was “selling [him] out.” The court advised McCoy that English would continue representing him and that it would not permit further outbursts. McCoy then testified in his own defense, presenting an unlikely alibi. English reiterated that McCoy was the killer in closing but urged mercy because of McCoy’s “serious mental and emotional issues.” The jury imposed the death penalty. McCoy retained a new attorney, seeking a new trial based on violations of his constitutional rights, but the Louisiana Supreme Court affirmed. Noting that state supreme courts disagreed on whether conceding guilt over a defendant’s objection violates the Sixth Amendment, the United States Supreme Court granted review.

**Issue**

Does conceding guilt over a client’s objection violate the right to assistance of counsel and constitute structural error reversible without showing prejudice?

**Holding and Reasoning (Ginsburg, J.)**

Yes. Conceding guilt over a client’s objection violates the right to assistance of counsel and constitutes structural error reversible without showing prejudice. The Sixth Amendment guarantees criminal defendants the assistance of counsel. Counsel manages trial strategy, but the client always retains the right to decide whether to plead guilty and whether to testify. Counsel may not concede guilt over the client’s objection even if counsel believes it is the only way to avoid the death penalty. The defendant may prefer to avoid admitting killing family members or prefer the death penalty over life in prison. The rules of professional conduct also require a lawyer to abide by client decisions about the representation’s objectives. Supreme Court case law finds Sixth Amendment violations to be structural errors not subject to harmless-error review, meaning that such a violation warrants reversal even without showing that the violation prejudiced the defendant. Structural errors include those that violate the right to make choices about one’s own defense, those with effects too difficult to measure, and those that made trial fundamentally unfair. Here, the Louisiana Supreme Court reasoned that the ethical rule prohibiting assisting a client in criminal or fraudulent conduct required English to concede McCoy’s guilt. However, the relevant case law applies to instances when the attorney must avoid suborning perjury by allowing the client to lie on the stand. Here, English conceded guilt in an attempt to avoid the death sentence, not to avoid suborning perjury. English did not doubt that McCoy believed his own testimony. Instead, English himself simply did not believe McCoy because of the prosecution’s overwhelming evidence. No ethical rule required English to concede McCoy’s guilt over his continuing objections. It both violated McCoy’s right to make fundamental choices about his own defense and almost certainly swayed the jury. Therefore, the Court grants McCoy a new trial without any need to show prejudice.

**Dissent (Alito, J.)**

English did not concede that McCoy was guilty of first-degree murder. English said that McCoy killed the victims but lacked the intent necessary for the crime charged. Overwhelming evidence demonstrated guilt. Stating that first-degree murder requires proof of killing someone and intent but that a client lacked the requisite intent necessarily implies that the client did kill someone, even though not explicitly stated. No fundamental constitutional right exists to insist that counsel contest guilt as to all charged offenses. This issue arises in extremely rare cases. Moreover, the Louisiana Supreme Court did not decide the structural-error question, so it was not properly raised for review. Admitting a lesser included offense does not necessarily violate a criminal defendant’s Sixth Amendment rights. Here, English arguing that McCoy lacked the requisite intent without explicitly conceding that he killed the victims would have had exactly the same effect. English did not violate McCoy’s fundamental rights by conceding guilt of a lesser included offense. The majority should not have recognized a new fundamental right and decided its violation amounted to structural error when that issue was not raised.

**Key Terms:**

**Perjury** - Willfully making a false statement under oath about a material matter.

**6th Amendment Right to Counsel** - Right of a person accused of a crime to have the help of an attorney throughout any criminal prosecution.

**Structural Error** - An error in a criminal trial that affects the entire framework of a trial, not just the trial process, and requires automatic reversal with no harmless-error review. Examples include a biased judge or denying the right to counsel.

# Florida v. Nixon

#### United States Supreme Court 543 U.S. 175 (2004)

#### Rule of Law

**When a defendant in a capital trial is nonresponsive after being advised of the best strategy for avoiding a death sentence, the attorney’s choice to use that strategy is judged under the ordinary ineffective assistance of counsel standard.**

#### Facts

Joe Elton Nixon (defendant) brutally murdered Jeanne Bickner and made a full confession to police. Nixon’s appointed counsel, Michael Corin, conducted an investigation before determining that there was no question as to Nixon’s guilt. Corin attempted to negotiate a plea agreement, but the prosecution would not drop the death penalty. Corin then made a tactical decision to concede guilt at trial so that his request for mercy during sentencing would be more effective. Corin tried to consult with Nixon about this plan three times, but Nixon did not participate or consent to the strategy. At trial, Nixon became so unmanageable that the judge had to remove him. Nixon then waived his right to be present. Corin conceded guilt as planned and presented extensive mitigating evidence related to Nixon’s mental state and capacity in hopes of avoiding a death sentence. The jury convicted Nixon and sentenced him to death. The Florida State Supreme Court overturned the conviction and ordered a new trial.

#### Issue

Is a criminal defendant entitled to reversal on the grounds of ineffective assistance of counsel if the attorney did not obtain the defendant’s express consent to conceding guilt?

#### Holding and Reasoning (Ginsburg, J.)

No. When a defendant in a capital trial is nonresponsive after being advised of the best strategy for avoiding a death sentence, the attorney’s choice to use that strategy is judged under the ordinary ineffective assistance of counsel standard. Thus, the question is whether the attorney’s actions were “below an objective standard of reasonableness.” The presumption of prejudice created when an attorney does not “meaningfully…oppose the prosecution’s case” set forth in *United States v. Cronic*, 466 U.S. 648 (1984), is inapplicable here. Under *Strickland v. Washington*, 466 U.S. 668 (1984), an attorney in a criminal trial is required to confer with the defendant about “important decisions,” such as the overall trial strategy. It is inherent in the duty to consult that an attorney cannot make significant decisions related to the defendant’s fundamental rights without the defendant’s consent. For example, only the defendant can decide whether to waive a trial or a jury, whether to testify, or whether to appeal. In this case, the lower court held that Corin’s trial strategy was tantamount to a guilty plea made without Nixon’s consent. Corin made multiple attempts to consult with Nixon about the defense, and Corin’s decision to go forward when Nixon did not object was not unreasonable. Corin’s choice to admit guilt might be problematic in a case not involving the death penalty. However, escaping a death sentence is sometimes the best hope in cases where guilt is clear and the prosecution is unwilling to plea bargain. Indeed, even famed attorney Clarence Darrow attempted to use a version of Corin’s trial strategy in the past. There is no bright line rule requiring explicit consent in capital cases. If the rule set forth in *Strickland*is met, the ineffective assistance of counsel claim fails. The ruling of the Florida Supreme Court is reversed.

**Key Terms:**

**Ineffective Assistance of Counsel -** Representation by an attorney that is so unreasonable as to deny the defendant the right to a fair trial.

**Right to Effective Assistance of Counsel -** The right to counsel guaranteed by the Sixth Amendment to the U.S. Constitution and some state laws.

**Cooke v. State**

977 A.2d 803

Supreme Court of Delaware.

**James COOKE, Defendant Below–Appellant,**

**v.**

**STATE of Delaware, Plaintiff Below–Appellee.**

Nos. 289 & 324, 2007.

Submitted: April 8, 2009.Decided: July 21, 2009.

## Synopsis

**Background:** Defendant was convicted in the Superior Court, New Castle County, of rape in the first degree, burglary in the first degree, arson in the first degree, and two counts of murder in the first degree, and was sentenced to death. Defendant appealed.

**Holdings:** The Supreme Court, [Ridgely](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0164213501&originatingDoc=I00b13a6d779911de8bf6cd8525c41437&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I00b13a6d779911de8bf6cd8525c41437), J., held that:

[1](https://1.next.westlaw.com/Document/I00b13a6d779911de8bf6cd8525c41437/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_anchor_F112019440224) defense counsel's proceeding with strategy seeking a verdict of guilty but mentally ill, over defendant's objection and claim that he was innocent and not mentally ill, violated defendant's fundamental right to plead not guilty;

[2](https://1.next.westlaw.com/Document/I00b13a6d779911de8bf6cd8525c41437/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_anchor_F132019440224) defendant's right to testify in his own defense was unconstitutionally negated;

[3](https://1.next.westlaw.com/Document/I00b13a6d779911de8bf6cd8525c41437/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_anchor_F142019440224) defendant's rights to an impartial jury at guilt and sentencing phases were violated;

[4](https://1.next.westlaw.com/Document/I00b13a6d779911de8bf6cd8525c41437/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_anchor_F202019440224) prejudice would be presumed on ineffective assistance claim, as counsel's overriding defendant's decisions regarding fundamental rights created a structural defect in the proceedings as a whole;

[5](https://1.next.westlaw.com/Document/I00b13a6d779911de8bf6cd8525c41437/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_anchor_F242019440224) trial court failed to protect defendant's right to a fair trial by failing to address conflict between defendant and defense counsel; and

[6](https://1.next.westlaw.com/Document/I00b13a6d779911de8bf6cd8525c41437/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_anchor_F392019440224) defendant's girlfriend's consent to police seizure of various items from her residence was voluntary.

Reversed and remanded for new trial.

[Steele](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0249798001&originatingDoc=I00b13a6d779911de8bf6cd8525c41437&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I00b13a6d779911de8bf6cd8525c41437), C.J., and [Jacobs](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0173419901&originatingDoc=I00b13a6d779911de8bf6cd8525c41437&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I00b13a6d779911de8bf6cd8525c41437), J., dissented and filed opinion.

**State v. Carter**

270 Kan. 426

Supreme Court of **Kansas**.

**STATE of Kansas, Appellee,**

**v.**

**Jerome G. CARTER, Appellant.**

No. 82,590.

Dec. 15, **2000**.

**Synopsis**

Defendant was convicted in the District Court, Sedgwick County, [James R. Fleetwood](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0294265601&originatingDoc=I0a3d7530f55711d9b386b232635db992&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I0a3d7530f55711d9b386b232635db992), J., of first-degree murder, aggravated robbery, and criminal possession of a firearm, for which he received a hard 40 sentence plus 199 months. Defendant appealed. The Supreme Court, [Allegrucci](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0235034301&originatingDoc=I0a3d7530f55711d9b386b232635db992&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I0a3d7530f55711d9b386b232635db992), J., held that: (1) defense counsel's imposition of guilt-based defense against defendant's wishes violated defendant's fundamental right to enter plea of not guilty, interfered with defendant's due process right to a fair trial, and deprived defendant of effective assistance of counsel that was prejudicial per se, and (2) testimony of murder victim's father was immaterial and served only to inflame jury against defendant, and thus should not have been admitted.

Reversed and remanded.

**Faretta v. California**

United States Supreme Court  
422 U.S. 806 (1975)

**Rule of Law**

**The right to defend is personal and defendants have the constitutional right to represent themselves at trial if they so choose.**

**Gonzalez v. United States**

United States Supreme Court  
553 U.S. 242 (2008)

**Rule of Law**

**A magistrate judge can be assigned the additional duty of presiding over voir dire and jury selection in a felony case with the express consent of counsel alone and without consent of the client.**

**Facts**

[Information not provided in casebook excerpt.]

**Issue**

Can consent to have a magistrate judge assigned the additional duty of presiding over voir dire and jury selection in a felony case be given by counsel acting on behalf of the client but without the client’s own express consent?

**Holding and Reasoning (Kennedy, J.)**

Yes. Under the Federal Magistrate Act (Act), a magistrate judge can be assigned the additional duty of presiding over voir dire and jury selection in a felony case with the express consent of counsel alone. Attorneys must be given substantial authority in the tactical conduct of the trial. And, given judges’ differing approaches to voir dire, assenting to the assignment of a magistrate judge is a tactical trial decision. Thus, as the Act does not specify a specific procedure for ascertaining consent, an attorney’s consent fulfills the requirements of the Act, as part of his trial strategy. Moreover, the choice of a magistrate judge conducting voir dire does not reach the level of a trial choice that is so fundamentally important that the client’s consent is required. Importantly, this case is not one where the client has objected to the attorney’s decision to assent to a magistrate judge’s participation.

**Concurrence (Scalia, J.)**

The distinction between a tactical choice and a fundamental right choice is unclear. Even pleading guilty can, in a sense, be a tactical choice. A rule should be adopted allowing all waivable rights—except the right to counsel—to be waived by counsel.

**Dissent (Thomas, J.)**

The majority’s reading of the Act is improper. The Act does not allow a magistrate judge to conduct voir dire, even with consent of the parties.

**Key Terms:**

**Voir Dire** - French meaning “to speak the truth,” the process by which the judge or an attorney questions a potential juror to assess the person’s suitability for sitting on the jury. Voir dire also may be used to qualify a witness as an expert during trial, or to explore certain aspects of a witness’s testimony out of the jury’s presence.

# Jones v. Barnes

#### United States Supreme Court 463 U.S. 745 (1983)

#### Rule of Law

**An attorney assigned to represent a criminal defendant on appeal is under no duty to raise every non-frivolous issue.**

#### Facts

David Barnes (plaintiff) was convicted of robbery and assault in a New York state court. Attorney Michael Melinger was assigned to represent Barnes on his appeal. Barnes asked Melinger to raise a number of issues on appeal, but Melinger concentrated on three of the issues, and rejected two others requested by Barnes. Barnes submitted a *pro se* brief presenting the three issues plus the other two issues rejected by Melinger to the appellate court. The appellate court affirmed Barnes’ conviction. After a number of post-conviction relief remedies proved unsuccessful, Barnes filed a writ of habeas corpus in federal district court against Jones (defendant), superintendent of the Great Meadow Correctional Facility where Barnes was incarcerated. Barnes alleged that Melinger’s failure to assert all the non-frivolous arguments Barnes had requested was a denial of his Sixth Amendment right to the effective assistance of counsel. The district court dismissed Barnes’ petition. A divided panel of the court of appeals reversed and held that Melinger was required to assert all legal issues. The U.S. Supreme Court granted certiorari.

#### Issue

Is an attorney assigned to represent a criminal defendant on appeal under a duty to raise every non-frivolous issue?

#### Holding and Reasoning (Burger, C.J.)

No. An attorney assigned to represent a criminal defendant on appeal is under no duty to raise every non-frivolous issue. A court-created rule that the client, not the trained attorney, is in control of which legal issues are to be presented undermines the purpose of having legal counsel. That is, utilizing the attorney’s training, experience, and professional judgment to present the legal issues he believes are most important. Most cases usually present three significant issues. If a defendant is unable to be successful on a few issues, he likely is not going to be successful by raising even more issues. The effect of adding weak arguments will be to dilute the force of the stronger ones. R. Stern, Appellate Practice in the United States, 266 (1981). Therefore, one of the largest benefits of having legal counsel is for him to pick out the most important issues for review. For judges to impose upon appointed counsel a duty to raise every “colorable” claim suggested by a client would dilute the goal of vigorous and effective advocacy. The judgment of the court of appeals is reversed and the matter is remanded for further proceedings consistent with the opinion.

#### Dissent (Brennan, J.)

The Sixth Amendment provides that “[i]n all criminal prosecutions, the accused shall enjoy the right…to have the Assistance of Counsel.” In *Faretta v. California*, 422 U.S. 806 (1975), the Court allowed a criminal defendant to represent himself at trial. In doing so, the Court noted that the right to defend against a criminal charge is personal. It is the defendant, not the lawyer, who suffers the consequences of a conviction. Thus, it is the defendant who must be free to decide whether to advance specific issues.

**Key Terms:**

**Writ of Habeas Corpus** - Enables a detainee or prisoner to challenge the legality of his detention by the government.

**Pro Se -** Representing oneself without the assistance of counsel.

**Right to Effective Assistance of Counsel -** The right to counsel guaranteed by the Sixth Amendment to the U.S. Constitution and some state laws.

# Godinez v. Moran

#### United States Supreme Court 509 U.S. 389 (1993)

#### Rule of Law

**The competency to plead guilty or to waive the right to counsel must be measured by the same standard as the competency standard for standing trial.**

#### Facts

The defendant was charged with murder. He fired his attorneys, waived his right to counsel, and pled guilty. He was convicted and sentenced to death. He appealed, arguing that he was not sufficiently competent to waive his right to counsel and plead guilty.

#### Issue

Is the competency to plead guilty and waive the right to counsel measured by a different standard than the competency standard for standing trial?

#### Holding and Reasoning (Thomas, J.)

No. To be deemed competent to stand trial, a defendant must be able to understand the proceedings and functionally consult with his lawyer. The competency to plead guilty or to waive the right to counsel is measured by the same standard. That is not to say, however, that a defendant who is deemed competent to stand trial is automatically able to plead guilty or waive the right counsel without further inquiry. In determining whether a defendant may plead guilty and waive his right to counsel, the court must determine that the defendant’s waiver of rights is knowing and voluntary, in addition to being competent. In this case, the Court rejects the defendant’s argument that a higher competency standard is necessary for pleading guilty and waiving the right to counsel. The conviction is affirmed.

**Key Terms:**

**The Dusky Standard -** [from *Dusky v. United States*, 420 U.S. 162 (1960)] Provides that a defendant has the right to a competency evaluation before his trial and that the standard for competency to stand trial is whether the defendant has “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and a “rational as well as factual understanding of the proceedings against him.”

**Competency -** The ability of a criminal defendant to understand the nature of proceedings, cooperate with defense counsel, and meaningfully participate in the defense.

**Right to Counsel** - Sixth Amendment guarantee that a defendant is entitled to be represented by an attorney during a criminal prosecution.

**Brookhart v. Janis**

86 S.Ct. 1245

Supreme Court of the United States

**James BROOKHART, Petitioner,**

**v.**

**Martin A. JANIS, Director of Ohio Department of Hygiene and Correction.**

No. 657.

Argued March 21, 22, **1966**.Decided April 18, **1966**.

## Synopsis

Habeas Corpus proceeding by Ohio defendant. The Supreme Court of [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I7c443da5d94811d98ac8f235252e36df&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=8dec4fc5bc3b464592a250f685cf65e7&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[Ohio, 2 Ohio St.2d 36, 205 N.E.2d 911,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1965116219&pubNum=578&originatingDoc=I9893a31a9c1c11d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))ordered defendant remanded to custody, and certiorari was granted. The Supreme Court, Mr. Justice Black, held that record did not establish that defendant, who emphasized in open court that he was not pleading guilty, had intelligently and knowingly waived right to confront and cross-examine witnesses, although his attorney agreed to ‘prima facie trial’ which was practical equivalent of guilty plea and in which defendant did not have right to confrontation and cross-examination.

Reversed and remanded.

Mr. Justice Harlan dissented in part.

# Nix v. Whiteside

#### United States Supreme Court 475 U.S. 157 (1986)

#### Rule of Law

**While counsel must take all reasonable and lawful means to attain the objectives of the client, counsel may not assist the client in presenting false evidence or otherwise violating the law.**

# Strickland v. Washington

#### United States Supreme Court 466 U.S. 668 (1984)

#### Rule of Law

**To establish the ineffective assistance of counsel, a convicted defendant must show that his counsel’s performance was deficient because the lawyer did not act as a reasonably competent attorney, and that he was prejudiced by the deficiency because there is a reasonable probability that, but for his attorney’s unprofessional errors, the result of the proceeding would have been different.**

# United States v. Cronic

#### United States Supreme Court 466 U.S. 648 (1984)

#### Rule of Law

**In the absence of a showing of particularized errors by defense counsel, a defendant claiming a violation of the Sixth Amendment right to the effective assistance of counsel must demonstrate that the totality of the circumstances supports a presumption of ineffective assistance.**

# McKaskle v. Wiggins

#### United States Supreme Court 465 U.S. 168 (1984)

#### Rule of Law

**A pro se defendant’s Sixth Amendment rights are not violated when a judge appoints a standby counsel.**

# United States v. Gonzalez-Lopez

#### United States Supreme Court 548 U.S. 140 (2006)

#### Rule of Law

**If a trial court errs by denying a defendant’s choice of counsel, the court must reverse the defendant’s conviction without harmless error analysis.**

# Arizona v. Fulminante

#### United States Supreme Court 499 U.S. 279 (1991)

#### Rule of Law

**The harmless-error doctrine applies to coerced confessions wrongly introduced as evidence at trial.**

**Weaver v. Massachusetts**

#### United States Supreme Court 137 S. Ct. 1899 (2017)

#### Rule of Law

**Ineffective assistance of counsel raised on collateral review is a structural error requiring a new trial only if the defendant shows prejudice or fundamental unfairness.**

**Yates v. Evatt**

111 S.Ct. 1884

Supreme Court of the United States

**Dale Robert YATES**

**v.**

**Parker EVATT, Commissioner, South Carolina Department of Corrections, et al.**

No. 89-7691.

Argued Jan. 8, 1991.Decided May 28, 1991.

**Synopsis**

After defendant's murder conviction was affirmed on direct appeal, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I2b00c24902e411da9439b076ef9ec4de&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[280 S.C. 29, 310 S.E.2d 805,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984101498&pubNum=711&originatingDoc=I862ead949c9011d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) defendant petitioned for writ of habeas corpus. The Supreme Court of South Carolina denied writ by summary order, and the United States Supreme Court, [474 U.S. 896, 106 S.Ct. 218, 88 L.Ed.2d 218,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985250965&pubNum=708&originatingDoc=I862ead949c9011d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) vacated and remanded for reconsideration. On remand, the Supreme Court of South Carolina, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I2dc319ca02e811da8ac8f235252e36df&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[290 S.C. 231, 349 S.E.2d 84,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986150497&pubNum=711&originatingDoc=I862ead949c9011d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) denied petition, and the United States Supreme Court, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Id4c2a1549c1d11d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[484 U.S. 211, 108 S.Ct. 534, 98 L.Ed.2d 546,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988007130&pubNum=708&originatingDoc=I862ead949c9011d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) remanded. The Supreme Court of [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I9cc1c42f02ed11da83e7e9deff98dc6f&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[South Carolina, 391 S.E.2d 530,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990084166&pubNum=711&originatingDoc=I862ead949c9011d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) again denied petition, and defendant sought writ of certiorari. The Supreme Court, Justice [Souter](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0263202201&originatingDoc=I862ead949c9011d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I862ead949c9011d993e6d35cc61aab4a), held that: (1) Supreme Court of South Carolina failed to apply proper harmless error standard, and (2) unconstitutional jury instructions on malice could not be excused as harmless error.

Reversed and remanded.

Justice [Blackmun](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0264439801&originatingDoc=I862ead949c9011d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I862ead949c9011d993e6d35cc61aab4a) concurred in part.

Justice [Scalia](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254763301&originatingDoc=I862ead949c9011d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I862ead949c9011d993e6d35cc61aab4a) filed opinion concurring in part and concurring in the judgment, in which Justice [Blackmun](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0264439801&originatingDoc=I862ead949c9011d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I862ead949c9011d993e6d35cc61aab4a) joined in part.

# Harris v. New York

#### United States Supreme Court 401 U.S. 222 (1971)

#### Rule of Law

**Statements made by a suspect who has not received the *Miranda* warnings may be admitted at trial for impeachment purposes.**

#### Facts

Harris (defendant) was arrested for selling drugs to an undercover police officer. At trial, Harris testified. During cross examination, the prosecution attempted to impeach Harris’ earlier testimony by asking questions about unwarned statements Harris made following arrest. The jury was instructed that the statements could only be used to assess Harris’ credibility. The statements were not used during the prosecution’s case in chief. Both attorneys discussed the statements during closing arguments. Harris was found guilty. In a per curiam opinion, the Court of Appeals of New York affirmed the conviction. The United States Supreme Court granted certiorari.

#### Issue

May statements made by a suspect who has not received the *Miranda*warnings be admitted at trial for impeachment purposes?

#### Holding and Reasoning (Burger, C.J.)

Yes. Unwarned statements may be used at trial for impeachment purposes. Miranda prohibits the prosecution from using unwarned statements to prove its case in chief. This serves to deter police from violating Miranda. Although dicta contained in the Miranda opinion suggests that unwarned statements may never be admitted, those pronouncements are not binding. In Walder v. United States, 347 U.S. 62 (1954), this Court held that evidence that had been barred from use in the government’s case-in-chief by the exclusionary rule could be used to impeach the witness by an inconsistent statement. The fact that Walder was impeached on collateral matters and Harris was impeached on issues directly related to the crimes charged does not prevent application of the rule in Walder to this case. Reliable unwarned statements may be used at trial for purposes other than the prosecution’s case in chief. Defendants are privileged against self-incrimination, but this does not mean that defendants may perjure themselves. Harris’s testimony conflicted with earlier statements made to police. The prosecutor used those earlier conflicting statements impeach Harris’ testimony, and those statements would certainly have been admissible if made to any other witness. Evidence of those statements was useful to jury members tasked with evaluating Harris’ credibility. Harris’ statements were properly admitted for purposes of impeachment, and the ruling of the lower court is affirmed.

#### Dissent (Brennan, J.)

The unwarned statements in this case were inadmissible under *Miranda*. Allowing illegally obtained statements to be used for impeachment purposes threatens the privilege against self-incrimination and may make suspects fear taking the stand in their own defense. *Miranda*specifically forbids the use of unwarned statement for impeachment purposes. The Court’s ruling compromises one of the key goals of *Miranda*:  deterring unconstitutional behavior by police.

**New York v. Hill**

120 S.Ct. 659

Supreme Court of the United States

**NEW YORK, Petitioner,**

**v.**

**Michael HILL.**

No. 98–1299.

Argued Nov. 2, 1999.Decided Jan. 11, 2000.

**Synopsis**

Defendant charged with murder and robbery moved to dismiss indictment pursuant to Interstate Agreement on Detainers (IAD). The County Court, Monroe County, [David D. Egan](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0191876001&originatingDoc=I6b35a0e29c2511d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I6b35a0e29c2511d9bc61beebb95be672), J., [164 Misc.2d 1032, 627 N.Y.S.2d 234,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995118869&pubNum=602&originatingDoc=I6b35a0e29c2511d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) denied motion, finding that defendant had waived his right under IAD to trial within 180 days. Defendant appealed, and the New York Supreme Court, Appellate Division, affirmed, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ib2e331e7d9a711d9a489ee624f1f6e1a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[244 A.D.2d 927, 668 N.Y.S.2d 126.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997230725&pubNum=602&originatingDoc=I6b35a0e29c2511d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) Defendant appealed. The New York Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I5f6ea589d99d11d9bf60c1d57ebc853e&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[92 N.Y.2d 406, 704 N.E.2d 542, 681 N.Y.S.2d 775,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1998235368&pubNum=602&originatingDoc=I6b35a0e29c2511d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))reversed and ordered that indictment be dismissed. Certiorari was granted. The United States Supreme Court, Justice [Scalia](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254763301&originatingDoc=I6b35a0e29c2511d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I6b35a0e29c2511d9bc61beebb95be672), held that: (1) defense counsel could effectively waive defendant's right to be brought to trial within 180-day period specified under IAD, by agreeing to a trial date outside that time period, even without express consent by defendant; (2) societal benefit from time limits provided under IAD did not preclude waiver; and (3) defendant need not make an “affirmative request” in order to waive IAD time limits.

Court of Appeals reversed.

# \*\*FARRETTA v. CALIFORNIA\*\*

#### United States Supreme Court 422 U.S. 806 (1975)

**Rule of Law**

**The right to defend is personal and defendants have the constitutional right to represent themselves at trial if they so choose.**

**Facts**

Faretta (defendant) was charged with grand theft in state court. Faretta had a high school education and requested that he be able to represent himself at trial. Initially, the trial judge, after warning Faretta of the dangers of representing himself, allowed Faretta to do so. However, at a hearing the judge later decided that Faretta did not have sufficient legal knowledge to represent himself. The judge then ruled that Faretta had not knowingly and intelligently waived his right to counsel and appointed him a public defender. The jury found Faretta guilty, and the judge sentenced him to prison.

**Issue**

Does a defendant in a state criminal proceeding have the constitutional right to reject the assistance of counsel and represent himself at trial?

**Holding and Reasoning (Stewart, J.)**

Yes. Defendants have the constitutional right to represent themselves at trial. First, such a right is implied in the Sixth Amendment. The Sixth Amendment outlines what a constitutionally complete defense requires. The rights outlined in the amendment–the right to notice, confrontation and compulsory process–are personal rights given to the defendant to make his own defense. He can therefore represent himself if he decides it would be the best course of action. Furthermore, the plain language of the Sixth Amendment speaks to the “assistance” of counsel. If counsel is imposed on the defendant, the defendant is no longer in charge of his own defense but is subject to the will of the attorney. Second, history supports the position that states may not impose counsel on unwilling defendants. From the common law of the seventeenth century, to the American colonies, self-representation has been the norm. While the Founders saw the benefit of having counsel present, there is no indication that they intended that the right to counsel be a compulsory one. In addition, defendants have had the right to represent themselves in federal courts since the United States was founded and most states today allow defendants to do so as well. Finally, forcing counsel on an unwilling defendant could actually hurt his case. The defendant could become convinced that the law works against him. Also, there are times when a defendant could actually represent himself more effectively than an attorney could. Therefore, defendants may knowingly and intelligently waive their right to counsel. This is what Faretta did in this case. He made it clear to the judge that he wanted to represent himself. He was literate, competent, understanding, and had been warned of the dangers of representing himself. He was therefore denied his constitutional right to conduct his own defense when the state courts forbade him to represent himself.

**Dissent (Burger, J.)**

There is no independent basis in the Constitution supporting the position that criminal defendants have a constitutional right to represent themselves at trial. The Court is wrong to assume that such a right is implied in the Constitution. The rights proffered in the Sixth Amendment are mandatory and guarantee that all defendants will receive the fullest defense possible. This will generally require the assistance of counsel at trial. In addition, the majority’s use of history to justify its conclusion is not only misplaced but it is also misleading. The Court takes examples of common law and early American law out of context. Furthermore, when the Court points to the federal court system, its holding is actually weakened. Federal courts have allowed self-representation since congress passed the Judiciary Act. If the right were embedded in the Sixth Amendment, no law would be necessary. In addition, the Judiciary Act was passed at approximately the same time as the Constitution, and both documents were drafted by many of the same people. Including the right in the statute but not in the Constitution suggests that there is no constitutional right to self-representation.

**Dissent (Blackmun, J.)**

The Court’s holding will lead to a number of procedural problems. Some of the unanswered questions which will plague the courts include: Should a pro se defendant be treated differently than counsel would? Does the pro se defendant have the right to change his mind during the trial?

**Key Terms:**

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

**Pro Se -** Representing oneself without the assistance of counsel.

# Singer v. United States

#### United States Supreme Court 380 U.S. 24 (1965)

#### Rule of Law

**A criminal defendant does not have a constitutional right to waive the right to a jury trial in favor of a bench trial.**

#### Facts

Singer (defendant) was charged by the United States government (plaintiff) in federal district court with 30 counts of mail fraud. At the start of the scheduled jury trial, Singer offered to waive his right to a jury trial in order to save time. Rule 23(a) of the Federal Rules of Criminal Procedure (FRCP) allows a defendant to waive the right to a jury trial with the approval of the court and the consent of the government. The trial court was willing to approve the waiver, but the government refused to consent. Singer was convicted by a jury on 29 of the 30 counts. Singer appealed, challenging FRCP 23(a) on the basis that Article III, Section 2 of the United States Constitution and the Sixth Amendment guarantee not only the right to trial by jury, but also the right to waive a jury trial in favor of a judge trial. The court of appeals affirmed. The United States Supreme Court granted certiorari.

#### Issue

Does a criminal defendant have a constitutional right to waive the right to a jury trial in favor of a bench trial?

#### Holding and Reasoning (Warren, C.J.)

No. Nothing in the common law or the United States Constitution grants a defendant the absolute right to demand a bench trial when a jury trial is required by law. Prior to the drafting of the United States Constitution, English common law gave no indication that a defendant had the right to demand a judge trial. Although some American colonies permitted a defendant to waive the jury-trial right, there was no general recognition by the colonies of the right to be tried by a judge instead of a jury. Article III, Section 2 of the U.S. Constitution directs that trials of all crimes shall be by jury. The intent of the framers of the U.S. Constitution was to protect defendants from government oppression, which is perhaps why there is no mention of a right to waive the jury-trial requirement. This Court examined Article III, Section 2 and the Sixth Amendment in *Patton v. United States*, 281 U.S. 276 (1930), and determined that the defendants in federal cases could waive the jury-trial right, but only with the consent of the government and the approval of the court. The only trial right guaranteed by the Constitution is the right to a trial by an impartial jury. Requiring the consent of the government for a jury waiver is proper, because the government also has an interest in trying cases by the method that the Constitution directs is most fair. The result of a lack of consent or court approval is a trial by an impartial jury, which the Constitution guarantees. FRCP 23(a) is constitutional, because requiring a jury trial against the wishes of a defendant does not violate fair-trial or due-process rights. The government is not compelled to provide any reason for failure to consent to a jury waiver under FRCP 23(a). There may be a future case where a defendant presents a compelling reason to demand a judge trial where a jury trial is required. In this case, however, Singer failed to demand a judge trial and only requested the waiver to save time. This is not a compelling reason to require a judge trial. Accordingly, the judgment of the court of appeals is affirmed.

**Key Terms:**

**Right to a Jury Trial** - A constitutional right to a jury trial exists under the Sixth Amendment, in federal and state criminal trials where a defendant faces punishment of greater than six months’ imprisonment, and under the Seventh Amendment, in federal civil cases where a plaintiff seeks money damages.

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

# Article II, Section 2, Clause 3 of the United States Constitution - Directs that the trial of all federal crimes, except impeachment, shall be by jury.

# Martinez v. Court of Appeal of California

#### United States Supreme Court 528 U.S. 152 (2000)

#### Rule of Law

**A state is not obligated to recognize a constitutional right to self-representation on direct appeal from a criminal conviction.**

#### Facts

Martinez (defendant) was charged with embezzlement and chose to represent himself at trial. He was convicted. He appealed and attempted to represent himself again on appeal. The court of appeals denied this attempt and determined that he must be represented by counsel on appeal. He appealed this decision of the court of appeals. The United States Supreme Court granted certiorari.

#### Issue

Is a state obligated to recognize a constitutional right to self-representation on direct appeal from a criminal conviction?

#### Holding and Reasoning (Stevens, J.)

No. A state is not obligated to recognize a constitutional right to self-representation on direct appeal from a criminal conviction. The Sixth Amendment, upon which pro se representation is partly based, outlines defendants’ rights in “all criminal prosecutions.” Such rights do not necessarily apply in appeals. In addition, individual autonomy based on due process is not a sufficient justification for pro se representation on appeal. Given that in an appeal the defendant has already been convicted, the state’s interest in the fair and efficient administration of justice outweighs a defendant’s autonomy interests on appeal. Accordingly, in the present case, the court of appeals was not required to permit Martinez to represent himself on appeal. It was proper for the court of appeals to require that he be represented by counsel. The court of appeals is affirmed.

**Key Terms:**

**Pro Se Representation -** Representing oneself without the assistance of counsel.

# Powell v. Alabama (Scottsboro Boys Trial)

#### United States Supreme Court 287 U.S. 45 (1932)

#### Rule of Law

**Due process requires that criminal defendants have the right to counsel both at trial and in the time leading up to trial when consultation and preparation take place.**

# Johnson v. Zerbst

#### United States Supreme Court 304 U.S. 458 (1938)

#### Rule of Law

**The Sixth Amendment guarantees the right of a criminal defendant to a lawyer's assistance, unless the defendant knowingly and intelligently waives that right.**

# Gideon v. Wainwright

#### United States Supreme Court 372 U.S. 335 (1963)

#### Rule of Law

**The Fourteenth Amendment incorporates the Sixth Amendment right to counsel to the states.**

# Argersinger v. Hamlin

#### United States Supreme Court 407 U.S. 25 (1972)

#### Rule of Law

**The Sixth Amendment right to counsel extends to defendants charged with any offense that carries a possible penalty of imprisonment.**

# Illinois v. Allen

#### United States Supreme Court 397 U.S. 337 (1970)

#### Rule of Law

**Removing a disruptive defendant from a criminal trial does not violate the Sixth Amendment Confrontation Clause.**

#### Facts

Allen (defendant) was a defendant in a criminal trial. Despite repeated warnings from the judge, Allen was highly disruptive and antagonistic. The judge ordered Allen’s removal so that the trial could be conducted outside his presence, but later allowed Allen to return. When Allen resumed the unruly behavior, the judge again ordered removal. Allen was permitted to return for the rest of the trial upon his promise to behave. After conviction, Allen appealed. The court of appeals held that a criminal defendant can never be denied the right to be present for trial. The United States Supreme Court granted certiorari to consider whether the Sixth Amendment prohibits removal of an unruly and highly disruptive criminal defendant.

#### Issue

Does removing a disruptive defendant from a criminal trial violate the Sixth Amendment Confrontation Clause?

#### Holding and Reasoning (Black, J.)

No. A highly disruptive defendant may be constitutionally removed from a criminal trial. Under the Sixth Amendment, a criminal defendant is entitled to confront any witness against him. Inherent in this guarantee is the right to be present during proceedings. Nevertheless, criminal trials must be conducted in a dignified manner. Trial judges have a degree of flexibility to deal with those who fail to meet the minimum standards of behavior. Although there is one method for maintaining order in every case, judges may constitutionally utilize (1) physical restraints, (2) contempt citations, or (3) removal of an unruly criminal defendant. Binding and gagging a defendant would eliminate disruptive behavior so that trial could continue in the defendant’s presence. This may be constitutionally appropriate in extreme cases, but there are substantial drawbacks including risk of prejudice to the jury, inherent indignity of restraints, and reduction in the defendant’s ability to assist his attorney. Next, criminal contempt sanctions may be used, but this may have little deterrent effect on defendants threatened with serious criminal penalties. Lastly, a judge may order a defendant’s removal until he agrees to behave. In this case, Allen’s conduct was disruptive and antagonistic enough to justify binding and gagging. Allen was given multiple warnings and allowed to return with a promise of good behavior. Allen gave up his Sixth Amendment right to be present. The appellate court’s ruling is reversed.

**Key Terms:**

**Confrontation Clause -** The provision of the Sixth Amendment to the United States Constitution that guarantees a criminal defendant the right to confront the witnesses against him and conduct a reasonable cross-examination.

# Indiana v. Edwards

#### United States Supreme Court 554 U.S. 164 (2008)

#### Rule of Law

**A state court may require a defendant to be represented by a lawyer if he does not have the ability to conduct the trial himself due to severe mental illness, even if the defendant is competent to stand trial under the *Dusky* standard.**

#### Facts

Edwards (defendant) wanted to present his own defense at trial. The state court held that Edwards was mentally competent to stand trial only if represented by a lawyer; he was mentally incompetent to represent himself. The Constitutional standard for mental competency to stand trial established in *Dusky v. United States*, 420 U.S. 162 (1960), is whether the defendant can rationally communicate with his lawyer to a reasonable degree and understand the proceedings. Edwards was represented by a lawyer at trial and convicted. The Supreme Court granted certiorari to decide whether the Constitution allows a state to require that a defendant be represented by a lawyer at trial if the defendant meets the *Dusky*standard for mental competency to stand trial.

#### Issue

May a state court require a defendant to be represented by a lawyer at trial if the defendant meets the *Dusky* standard for mental competence to stand trial?

#### Holding and Reasoning (Kennedy, J.)

Yes. The right of a defendant to represent himself upholds the defendant’s dignity and autonomy. However, where a defendant lacks the mental capacity to defend himself, the events that would unfold at trial as a result of allowing him to represent himself in such a mental state are more likely to harm his dignity. Allowing a defendant in an impaired mental state to represent himself also threatens the defendant’s right to receive a fair trial. Moreover, allowing a mentally impaired defendant to conduct his own defense would not appear fair to those observing the trial. Application of only the basic *Dusky* test for mental competency to stand trial is not enough to determine whether a defendant is mentally capable of conducting his own defense at trial. The trial judge presiding over the defendant’s case is often in the best position to determine whether a particular defendant has the mental capacity to represent himself in the proceedings. States may require a defendant to be represented by a lawyer if he meets the *Dusky* standard for mental competence to stand trial but suffers from a mental illness so severe that he does not have the ability to conduct the trial himself. The judgment of the state trial court is affirmed.

#### Dissent (Scalia, J.)

The Court misconstrues the purpose behind a defendant’s right to represent himself. The loss of “dignity” that this right upholds is not the defendant embarrassing himself. It is the dignity of the defendant to choose his own fate. To uphold this dignity, the Court must honor the defendant’s choice to represent himself. The Court should not base its decision to deny the defendant’s right to represent himself because it may appear unfair to those observing the trial.

**Key Terms:**

**The Dusky Standard -** [from *Dusky v. United States*, 420 U.S. 162 (1960)] Provides that a defendant has the right to a competency evaluation before his trial and that the standard for competency to stand trial is whether the defendant has “sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding” and a “rational as well as factual understanding of the proceedings against him.”

**Competency -** The ability of a criminal defendant to understand the nature of proceedings, cooperate with defense counsel, and meaningfully participate in the defense.

**Right to Counsel** - Sixth Amendment guarantee that a defendant is entitled to be represented by an attorney during a criminal prosecution.

# Santobello v. New York

#### United States Supreme Court 404 U.S. 257 (1971)

#### Rule of Law

**When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.**

#### Facts

Santobello (defendant) was indicted on two felony counts. After negotiations, Santobello entered a plea of guilty to a lesser included offense. The offense carried a maximum sentence of one year in jail. The prosecutor promised to make no sentencing recommendations to the judge. At the sentencing hearing, a new prosecutor represented the state and recommended the maximum one-year sentence. Santobello’s attorney objected, citing the other prosecutor’s promise to make no sentencing recommendation. The sentencing judge said that he was not influenced by the prosecutor’s recommendation and that based on Santobello’s long criminal record the maximum sentence is appropriate. Santobello was sentenced to one year in jail.

#### Issue

Where a defendant pleads guilty, in part relying on a promise made by the prosecutor during their plea-bargaining, may the prosecution later go back on its promise?

#### Holding and Reasoning (Burger, C.J.)

No. Where the prosecution makes a promise to the defendant during plea negotiations, and this promise acts as an inducement to the defendant to accept the plea agreement, the prosecution is bound by its promise. Plea agreements are an important part of the criminal justice system, preserving the state interest and a defendant’s rights in a highly efficient manner. However, the agreements must be fair and entered into knowingly and voluntarily by the defendant. Therefore, when a prosecutor makes a promise that the defendant relies on in accepting the plea agreement, the prosecution is bound by this promise. In this case, while the sentencing judge claims his decision was not influenced by the prosecutor’s recommendation, in the interest of justice, the case must be remanded. The state court may decide if specific performance of the plea agreement is appropriate or whether the defendant should be given the opportunity to withdraw his guilty plea. Accordingly, the judgment below is vacated.

#### Concurrence (Douglas, J.)

When the prosecution does not hold up his end of a plea agreement, the court must decide whether specific performance or the withdrawal of the defendant’s guilty plea is the appropriate remedy. In making its decision, the court should give the defendant’s preference substantial weight.

#### Concurrence/Dissent (Marshall, J.)

When the prosecution breaks its agreement, the basis for the waiver of the defendant’s constitutional right to a trial has been undercut. Therefore, the defendant may rescind his guilty plea if he so chooses.

**Key Terms:**

**Specific Performance -** An equitable remedy that requires a specific action when monetary damages are inappropriate or too difficult to ascertain.

# Betts v. Brady

#### United States Supreme Court 316 U.S. 455 (1942)

#### Rule of Law

**Under the Due Process Clause of the Fourteenth Amendment, states are not required to appoint counsel for a criminal defendant unable to secure her own in all cases, provided that the trial is fundamentally fair.**

# McKaskle v. Wiggins

#### United States Supreme Court 465 U.S. 168 (1984)

#### Rule of Law

**A pro se defendant’s Sixth Amendment rights are not violated when a judge appoints a standby counsel.**

# United States v. Bagley

#### United States Supreme Court 473 U.S. 667 (1985)

#### Rule of Law

**Under *Brady*, the prosecution’s failure to turn over favorable evidence only requires a new trial if a reasonable probability exists that the outcome would have been different if the evidence was turned over.**

**Chapter 13 – Duty To Disclose**

# \*\*WILLIAMS v. FLORIDA\*\*

#### United States Supreme Court 399 U.S. 78 (1970)

**Rule of Law**

**(1) Requiring a criminal defendant to give notice of an alibi defense and disclose his alibi witnesses to the state prior to trial does not violate the Fifth and Fourteenth Amendments.**

**(2) The Sixth Amendment does not require trial by a jury of exactly 12 people.**

**Facts**

The Florida Rules of Criminal Procedure required a criminal defendant to give pretrial notice to the prosecution if he planned on raising an alibi defense at trial, including information about the place the defendant claimed to have been and the names and addresses of any alibi witnesses the defendant intended to call at trial. In advance of his robbery trial, Williams (defendant) moved for a protective order to be excused from the rule's requirements, arguing that the rule violated his Fifth and Fourteenth Amendment rights by compelling him to be a witness against himself. However, Williams ultimately complied with the rule after his motion was denied. Williams also filed a pretrial motion for a 12-person jury instead of the six-person jury provided by Florida law in noncapital cases; this motion was denied. Williams identified Mary Scotty as his alibi witness. Prosecutors called Scotty for a pretrial deposition. Scotty then testified at trial that Williams was at her apartment during the time of the robbery. The prosecution impeached Scotty twice during cross-examination with her deposition testimony. The state also presented the rebuttal testimony of an officer who said that Scotty had asked him for directions during the time in which she claimed to be in her apartment with Williams. The jury ultimately convicted WIlliams, and he was sentenced to life in prison. The appellate court affirmed the conviction. The United States Supreme Court granted certiorari.

**Issue**

(1) Does requiring a criminal defendant to give notice of an alibi defense and disclose his alibi witnesses to the state prior to trial violate the Fifth and Fourteenth Amendments?

(2) Does the Sixth Amendment require trial by a jury of exactly 12 people?

**Holding and Reasoning (White, J.)**

(1) No. Requiring a criminal defendant to give notice of an alibi defense and disclose his alibi witnesses to the state prior to trial does not violate the Fifth and Fourteenth Amendments. Florida's alibi-notice rule requires a defendant to disclose the witnesses he intends to use in support of an alibi defense and requires the prosecution to provide the defendant with a list of rebuttal witnesses. This rule, and similar rules in other states, are based on legitimate state interests in avoiding a surprise, fabricated alibi defense at trial. These alibi-notice rules do not violate the privilege against self-incrimination. Although the state requires a defendant to disclose his alibi witness, the defendant maintains the ability to choose whether or not to present his alibi defense. Therefore, the defendant is not “compelled” to be a witness against himself in violation of the Fifth and Fourteenth Amendments. Furthermore, nothing in the Fifth Amendment gives a defendant the right to wait until the prosecution finishes its case before he presents the nature of his defense. Finally, as Williams concedes in this case, the prosecution would have the right to a continuance if the defendant presented a surprise alibi witness at trial. During the continuance, the prosecution could take the witness's deposition and find rebuttal evidence. If that sort of continuance is permissible, then it is equally permissible to allow the same type of discovery before the trial using the pretrial alibi-notice procedure. Therefore, states may maintain their requirements for pretrial notice of alibi disclosure, and complying with Florida's alibi-notice rule did not violate Williams's constitutional rights.

(2) No. The Sixth Amendment does not require trial by a jury of exactly 12 people. The concept of a trial by jury is of great historical importance, but the requirement of a 12-person jury appears to be nothing more than a historical accident. Although the Supreme Court has previously assumed or recognized in dicta that the Constitution requires a 12-person jury, the issue has never been fully considered or decided. There is no indication that the framers of the Constitution explicitly intended to carry over the common-law practice of a 12-person jury to the Constitution's trial-by-jury requirement. Moreover, the purpose of a jury is to serve as a safeguard against government oppression, and there is no reason to believe that a six-member jury is any less capable of fulfilling this purpose than a jury of 12. A jury must be large enough to serve as a deliberative group, to be free from external pressures or intimidation, and to provide a fair chance of a representative cross-section of the community. A group of six people is as likely to achieve these goals as a group of 12. Finally, there is no indication that the size of the jury has any impact on the jury's reliability as a factfinding body. In this case, Williams was provided a six-person jury under Florida law. Because the Sixth Amendment does not require a jury of 12 people, Williams's Sixth Amendment rights were not violated. The appellate court's decision is affirmed.

**Concurrence (Burger, C.J.)**

The alibi-notice rule has an added benefit in that it may dispose of some cases without trial, which will expedite the criminal-justice process. If a prosecutor investigates a defendant's alibi witness and finds the witness to be reliable and unimpeachable, the prosecutor may dismiss the charges against the defendant. On the other hand, if a prosecutor investigates a defendant's alibi witness and finds that the alibi defense has been fabricated, the defendant's counsel may need to reexamine the case and either withdraw from the case, if the defendant has proposed using false testimony, or try and persuade the defendant to plead guilty.

**Concurrence/Dissent (Marshall, J.)**

The Court correctly decided the alibi-notice issue. However, the Fourteenth Amendment guaranteed Williams a trial by a 12-person jury, so his conviction should be reversed. The Fourteenth Amendment guarantees a criminal defendant in a state case the same right to a trial by jury as the Sixth Amendment would provide in a federal case, and this Court has previously concluded that the Sixth Amendment requires trial by a 12-person jury.

**Concurrence/Dissent (Black, J.)**

Requiring a defendant to make a pretrial disclosure of his alibi defense and his alibi witnesses is a violation of the defendant's right against self-incrimination. The Court’s holding that this type of state procedural rule is constitutional wrongly assumes that a defendant who gives the proper alibi notice to the prosecution will not be harmed if he later decides not to present his alibi defense. However, a defendant could be harmed because the prosecution now knows someone else to question, who may be able to lead the prosecution to more incriminating evidence regarding the defendant. The plain language of the Constitution clearly prohibits such a rule. The Fifth Amendment protects a defendant from being compelled to give the prosecution any evidence that could be used to convict him. The burden is clearly placed on the state to find its own evidence and develop its own case without any help from the defendant. The holding today is not only unconstitutional, but it opens the door for states to compel further information from the defense prior to trial.

**Key Terms:**

**Fifth Amendment** - An amendment added to the U.S. Constitution as part of the Bill of Rights that provides important protections from government actions, including a guarantee that no person will be required to answer for a capital crime unless first indicted by a grand jury; no one will suffer double jeopardy; no one must testify against himself or herself; no one will be deprived of life, liberty, or property without due process of law; and no property will be taken for public use without just compensation.

**Fourteenth Amendment –** Provides that all persons born or naturalized in the United States are U.S. citizens. Also provides that no state shall: (1) abridge the privileges or immunities of a U.S. citizen; (2) deprive any person of life, liberty, or property, without due process of law; or (3) deny equal protection of the laws to anyone within its jurisdiction.

# Pennsylvania v. Ritchie

#### United States Supreme Court 480 U.S. 39 (1987)

#### Rule of Law

**The Confrontation Clause of the Sixth Amendment does not compel pretrial discovery.**

# United States v. Ruiz

#### United States Supreme Court 536 U.S. 622 (2002)

#### Rule of Law

**Federal prosecutors are not constitutionally obligated to disclose impeachment information relating to any informants or other witnesses before entering into a binding plea agreement with a criminal defendant.**

#### Facts

After immigration agents found marijuana in luggage belonging to Ruiz (defendant), federal prosecutors offered her a “fast track” plea bargain, whereby a defendant will waive indictment, trial and an appeal in return for a lesser sentence. The agreement stated that any information establishing the defendant’s innocence would be turned over to the defendant. Moreover, the defendant must “waive the right” to receive “impeachment information relating to any informants or other witnesses” and the right to receive information supporting possible affirmative defenses if the case goes to trial. Ruiz refused the last condition, the government indicted her, but Ruiz ultimately pleaded guilty to the drug change. At sentencing, Ruiz asked for the same sentence that prosecutors would have given her had she signed the “fast track” plea bargain agreement, but the government opposed the request and the district court denied it, giving her instead the typical longer sentence. Ruiz appealed to the United States Court of Appeals for the Ninth Circuit, and that court vacated the lower court’s judgment, pointing out that the Constitution requires that prosecutors make certain impeachment information available to defendants before trial. The Ninth Circuit said that this obligation requires that a defendant receive the same information before a plea bargain. The same court said the Constitution prohibits defendants from waiving their right to that information and invalidated the “fast track” plea bargain because it included the waiver.

#### Issue

Are federal prosecutors constitutionally obligated to disclose impeachment information relating to any informants or other witnesses before entering into a binding plea agreement with a criminal defendant?

#### Holding and Reasoning (Breyer, J)

No. Federal prosecutors are not constitutionally obligated to disclose impeachment information relating to any informants or other witnesses before entering into a binding plea agreement with a criminal defendant. It is true that the Constitution, as part of its “fair trial” guarantee, provides that defendants have a right to exculpatory impeachment information. But a plea bargain is not a trial. The Ninth Circuit said that a guilty plea is not truly voluntary unless the prosecutors provided the same type of impeachment information that they would have provided to a defendant going to trial. We decide today whether the Constitution requires the pre-guilty plea disclosure of impeachment information. First, impeachment information is relevant to the fairness of a trial, not to the question of whether a plea has been voluntarily made. The Constitution does not require that a prosecutor make available to a defendant all possible useful information, including impeachment information. Also, one cannot characterize impeachment information as critical information to which the defendant is absolutely entitled, because of the nature of the information and the fact that the defendant may use it, or may decide not to use it. A defendant may use the impeachment information, but this fact depends on his knowledge of the prosecutor’s potential case, and the Constitution does not require the prosecutors to disclose such information. Next, there is no authority that would support the Ninth Circuit’s decision. On the contrary, our prior decisions have shown that the Constitution does not require the defendant’s complete knowledge of the relevant circumstances surrounding his case, but will allow a court to accept a guilty plea, with a waiver of certain constitutional rights, even if the defendant is unaware of certain circumstances. Furthermore, the Ninth Circuit spoke of the defendant’s trial-related “rights,” but those rights are sometimes limited, as in this case. Here, Ruiz’s “rights” depend on her having independent knowledge of the prosecutor’s case, and we think that this goes too far. In the plea agreement Ruiz considered, the prosecutor was obligated to turn over to her any information establishing the defendant’s innocence. We think that this is enough of a safeguard of Ruiz’s rights. Finally, we feel that having a constitutional obligation to provide impeachment information will interfere with the government’s interest in securing guilty pleas that are factually justified, desired by the defendants, and serve the ends of justice. Forcing the government to reveal impeachment information might result in witnesses’ and informants’ identities being revealed and concomitant harm to them. The government might also start to abandon its heavy reliance on plea bargaining, which is a resource-saving device. We see no reason why due process concerns require us to change the requirement in the way demanded by the defendant. For the foregoing reasons, we reverse the decision of the Ninth Circuit.

# Wardius v. Oregon

#### United States Supreme Court 412 U.S. 470 (1973)

#### Rule of Law

**Notice-of-alibi rules require reciprocal discovery.**

#### Facts

Oregon (plaintiff) prosecuted Wardius (defendant) for dealing drugs. At trial, Wardius wanted to call an alibi witness to testify that Wardius was elsewhere on the night in question, but the court did not allow it because Wardius had not provided the prosecution with prior notice of his alibi defense in accordance with Oregon’s rules of criminal procedure. Wardius then took the stand himself and attempted to testify about his alibi, but the court again refused to allow it. Wardius was convicted and appealed on the ground that the court prevented him from presenting his alibi defense. After the Oregon appellate courts affirmed his conviction, the Supreme Court granted review.

#### Issue

Do notice-of-alibi rules require reciprocal discovery?

#### Holding and Reasoning (Marshall, J.)

Yes. Notice-of-alibi rules require reciprocal discovery. Many states have adopted notice-of-alibi rules. Liberal discovery promotes the ends of justice by giving both sides the most information possible to prepare their cases and reduce surprises at trial. States may adopt procedural rules that enhance the fairness of the adversarial system. In *Williams v. Florida*, 399 U.S. 78 (1970), the Supreme Court upheld Florida’s notice-of-alibi rule as constitutional. However, Florida’s rule required reciprocity, meaning the prosecution also had to provide notice of the witnesses and evidence it intended to use to refute the accused’s alibi defense. For that reason, the *Williams* court noted that the constitutionality of a notice-of-alibi rule might depend on whether the accused has a right to reciprocal discovery. Due process requirements balance the respective power of the prosecution and the accused. Unlike Florida, Oregon does not give the accused discovery rights, not even a bill of particulars. More important, Oregon does not require the prosecution to disclose the witnesses it will use to refute an alibi defense. Due process does not itself require that disclosure. However, making the accused but not the prosecution disclose alibi evidence is fundamentally unfair. Oregon concedes that had Wardius provided notice of his alibi, the court might have read the Oregon rules to require the prosecution to provide reciprocal discovery. Oregon courts decide Oregon law, but the Oregon rules do not make what would have happened clear. Therefore, Wardius could not rely on the statute to predict what the court would decide. The court could have ruled that only Wardius had to disclose his alibi defense, but at that point he would not have been able to retract it. That would put Wardius at risk of presenting an alibi without being able to predict and counter evidence the prosecution introduces to refute it. Without fair notice and information about the state’s rebuttal witnesses, the court cannot compel Wardius to reveal his alibi defense. Because that error prevented Wardius from presenting an alibi, it may have changed the outcome of the case. The Court accordingly reverses Wardius’s conviction and remands.

#### Concurrence (Douglas, C.J.)

Procedural rules requiring a criminal defendant to provide the prosecution with notice of an alibi in order to present one violate constitutional Fifth Amendments rights regardless of reciprocity. The government would not want a notice-of-alibi rule unless it helped the prosecution prove its case. The Fifth Amendment mandates that criminal defendants cannot be required to testify against themselves or otherwise assist the prosecution in proving its case. The Bill of Rights was not intended to ensure an adversarial process between two equal parties in criminal proceedings. Instead, it recognizes the inherent advantage the government holds and was designed to redress that imbalance. Therefore, the Court should reverse Wardius’s conviction regardless of the reciprocity of the Oregon notice-of-alibi rule.

**Key Terms:**

**Due Process -** A constitutional guarantee that a law shall not be unreasonable, arbitrary, or capricious and that individuals will be given notice of legal proceedings conducted fairly with an opportunity for an individual to be heard before the government may impose sanctions on one’s life, liberty, or property.

**Bill of Particulars -** A discovery device consisting of a written list of questions requesting specifics about an adversary’s claim.

**Defense of Alibi -** A defense intended to create a reasonable doubt as to a crime's element of identification by introducing evidence that the defendant was elsewhere, or doing something else, at the time of the alleged offense.

# Taylor v. Illinois

#### United States Supreme Court 484 U.S. 400 (1988)

#### Rule of Law

**Where the defendant’s discovery violation is sufficiently serious, the Compulsory Process Clause does not prohibit a trial judge from refusing to allow an undisclosed witness to testify.**

#### Facts

Taylor (defendant) was convicted by a jury of attempting to murder a man during a street fight. In response to the prosecution’s discovery motion requesting a list of Taylor’s witnesses, the defense identified two sisters, who testified on Taylor’s behalf, and two men, who did not end up testifying at trial. On the second day of trial, defense counsel made an oral motion to amend his answer to discovery to include two more witnesses. He explained that he had just learned about the two additional witnesses and that they had seen the entire incident. After being questioned by the police however, defense counsel conceded that Taylor had told him about the two additional witnesses but he had been unable to locate them. Concerned that the witnesses had not really observed the incident, the judge heard the testimony of one of the witnesses outside the presence of the jury. The testimony was not at all consistent with defense counsel’s representation and he had not witnessed the incident firsthand. The judge suspected that defense counsel deliberately violated the rules, based on similar tactics in prior cases, and that the witnesses had not been truthful. Therefore, the trial judge decided that the seriousness of the discovery violation warranted the exclusion of the testimony. The court of appeals affirmed Taylor’s conviction.

#### Issue

Where a defendant fails to identify a witness in response to a pretrial discovery request, does the trial judge violate the defendant’s right under the Compulsory Process Clause if he refuses to allow the undisclosed witness to testify?

#### Holding and Reasoning (Stevens, J.)

No. The Compulsory Process Clause does not prevent a judge from prohibiting a witness from testifying where the defense’s failure to identify a witness at the start of trial can be attributed to his desire to obtain a tactical advantage. At the center of the defendant’s right to call his own witnesses is the right of each party to have a fair opportunity to present its case. This right to an equal and fair opportunity demands that criminal trials be conducted in an orderly and efficient way. Discovery is a legitimate way of preserving this public interest. Discovery rules are in place not to hinder the defense but to protect the prosecution from incomplete, misleading, or fabricated testimony. While other sanctions may be appropriate at times, prohibiting a witness from testifying may sometimes be the only means of preserving the integrity of the adversary process. In addition, just as it is assumed that evidence discovered after trial would not have affected the outcome of the trial, it is reasonable to assume that there is something suspect about a witness who is not identified until after the prosecution has presented its case-in-chief. This is especially true because it is easy for defense counsel to comply with pretrial discovery requests. Again, the purpose of the Compulsory Process Clause is to give each side a fair opportunity to present its case. It is therefore consistent with the Sixth Amendment to bar a witness from testifying where the defense’s failure to comply with the discovery rules is suspect and suggestive of manipulating the system. In this case, the witness was properly prevented from testifying. It is true that other sanctions could have protected the prosecution from possible prejudice. However, the trial judge’s decision, once he found that defense counsel had acted deliberately, was the only way to ensure the integrity of the system.

#### Dissent (Brennan, J.)

The Sixth Amendment Compulsory Process Clause creates a truth-seeking process. Therefore, unless the defendant himself is to blame for the discovery violation, the Compulsory Process Clause bars discovery sanctions that exclude criminal defense evidence. Preventing the defense from making its full case favors the prosecution and risks the jury convicting an innocent person. In addition, the discovery rules serve truth-seeking purposes by aiding effective trial preparation. However, these objectives are not accomplished when a witnesses is prevented from testifying because of the defense’s failure to follow the discovery rules. Therefore, such a sanction is inappropriate when other sanctions will correct the discovery violation. Finally, the Court’s opinion creates a serious conflict of interest. Where defense counsel fails to make a timely witness identification, the proper sanction is disciplinary action against the attorney, not a bar to the witness testifying.

**Key Terms:**

**Discovery -** Pretrial disclosure of information, documents, or tangible evidence to the opposing party in a lawsuit.

# \*\*UNITED STATES v. BAGLEY\*\*

#### United States Supreme Court 473 U.S. 667 (1985)

**Rule of Law**

**Under *Brady*, the prosecution’s failure to turn over favorable evidence only requires a new trial if a reasonable probability exists that the outcome would have been different if the evidence was turned over.**

**Facts**

Bagley (defendant) was indicted on drug and weapons charges. Before trial, Bagley sought discovery of the prosecution’s witnesses and any deals made in exchange for testimony. In response, the prosecution provided affidavits from two key witnesses stating that no deals had been made. The witnesses testified, and Bagley was convicted of the drugs charges and acquitted of the weapons charges. Later, Bagley filed Freedom of Information Act requests and received contracts that the two witnesses had signed agreeing to testify in exchange for $300. Bagley claimed that the government had violated his due process rights by withholding evidence that the defense could have utilized to impeach the witnesses. The district court held that the evidence was not material because the outcome would have been the same. The court of appeals reversed, holding that Bagley was entitled to automatic reversal under *Brady v. Maryland*, 373 U.S. 83 (1964). The United States Supreme Court granted certiorari.

**Issue**

Under *Brady*, is the prosecution’s failure to turn over evidence that could impeach its key witnesses grounds for automatic reversal?

**Holding and Reasoning (Blackmun, J.)**

No. A defendant is only entitled to a new trial if the prosecution withheld material evidence. Under *Brady*, due process requires the prosecution to turn over favorable evidence upon request if that evidence is material to culpability or sentencing. This departure from a purely adversarial process preserves the defendant’s right to a fair trial. Impeachment evidence, like exculpatory evidence, must be turned over under the *Brady*rule. The issue is what standard should be applied to determine whether evidence is material. The Court in *United States v. Agurs*, 427 U.S. 97 (1976), suggested that the standard should be most rigid if the prosecutor presents or allows perjured testimony, less rigid if the prosecutor fails to turn over evidence after no request or a general request, and most favorable to the defense if the prosecutor does not turn over evidence specifically requested. In light of *Agurs*, the Court in *Strickland v. Washington*, 466 U.S. 668 (1984), articulated the reasonable probability test that the Court now adopts for determining materiality. Evidence is material if a reasonable probability exists that the outcome of the case might have been different had the evidence been turned over. A reasonable probability is defined as “a probability sufficient to undermine the confidence in the outcome.” Failure to turn over specifically requested evidence is more likely to give rise to the assumption that evidence is material. The prosecution’s actions in this case likely led Bagley’s attorney to believe that the witnesses could not be impeached. Thus, the case is reversed and remanded for consideration of whether the evidence was material under the reasonable probability standard.

**Concurrence (White, J.)**

Bagley is only entitled to a new trial if it can be proven that the prosecution withheld material evidence. The reasonable probability test for determining materiality articulated by the majority adequately addresses all such cases, and there is no need to address the nature of the defendant’s request. The conviction should be reversed.

**Dissent (Marshall, J.)**

The prosecution failed to turn over evidence that could impeach its key witnesses. Since this is more than harmless error, the appellate court should be affirmed. The Court’s rule erodes the due process protections of *Brady*. Protecting the innocent is just as important as punishing the guilty, and it is impossible to know what piece of evidence will sway a jury. Defendants do not have the knowledge or the resources available to the prosecution. Although the Court is not willing to do away with the adversarial process, it has recognized the need to require prosecutors to turn over favorable material evidence to the defense. Prosecutors are asked to secure convictions and serve justice, and those difficult and often conflicting demands can lead to understandable failures to turn over favorable evidence. A simple rule requiring disclosure of all favorable evidence would be easily applied by prosecutors while furthering truth and due process. The Court’s rule that only evidence deemed material under the reasonable probability standard must be turned over is complicated and invites speculation by prosecutors. Failure to turn over favorable evidence should result in a new trial unless the prosecution can prove that the failure was harmless error.

**Key Terms:**

**Harmless Error** - A ruling by a trial judge, which is later held to be mistaken by a higher court, but is not so prejudicial to the defendant as to warrant the reversal of a conviction.

**Reasonable Probability Test -** Standard for determining whether evidence is material under *Brady*; under the test, evidence is material if a reasonable probability, or a probability large enough to call the outcome into question, exists that the outcome of the case might have been different if the evidence was turned over to the defense.

# Brady v. Maryland

#### United States Supreme Court 373 U.S. 83 (1963)

#### Rule of Law

**Under the Due Process Clause, the prosecution must turn over evidence favorable to the defense upon request if the evidence is material to either culpability or punishment.**

#### Facts

Brady (defendant) and Boblit were suspected of murder. Brady was tried first. Before trial, Brady’s attorney asked to review Boblit’s statements, but the prosecutor withheld the statement in which Boblit admitted to the actual killing. At trial, Brady confessed his involvement in the crime but claimed to have no role in killing the victim. Brady was found guilty of murder and given the death penalty. Brady did not learn of the prosecutor’s suppression of Boblit’s statement until after sentencing. The court of appeals held that the prosecutor’s suppression violated the Due Process Clause.

#### Issue

Under the Due Process Clause, must the prosecution turn over evidence favorable to the defense?

#### Holding and Reasoning (Douglas, J.)

Yes. Due process requires the prosecution turn over evidence that is favorable to the defense upon request if the evidence relates to the defendant’s guilt or innocence or to sentencing. Under *Mooney v. Holohan*, 294 U.S. 103 (1935), and*Napue v. Illinois*, 360 U.S. 264 (1959), prosecutors may not present false testimony or allow false testimony to go uncorrected. The ruling in this case builds on that foundation. It is a denial of due process for the prosecution to withhold favorable evidence material to culpability or sentencing after a request by the defense. The violation is in no way contingent upon whether the prosecutor acted in good or bad faith. The purpose of this rule is to safeguard the accused’s right to a fair trial. The good of the people is best served by fair process, not just punishing the guilty. It is unjust for a prosecutor to withhold exculpatory evidence requested by the defense. The ruling of the court of appeals is affirmed.

**Key Terms:**

**Due Process -** A constitutional guarantee that a law shall not be unreasonable, arbitrary, or capricious and that individuals will be given notice of legal proceedings conducted fairly with an opportunity for an individual to be heard before the government may impose sanctions on one’s life, liberty, or property.

# United States v. Agurs

#### United States Supreme Court 427 U.S. 97 (1976)

#### Rule of Law

**A prosecutor’s failure to provide information to defense counsel will not deprive a defendant of a fair trial unless specific information was requested by defense counsel or if the withheld information contained perjured testimony.**

# Napue v. Illinois

#### United States Supreme Court 360 U.S. 264 (1959)

#### Rule of Law

**In a criminal trial, the prosecutor may not knowingly use false evidence to obtain the defendant's conviction.**

#### Facts

Henry Napue (defendant) and George Hamer were accused of participating in the murder of a policeman. The jury convicted Hamer and gave him a long sentence. Hamer testified for the State of Illinois (plaintiff) against Napue in his trial for the same offense. On direct examination, the prosecutor questioned Hamer whether the state had promised any consideration in exchange for his testimony. Hamer denied the state had made any promise, but said the public defender had promised to do what he could for Hamer. The prosecutor repeated his question on redirect examination, and Hamer once again denied that the state had promised any consideration. In fact, the prosecutor had told Hamer that, in exchange for Hamer's testimony, the prosecutor would recommend a reduction in Hamer's sentence. The jury convicted Napue, largely on Hamer's testimony, and his appeal reached the United States Supreme Court. Napue contended the prosecutor's failure to correct Hamer's testimony, which the prosecutor knew to be false, violated Napue's Fourteenth Amendment right to due process.

#### Issue

In a criminal trial, may the prosecutor knowingly use false evidence to obtain the defendant's conviction?

#### Holding and Reasoning (Warren, C.J.)

No. In a criminal trial, the prosecutor may not knowingly use false evidence to obtain the defendant's conviction. It does not matter if: (1) the prosecutor does not solicit the false evidence but only allows it to go uncorrected, (2) the falsehood goes only to the credibility of the evidence and not to the defendant's guilt, (3) the prosecutor does not act out of guile or with the intention of swaying the verdict, or that (4) other evidence might negate the impact of the falsehood. In Napue's case, the prosecutor knew that Hamer's denial of any promised consideration from the state was false. The state contends that, to the extent the prosecutor tainted Napue's trial, the taint was offset by Hamer's testimony that a promise of consideration had been made by the public defender. However, that testimony was unlikely to sway the jurors, who probably understood the public defender was not in a position to reduce Hamer's sentence. By contrast, a reduction in Hamer's sentence was within the state's power to promise and fulfill. The prosecutor failed to disclose Hamer's false testimony. This prevented the jury from assessing Hamer's overall credibility in light of that false testimony and the prosecutor's promise of consideration. Consequently, Napue did not receive a fair trial, and his conviction is reversed.

**Key Terms:**

**Fourteenth Amendment Due Process** **Clause** - The provision set forth at Amendment XIV, Section 1 of the United States Constitution prohibiting states from depriving any person of life, liberty, or property by means that are arbitrary or fundamentally unfair.

**Direct Examination -** A trial lawyer's interrogation of a witness to support the lawyer's case.

**Redirect Examination -** A lawyer's subsequent interrogation of a witness initially interrogated by the lawyer on direct examination, to offset the adverse impact produced by the opposing lawyer's cross examination of the witness.

# Berger v. United States

#### United States Supreme Court 295 U.S. 78 (1935)

#### Rule of Law

**The cumulative effect of pronounced, persistent prosecutorial misconduct during trial likely prejudices the jury and requires a new trial.**

#### Facts

The government indicted eight individuals for conspiring to pass counterfeit money. One pleaded guilty and testified against Berger (defendant) under a non-prosecution agreement. During cross-examination and argument to the jury, the federal prosecutor misstated facts; assumed facts not in evidence; bullied, badgered, and argued with witnesses; mischaracterized testimony; implied he had personal knowledge that witnesses were lying; and suggested without proof that witnesses had spoken to him personally outside the courtroom. The prosecutor also stated that a witness who had difficulty identifying Berger actually knew him well, and that the defense had an advantage in being allowed to “twist” witnesses while the prosecution could not. The trial judge sustained objections to some of the prosecutor’s comments and directed the jury to disregard them, but did not grant a mistrial. Although the case against Berger was weak because it relied on the testimony of a co-conspirator who entered a plea agreement and had a long criminal record, the court denied Berger’s motion to dismiss the conspiracy charges at the close of the evidence. After the jury convicted Berger of conspiracy, Berger appealed on grounds of prosecutorial misconduct in addition to insufficiency of the evidence.

#### Issue

Does the cumulative effect of pronounced, persistent prosecutorial misconduct during trial likely prejudice the jury and require a new trial?

#### Holding and Reasoning (Sutherland, J.)

Yes. The cumulative effect of pronounced, persistent prosecutorial misconduct during trial likely prejudices the jury and requires a new trial. The government’s interest in criminal cases is not to win cases, but to ensure justice is served. As a representative of the government, the federal prosecutor holds a duty not only to use every legitimate means to convict the guilty, but to refrain from using improper methods to convict the innocent. Because the average jury trusts that the prosecutor meets those obligations, prosecutorial misconduct carries undue weight influencing the jury. Here, the record, when read as a whole, reveals that the prosecutor’s improper questions and comments were calculated to mislead the jury. For example, the prosecutor repeatedly badgered a witness and suggested the witness had made statements he had not. Stating that another witness who had difficulty identifying Berger actually knew Berger well implied that the prosecutor had personal knowledge impugning the witness’s credibility. The prosecutor also improperly claimed the defense had the advantage of being allowed to manipulate witness testimony while the government could not. The trial judge’s mild admonishments and instructions to the jury did not adequately cure the prejudicial effect of the prosecutor’s misconduct. Moreover, the case against Berger was weak because it depended on the testimony of a co-conspirator with a lengthy criminal record. Under those circumstances, and without overwhelming evidence of guilt, the prosecutor’s misconduct was highly likely to prejudice Berger’s case. The prosecutorial misconduct here was pronounced and persistent, not just one slight instance. Therefore, the cumulative effect of the prosecutor’s misconduct likely prejudiced the jury and requires a new trial.

**Key Terms:**

**Prosecutorial Misconduct -** Conduct by a prosecutor that violates ethical rules or prejudices the fairness of a defendant’s criminal trial, such as knowingly withholding exculpatory evidence or improperly impugning the credibility of a witness, defendant, or defense counsel.

**Giles v. Maryland**

87 S.Ct. 793

Supreme Court of the United States

**James V. GILES et al., Petitioners,**

**v.**

**STATE OF MARYLAND.**

No. 27.

Argued Oct. 12, 1966.Decided Feb. 20, **1967**.

## Synopsis

Post-conviction relief proceeding based on allegation that prosecution had denied petitioners due process by suppressing evidence favorable to them at trial for rape and by knowing use of perjured testimony. The Circuit Court for Montgomery County, **Maryland**, granted accuseds a new trial and the state appealed. The Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I9f2e0af233f111d98b61a35269fc5f88&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=3f70aaebb0b048db9519c73b395e26a6&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[239 Md. 458, 212 A.2d 101,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1965107926&pubNum=162&originatingDoc=I5ab88e3e9be911d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) reversed and certiorari was granted. The United States Supreme Court remanded case to afford state court opportunity to decide whether further hearing should be directed.

Judgment of Court of Appeals vacated and case remanded to that court for further proceedings.

Mr. Justice Harlan, Mr. Justice Black, Mr. Justice Clark and Mr. Justice Stewart dissented.

**Mooney v. Holohan**

55 S.Ct. 340

Supreme Court of the United States

**MOONEY**

**v.**

**HOLOHAN, Warden of San Quentin Penitentiary.**[**\***](https://1.next.westlaw.com/Document/I97d770049cc111d9bc61beebb95be672/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_footnote_B0011935124068)

Decided Jan. 21, 1935.

**Synopsis**

Motion for leave to file petition for an original writ of habeas corpus.

Proceeding on the application of Thomas J. Mooney for leave to file a petition for an original writ of habeas corpus against James B. Holohan, Warden of San Quentin Penitentiary.

Leave denied, without prejudice.

**United States v. Valenzuela-Bernal**

102 S.Ct. 3440

Supreme Court of the United States

**UNITED STATES, Petitioner**

**v.**

**Ricardo VALENZUELA–BERNAL.**

No. 81–450.

Argued April 20, 1982.Decided July 2, 1982.

## Synopsis

Defendant was convicted in the United States District Court for the Southern District of California of transporting an illegal alien and he appealed. The Court of Appeals for the Ninth Circuit, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ia1623905927811d9bdd1cfdd544ca3a4&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[647 F.2d 72](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981121729&pubNum=0000350&originatingDoc=Ia09f47819c9a11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), reversed. The Supreme Court, Justice Rehnquist, held that: (1) defendant seeking to show denial of due process or denial of Sixth Amendment right of confrontation because of the deportation of an alien witness must make some plausible explanation of the assistance that he would have received from the testimony of the deported witnesses; (2) responsibility of the Executive Branch to faithfully execute the immigration policy of the country justifies prompt deportation of illegal alien witnesses upon a good-faith determination that they possess no evidence favorable to the defendant; and (3) sanctions will be warranted for deportation of alien witnesses only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact.

Reversed.

Justice Blackmun and Justice O'Connor filed opinions concurring in the judgment.

Justice Brennan filed a dissenting opinion in which Justice Marshall joined.

# Strickland v. Washington

#### United States Supreme Court 466 U.S. 668 (1984)

#### Rule of Law

**To establish the ineffective assistance of counsel, a convicted defendant must show that his counsel’s performance was deficient because the lawyer did not act as a reasonably competent attorney, and that he was prejudiced by the deficiency because there is a reasonable probability that, but for his attorney’s unprofessional errors, the result of the proceeding would have been different.**

# Kyles v. Whitley

#### United States Supreme Court 514 U.S. 419 (1995)

#### Rule of Law

**A defendant is entitled to a new trial under *Brady v. Maryland*, 373 U.S. 83 (1964), if the prosecution withheld multiple pieces of favorable evidence that, taken together, undermine confidence in the verdict.**

#### Facts

Delores Dye was killed during a carjacking. Eyewitnesses gave police contradictory descriptions of the attacker. Police made a list of cars at the crime scene. A man called Beanie claimed to have bought Dye’s stolen car from Curtis Kyles (defendant). Beanie used an alias and gave several inconsistent statements implicating Kyles. Police found evidence of the murder in Kyles’s apartment and trash. Kyles’s fingerprint was found on a slip of paper in Dye’s car. Three of the five witnesses identified Kyles photo. Police did not investigate Beanie. Kyles was charged with first-degree murder. Prior to trial, Kyles’s attorney requested any exculpatory or impeachment evidence. The prosecution claimed no such evidence existed. At trial, Kyles claimed Beanie was trying to frame him. Beanie did not testify. The trial resulted in a mistrial. At the second trial, Kyles’ presented evidence of his innocence and Beanie’s guilt. With Beanie in the court, the witnesses still identified Kyles. Kyles was found guilty and sentenced to death. After appeal, Kyles learned that the prosecution withheld favorable evidence. Unable to get relief at the state level, Kyles filed a petition for habeas corpus. The district court denied, and the court of appeals affirmed. The United States Supreme Court granted certiorari.

#### Issue

Under *Brady*, is a defendant entitled to a new trial if the prosecution withheld several pieces of evidence favorable to the defense?

#### Holding and Reasoning (Souter, J.)

Yes. Under *Brady*, a defendant is entitled to a new trial if the prosecution suppressed evidence that, when considered collectively, undercuts confidence in the outcome. The Court held that due process requires the disclosure of evidence favorable to the defense upon request if that evidence is material to culpability or sentencing. In *United States v. Bagley*, 473 U.S. 667 (1985), the Court held that *Brady*required disclosure of exculpatory and impeachment evidence and set forth the reasonable probability test for determining whether evidence is material. Under that test, evidence is material if there is a reasonable probability that a different outcome would have resulted if the evidence was turned over. Under *Bagley*, the defense only has to show that suppression undercuts confidence in the verdict. The defense does not have to prove the defendant would have been acquitted, that there was insufficient evidence for conviction, or that there was more than harmless error. All suppressed evidence must be assessed collectively. The prosecutor has a duty to find and assess any favorable evidence known to the prosecution and others acting on the government's behalf to determine whether the collective effect of the evidence rises to the reasonable-probability standard requiring disclosure. In Kyles’s case, there is a reasonable probability that the outcome would have been different if the prosecution turned over the favorable evidence. Inconsistencies in eyewitness statements and contradictory descriptions of the attacker could have impeached testimony. Impeachment of Beanie would have called all physical evidence found in the apartment and the trash into question. Even if Beanie did not testify, the police could have been questioned about the failure to investigate Beanie. This Court cannot be certain Kyles would have been convicted if the prosecution had turned over the evidence. The decision of the lower court is reversed, and the case is remanded for a new trial.

#### Dissent (Scalia, J.)

It is unbelievable that Beanie, who was not a suspect, would go to police in order to frame Kyles for murder. It is even more unbelievable that all of the witnesses who identified Kyles were mistaken. The prosecution presented ample evidence that Kyles was guilty, and the suppressed evidence would not have affected the outcome or changed the sentence.

**Key Terms:**

**Reasonable Probability Test -** Standard for determining whether evidence is material under *Brady*; under the test, evidence is material if a reasonable probability, or a probability large enough to call the outcome into question, exists that the outcome of the case might have been different if the evidence was turned over to the defense.

# Brecht v. Abrahamson

#### United States Supreme Court  507 U.S. 619 (1993)

#### Rule of Law

**When deciding whether to grant a defendant habeas corpus relief for a trial error, the correct standard is whether the error had substantial and injurious effect on the verdict in the defendant’s case.**

#### Facts

Brecht (plaintiff) shot and killed his brother-in law and then left the state in his sister’s car. He was arrested and read his *Miranda* rights. At trial, Brecht claimed that the shooting was an accident. On cross examination, the prosecution repeatedly noted that Brecht had not claimed that the shooting was an accident at any time before trial. Brecht was convicted of first-degree murder and sentenced to life. On appeal, the court reversed Brecht’s conviction. The court held that the prosecution’s comments on Brecht’s post-*Miranda* silence regarding the accidental nature of the shooting violated *Doyle v. Ohio*, 426 U.S. 610 (1976), which prohibits the prosecution from using a defendant’s post-*Miranda* silence for impeachment purposes. The court held that the *Doyle* violation was prejudicial. The state supreme court reversed, holding that the error was harmless beyond a reasonable doubt under the standard established in *Chapman v. California*, 386 U.S. 18 (1967). Brecht petitioned in federal court for habeas corpus relief. The federal district court again set aside his conviction, finding that the error was prejudicial under the *Chapman* harmless error test. On appeal, the court again reversed and reinstated Brecht’s conviction. The court held that the wrong standard had been applied by the lower court; the correct standard for deciding whether to grant a defendant habeas corpus relief was whether the error had substantial and injurious effect on the verdict in the defendant’s case. The court held that the error in Brecht’s case did not meet this standard and that his conviction should not have been reversed. The Supreme Court granted certiorari.

#### Issue

When deciding whether a defendant is entitled to habeas corpus relief for a trial error, must a court deny relief if the error is harmless beyond a reasonable doubt?

#### Holding and Reasoning (Rehnquist, C.J.)

No. A trial error, such as the *Doyle* error in Brecht’s case, is normally reviewed under a harmless error analysis. The court has used the *Chapman*harmless error test when directly reviewing trial error claims, but has not addressed the issue of what standard should be used on collateral review of a trial error. The federal habeas corpus statute does not provide a standard for harmless error review. Thus, the Court must determine what standard applies. The Court has long recognized the difference between direct review and collateral review. Direct review is the main avenue for challenging a conviction, whereas collateral review is much more limited. Given this difference, it would be illogical to use the same standard for both levels of review. The standard set out in *Kotteakos v. United States*, 328 U.S. 750 (1946), should be applied for collateral review of a trial error instead of the *Chapman* harmless error test applied by the state courts. Under the *Kotteakos* test, relief should be granted if the error had substantial and injurious effect on the verdict in the defendant’s case. This standard is more properly aligned with the purpose of collateral review because it requires a showing of actual prejudice. The *Kotteakos* standard also advances the states’ interest in the finality of convictions, comity, and federalism. In Brecht’s case, the prosecution’s comments regarding Brecht’s post-*Miranda* silence violated *Doyle*. However, the comments were few and there was substantial evidence pointing toward Brecht’s guilt. Thus, the *Doyle* violation in Brecht’s case does not warrant reversal of his conviction under the *Kotteakos* standard because it did not have a substantial, injurious effect on the verdict in his case. The appellate court’s decision is affirmed.

#### Concurrence (Stevens, J.)

To properly apply the *Kotteakos* standard on collateral review, the court must review the trial record de novo to make sure that all of the ways the error could have affected the trial were considered.

#### Dissent (White, J.)

The *Chapman* test provides that federal courts must reverse a conviction that involved an error that was not harmless beyond a reasonable doubt. It has been the Court’s practice to grant habeas relief to a defendant whose conviction was upheld despite an error that did not pass the *Chapman* test. The Court’s decision today to radically move away from this precedent and now require a defendant to show actual prejudice to obtain habeas relief does not fit with Congress’s intent for the role of habeas relief.

#### Dissent (O’Connor, J.)

The Court should employ great restraint when changing a standard that affects the review of cases of error. Nothing necessitates changing the use of the *Chapman* harmless error test in cases of both direct and habeas review; so the standard should not be changed. Applying this new standard undercuts the reliability of jury verdicts.

**Key Terms:**

**Trial Error -** An error that occurs when a case is presented to the jury; as opposed to a structural error which affects the entire structure of a trial, such as denial of the right to counsel.

# Chapman v. California

#### United States Supreme Court 386 U.S. 18 (1967)

#### Rule of Law

**In order for a federal constitutional error to be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.**

# Coleman v. Alabama

#### United States Supreme Court 399 U.S. 1 (1970)

#### Rule of Law

**A defendant has the right to counsel during any pre-trial confrontation where there is the potential for substantial prejudice to his right to a fair trial as affected by his right to meaningfully cross-examine a witness and have effective assistance of counsel at the trial.**

#### Facts

Coleman (defendant) was arrested and convicted of assault with intent to murder. At the preliminary hearing, Coleman was not appointed counsel. Testimony given at the hearing was not admissible at trial where the defendant did not have a chance to cross-examine through counsel. Therefore, the court of appeals held that the denial of counsel at the preliminary hearing did not prejudice Coleman’s rights.

#### Issue

Does the potential for substantial prejudice to a defendant’s rights exist where he is denied access to an attorney during a preliminary hearing?

#### Holding and Reasoning (Brennan, J.)

Yes. A preliminary hearing is a critical stage of the prosecution, and the defendant maintains the right to have an attorney present, because the potential to seriously prejudice the defendant’s rights exists. While testimony elicited at the hearing cannot be admitted at trial where the defendant did not meaningfully cross-examine the witness, the potential to harm the defendant by pursuing an improper prosecution exists. With counsel present, fatal weaknesses of the prosecution’s case may be exposed. On cross-examination, counsel could elicit statements that could be used to impeach a witness at trial or preserve testimony favorable to the defendant. The preliminary hearing would give counsel an understanding of the prosecution’s case so he may effectively argue against it at trial. Finally, the preliminary hearing would give defense counsel a chance to put forth some of its own arguments, like the need for a psychiatric exam or bail. Accordingly, the conviction is vacated. The case is remanded to determine whether the denial of counsel in this case was harmless error.

#### Concurrence (Black, J.)

The Sixth Amendment requires that a defendant have access to counsel in all criminal prosecutions. The preliminary hearing is a definite part of the criminal prosecution because if the magistrate finds probable cause the defendant will be incarcerated or admitted to bail.

#### Dissent (Stewart, J.)

The Court’s opinion seems to hold that a defendant maintains the right to counsel at a preliminary hearing to ensure a fair preliminary hearing, not a fair trial.

**Key Terms:**

**Critical Stages of Prosecution** - Any interaction between an accused person and the government in which the government makes a deliberate effort to elicit incriminating information from the accused person. Critical stages of prosecution include (1) any pretrial proceeding in which the accused person's substantial rights may be affected by the outcome (*e.g.*, preliminary hearings), (2) the guilt phase of the trial, and (3) the sentencing phase of the trial. The Sixth Amendment to the United States Constitution guarantees an accused person the right to the effective assistance of counsel at all critical stages of the prosecution.

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

**\*\*PENNSYLVANIA v. RITCHIE\*\***

United States Supreme Court  
480 U.S. 39 (1987)

**Rule of Law**

**The Confrontation Clause of the Sixth Amendment does not compel pretrial discovery.**

**Facts**

George Ritchie (defendant) was charged with sexually assaulting his 13-year-old daughter repeatedly over a four-year period. The Children and Youth Services (CYS) of the State of Pennsylvania (plaintiff) was the state agency responsible for the investigation. During pretrial discovery, Ritchie requested from CYS all records related to the charges, including a recorded interview of the daughter. CYS refused to comply, citing a Pennsylvania statute directing that CYS records remain confidential except upon court order. Ritchie argued that the CYS file might contain names of potential witnesses and unspecified exculpatory evidence. The trial judge denied Ritchie’s request without examining the entire CYS file. Ritchie’s daughter was cross-examined in depth at trial. Ritchie was convicted of all charges. On appeal, the Pennsylvania Superior Court ruled that failure to disclose the CYS records was a violation of Ritchie’s right to full cross-examination of the victim. The superior court vacated the conviction and held that Ritchie was entitled to a new trial on remand unless the trial court determined that the failure to disclose was harmless error. The Supreme Court of Pennsylvania affirmed the superior court’s decision and further ordered that Ritchie was entitled on remand to review the full CYS file for potential evidence under the Confrontation Clause and the Compulsory Process Clause of the Sixth Amendment to the United States Constitution. The United States Supreme Court granted certiorari.

**Issue**

Does the Confrontation Clause of the Sixth Amendment compel pretrial discovery?

**Holding and Reasoning (Powell, J.)**

No. The Confrontation Clause protects a defendant’s right to confront witnesses at trial, but does not force pretrial discovery. The Confrontation Clause of the Sixth Amendment guarantees a criminal defendant the right to confront witnesses against him or her. This right also prohibits improper restrictions on cross-examination. The supreme court improperly ruled that this right compels pretrial discovery to aid the defendant in preparation for cross-examination under *Davis v. Alaska*, 415 U.S. 308 (1974). *Davis* held that a defendant was improperly prevented from cross-examining a witness on the witness’s prior juvenile record, even though the evidence could have affected the witness’s credibility. *Davis* did not, however, hold that a failure to disclose confidential records was improper. In this case, denying cross-examination of Ritchie’s daughter would have been improper, but holding that the CYS file was confidential was not a violation of the Confrontation Clause. The supreme court also improperly held that disclosure of the CYS records was mandated under the Compulsory Process Clause of the Sixth Amendment. Ritchie’s claims regarding discovery of witnesses and exculpatory evidence should be evaluated under the Due Process Clause of the Fourteenth Amendment instead of the Compulsory Process Clause. The government is obligated to disclose evidence that is both favorable to the defendant and material to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83 (1963). The Pennsylvania statute governing confidentiality does permit disclosure of evidence based upon a court order. Because there is a mechanism in place for disclosure of relevant CYS evidence pursuant to *Brady*, this Court cannot hold that due process has been violated. However, Ritchie is entitled to have the trial judge review the entire CYS file to determine whether the file contains evidence that must be disclosed. The supreme court went too far in ruling that Ritchie was entitled to review the CYS file, as opposed to having the court review the file. Accordingly, the supreme court’s ruling is affirmed in part, reversed in part, and remanded for further proceedings.

**Concurrence (Blackmun, J.)**

The majority improperly concludes that the right of confrontation is only a trial right. The right to effective cross-examination in some instances demands the right to pretrial discovery. The majority’s decision to remand the case for court review of the evidence satisfies this concern.

**Dissent (Brennan, J.)**

Denying Ritchie access to the daughter’s prior statement contained in the CYS files constitutes a violation of his confrontation rights under the Sixth Amendment. *Jencks v. United States*, 353 U.S. 657 (1957), held that criminal defendants are entitled to prior statements of trial witnesses. Under *Jencks*, Ritchie is entitled to his daughter’s prior statement in order to have effective cross-examination.

# United States v. Agurs

#### United States Supreme Court 427 U.S. 97 (1976)

#### Rule of Law

**A prosecutor’s failure to provide information to defense counsel will not deprive a defendant of a fair trial unless specific information was requested by defense counsel or if the withheld information contained perjured testimony.**

# Davis v. Alaska

#### United States Supreme Court 415 U.S. 308 (1974)

#### Rule of Law

**A defendant’s Sixth Amendment right to impeach a witness through cross-examination outweighs a state’s interest in maintaining the confidentiality of the witness’s juvenile record.**

#### Facts

Davis (defendant) was charged with the theft of a safe containing over $1,000 from a bar in Anchorage, Alaska on February 16, 1970. The empty safe was discovered outside of the city later that day. Sixteen-year-old Richard Green lived nearby and told police that he had seen two Negro men standing by a car near where the safe was found and that one of the men had a crowbar. Green identified Davis as one of the men. Green had a juvenile criminal record for burglary and was on probation at the time of the investigation. Prior to trial, the state moved for a protective order to prevent Davis from questioning Green about his juvenile record. Davis responded that he planned to use the juvenile record only to show that Green was on probation during the investigation and not as a general impeachment of Green’s character. Davis planned to then argue at trial that Green might have felt pressure to identify Davis in order to shift any suspicion away from Green or out of fear that Green’s probation might be revoked if he did not satisfy the police. The trial court granted the protective order based upon state laws that prohibited the use of juvenile adjudications against an individual in future proceedings. During trial, Davis cross-examined Green about his state of mind during the investigation and specifically asked Green if he had ever been questioned like that before by the police. Green responded in the negative, and the judge prevented further questioning. Davis was convicted and appealed. The Alaska Supreme Court affirmed the conviction, holding that Davis had a reasonable opportunity to cross-examine Green on bias and motive without using the juvenile record. The United States Supreme Court granted certiorari.

#### Issue

Does a defendant’s Sixth Amendment right to impeach a witness through cross-examination outweigh a state’s interest in maintaining the confidentiality of the witness’s juvenile record?

#### Holding and Reasoning (Burger, C.J.)

Yes. The right of confrontation that a defendant has against an accusing witness takes priority over a state’s policy of protecting a juvenile offender. The Sixth Amendment to the United States Constitution guarantees an accused the right to confront the witnesses against him. A primary protection offered by the Confrontation Clause is the right of cross-examination. *See Douglas v. Alabama*, 380 U.S. 415 (1965). Cross-examination is the principal means by which to test the credibility and truthfulness of a witness. Cross-examination may also be used to impeach a witness through the introduction of prior convictions. Exposing a witness’s biases, prejudices, or ulterior motives is also an important function of cross-examination. Here, the truthfulness of Green’s testimony was critical. Davis sought to use cross-examination to challenge the accuracy of Green’s identification of Davis based on the fact that Green was on probation at the time. The inference was that Green felt undue pressure to identify a suspect for fear of probation revocation or fear that Green himself might be a suspect. Davis had a right under the Confrontation Clause to pursue this matter on cross-examination by introducing Green’s juvenile record. The Alaska Supreme Court incorrectly held that Davis’s cross-examination without using the record was sufficient, especially when Green denied having been questioned by the police in the past. Any state interest in protecting the privacy of Green, a juvenile offender, was not as important as protecting the Sixth Amendment rights of Davis, the accused. Accordingly, the judgment is reversed, and the case is remanded for further proceedings.

#### Concurrence (Stewart, J.)

The holding in this case is limited to the facts presented and does not create a rule of law that cross-examination regarding juvenile records is permitted in every case.

#### Dissent (White, J.)

There is no constitutional issue here, and this Court should not disturb the trial court’s exercise of discretion to control the limits of cross-examination.

**Key Terms:**

**Impeachment of a Witness -** The questioning or discrediting of a witness's veracity or reliability. Any party may impeach any witness, including a witness the party has called.

# Delaware v. Fensterer

#### United States Supreme Court 474 U.S. 15 (1985)

#### Rule of Law

**Expert testimony is admissible as evidence even when the expert cannot recall the basis upon which the expert arrived at a particular opinion.**

#### Facts

Fensterer (defendant) was convicted of murder in the courts of the state of Delaware (plaintiff). At trial, the prosecution presented the expert testimony of an FBI agent who testified that a hair from the victim found at the scene had been forcibly removed. The FBI agent explained that he considered three different characteristics of a hair follicle to be evidence of forcible removal. The FBI agent did not make a written record of which characteristic he relied upon to conclude that the victim’s hair had been forcibly removed. The agent could not remember which characteristic he had relied upon. Fensterer objected to the admission of the agent’s testimony on grounds that he was deprived of the opportunity for effective cross-examination by the agent’s inability to remember which characteristic he had relied upon. The trial court overruled Fensterer’s objection. Fensterer presented an expert witness who testified that he had spoken with the FBI agent and had been told by the agent that he had concluded that the hair had been forcibly removed because a follicular tag was present on the hair. Fensterer’s expert testified that the follicular tag characteristic had been discredited as reliable evidence of forcible removal. Fensterer was convicted and appealed through the state courts. The state supreme court concluded that by presenting a witness with advance knowledge that the witness could not remember the basis for his opinion, the prosecution had obstructed Fensterer’s ability to effectively cross-examine the adverse witness. The state supreme court reversed Fensterer’s conviction. The state of Delaware petitioned the United States Supreme Court for review.

#### Issue

Is expert testimony admissible as evidence even when the expert cannot recall the basis upon which the expert arrived at a particular opinion?

#### Holding and Reasoning (Per Curiam)

Yes. Expert testimony is admissible as evidence even when the expert cannot recall the basis upon which the expert arrived at a particular opinion. The trial court correctly concluded that the FBI agent’s inability to recall which characteristic he had relied upon to reach the opinion that the victim’s hair had been forcibly removed did not affect the admissibility of the agent’s testimony. Lapse of memory goes to the weight of evidence. When an expert cannot recall the method by which he reached a particular conclusion, his lapse of memory increases the likelihood that the jury will find his testimony unreliable. The Confrontation Clause guarantees the opportunity to cross-examine a witness. It does not guarantee the right to cross-examination on every particular topic or by every particular method the defense may desire. Fensterer’s cross-examination showed the jury that the FBI agent could not remember the basis for his opinion. Fensterer presented his own expert witness to identify and discredit the basis for the agent’s opinion. Fensterer had a full and fair opportunity to expose the weaknesses of the agent’s testimony. The fact that the agent could not recall the basis for his opinion did not deprive Fensterer of any rights under the Confrontation Clause. The state supreme court judgment is reversed.

#### Dissent (Marshall, J.)

I dissent because the Court issued this opinion by summary disposition without notice and did not allow the parties to submit briefs.

**Key Terms:**

**Confrontation Clause -** The provision of the Sixth Amendment to the United States Constitution that guarantees a criminal defendant the right to confront the witnesses against him and conduct a reasonable cross-examination.

# United States v. Bagley

#### United States Supreme Court 473 U.S. 667 (1985)

#### Rule of Law

**Under *Brady*, the prosecution’s failure to turn over favorable evidence only requires a new trial if a reasonable probability exists that the outcome would have been different if the evidence was turned over.**

# Brady v. Maryland

#### United States Supreme Court 373 U.S. 83 (1963)

#### Rule of Law

**Under the Due Process Clause, the prosecution must turn over evidence favorable to the defense upon request if the evidence is material to either culpability or punishment.**

**Jencks v. United States**

77 S.Ct. 1007

Supreme Court of the **United** **States**

**Clinton E. JENCKS, Petitioner,**

**v.**

**UNITED STATES of America.**

No. 23.

Argued Oct. 17, 1956.Decided June 3, **1957**.

**Synopsis**

Prosecution for filing a false noncommunist affidavit with National Labor Relations Board. The **United** **States** District Court for the Western District of Texas entered judgment of conviction and defendant appealed. The **United** **States**Court of Appeals for the Fifth Circuit, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ifdd775808e8911d9a707f4371c9c34f0&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=c66e9ddb185e42a09b1ab4af6b1bcf10&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[226 F.2d 540,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1955119078&pubNum=350&originatingDoc=Id4d3433b9c1d11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed, and at [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ifdd775908e8911d9a707f4371c9c34f0&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=c66e9ddb185e42a09b1ab4af6b1bcf10&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[226 F.2d 553,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1955119077&originatingDoc=Id4d3433b9c1d11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) also affirmed an order of the District Court denying defendant's motion for new trial, and certiorari was granted. The Supreme Court, Mr. Justice Brennan, held that defendant was entitled to an order directing government to produce for inspection all reports of two government witnesses to Federal Bureau of Investigation touching upon events and activities as to which they testified at trial, and defendant was entitled to inspect such reports and to decide whether to use them in his defense.

Reversed.

Mr. Justice Clark dissented.

**West**

**United States v. Palermo**

79 S.Ct. 1217

Supreme Court of the **United** **States**

**Anthony M. PALERMO, Petitioner,**

**v.**

**UNITED STATES of America.**

No. 471.

Argued April 28, **1959**.Decided June 22, **1959**.Rehearing Denied Oct. 12, **1959**.

See [80 S.Ct. 41](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&pubNum=708&cite=80SCT41&originatingDoc=Ida7cab409bf011d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

**Synopsis**

Defendant was convicted of willfully attempting to evade payment of income taxes. The **United** **States** District Court for the Southern District of New York rendered judgment, and defendant appealed. The **United** **States** Court of Appeals for the Second Circuit, [258 F.2d 397,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1958105054&pubNum=350&originatingDoc=Ida7cab409bf011d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed, and certiorari was granted. The Supreme Court, Mr. Justice Frankfurter, held that determination by **United** **States** District Court and by unanimous Court of Appeals that statement, consisting of government agent's brief summary of approximately 600 words, of a conference with government witness lasting three and one-half hours was not a statement within purview of statute governing production of statements given to government agents by government witnesses in criminal cases was justified and would be sustained.

Affirmed.

# Arizona v. Youngblood

#### United States Supreme Court 488 U.S. 51 (1988)

#### Rule of Law

**The failure of a state to preserve physical evidence that could have been useful to the defendant is not a violation of due process unless bad faith on the part of the police is shown.**

#### Facts

A ten-year-old boy was kidnapped from a church carnival and assaulted for one and a half hours. When the boy finally got home, his mother took him to the hospital where the doctor collected evidence using a sexual-assault kit the police department supplied to the hospital. In addition to the blood samples, hair samples, saliva samples, and swabs and smears the doctor took, the boy’s underwear and T-shirt were given over to the police. The police examined the sexual-assault kit to determine that sexual contact had occurred but did not perform any tests to help identify the assailant. Nine days after the incident, the boy identified Youngblood (defendant) in a photographic lineup shown to him by police. Youngblood was arrested about four weeks later. About two years later, the police examined the boy’s clothing for the first time and found two semen stains. The police tried to identify the assailant by testing the semen stains but were unable to do so. The clothing had not been refrigerated during the intervening two years. The police had followed standard department procedures regarding the preservation and testing of evidence. At trial, Youngblood called an expert witness who testified to what could have been shown if further tests had been conducted on the samples or the clothing had been refrigerated. Nonetheless, the jury found Youngblood guilty. The court of appeals reversed the conviction, holding that the destruction of evidence that could have exonerated the defendant was a violation of due process. The United States Supreme Court granted certiorari.

#### Issue

Is the failure of a state to preserve physical evidence that could be useful to a criminal defendant a violation of due process?

#### Holding and Reasoning (Rehnquist, C.J.)

No. The defendant’s due process rights are not violated when the state fails to preserve physical evidence that may have been helpful to the defendant. In past cases dealing with the constitutional ramifications of lost evidence, emphasis has been placed on whether the government acted in good or bad faith. In *United States v. Valenzuela-Bernal* (1982), a prompt deportation of a witness was justified because the agents had acted in good faith. Furthermore, in *California v. Trombetta* (1984), the defense wanted a breathalyzer test excluded from evidence because the state had not preserved the breath sample that was used in the test. Nevertheless, the test was admissible in part because the officers had acted in good faith. It is true that the state must disclose exculpatory evidence to the defendant and failure to do so, even in good faith, is a violation of the defendant’s due process rights. However, this need not be the standard when the state fails to preserve material that may have been helpful to the defendant. A good faith test is more appropriate in such situations because otherwise the courts must determine the importance of the lost, potentially exculpatory evidence. This is almost impossible when the nature and contents of the evidence are often unknown and disputed. In addition, the police are not charged with finding and preserving all evidence that could possibly be important to any prosecution. The police must only act in good faith. This requires that they preserve evidence where it is reasonable to do so and where justice requires it because the police realize the evidence could exonerate the defendant. In this case, the police collected the necessary evidence but Youngblood was not arrested until weeks later. All evidence was properly made available to Youngblood. While the police may have acted negligently, they acted in good faith. Accordingly, the judgment of the court of appeals is reversed and the case is remanded.

#### Concurrence (Stevens, J.)

The Court is right that in this case there has been no violation of Youngblood’s due process rights. First, when the police failed to refrigerate the victim’s clothing, they were hurting themselves more than they were the defendant. At that time, the police still had to find a suspect and the prosecution bears the burden of proving that the future defendant is in fact guilty. Second, it is unlikely that Youngblood was prejudiced by the lost evidence. The jury was instructed to interpret any lost evidence in favor of the defendant. Finally, in the end, the lost evidence was immaterial. Despite being instructed that it may do so, the jury found the rest of the state’s case so persuasive that no juror believed that proper preservation of the evidence would have proven that Youngblood was not the assailant.

#### Dissent (Blackmun, J.)

The Court’s “bad faith” test is vague and inconsistent with prior due process cases. Instead, the defendant’s due process rights are violated when the police do not preserve physical evidence where they reasonably should know that the evidence has the potential to reveal immutable characteristics of the criminal, and no comparable evidence is likely to be available to the defendant. In this case, Youngblood’s due process rights were clearly violated when the police did not properly preserve the criminal’s semen. First, this evidence was relevant and material. The court of appeals even held that tests on the semen would have been more conclusive than the samples collected in the assault kit. Second, had the semen been tested by available methods, it would have revealed an immutable characteristic of the assailant. The police should have recognized this and seen the importance of properly preserving the evidence. Finally, the semen would have been independently exculpatory. While Youngblood had other evidence proving his innocence, the semen would have shown that it was impossible that he had been the assailant.

**Key Terms:**

**Fourteenth Amendment Due Process** **Clause** - The provision set forth at Amendment XIV, Section 1 of the United States Constitution prohibiting states from depriving any person of life, liberty, or property by means that are arbitrary or fundamentally unfair.

**Tenn. R. Crim. P. Rule 16**

**Tennessee Rules of Criminal Procedure – Rule 16**

**Effective: May 1, 2020**

Tenn. R. Crim. P., Rule 16

**Rule 16. Discovery and Inspection**

[Currentness](https://1.next.westlaw.com/Document/ND7B92FF003A411DCA094A3249C637898/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_anchor_IB24F6AE067DB11EBB9D0FED70C9089F7)

**(a) Disclosure of Evidence by the State.**

(1) *Information Subject to Disclosure.*

(A) Defendant's Oral Statement. Upon a defendant's request, the state shall disclose to the defendant the substance of any of the defendant's oral statements made before or after arrest in response to interrogation by any person the defendant knew was a law-enforcement officer if the state intends to offer the statement in evidence at the trial;

(B) Defendant's Written or Recorded Statement. Upon a defendant's request, the state shall disclose to the defendant, and make available for inspection, copying, or photographing, all of the following:

(i) the defendant's relevant written or recorded statements, or copies thereof, if:

(I) the statement is within the state's possession, custody, or control; and

(II) the district attorney general knows--or through due diligence could know--that the statement exists; and

(ii) the defendant's recorded grand jury testimony which relates to the offense charged.

(C) Organizational Defendant. Upon a defendant's motion, if the defendant is a corporation, limited liability company, limited liability partnership, partnership, association, or labor union, the court may grant the defendant discovery of relevant recorded testimony of any witness before a grand jury who was:

(i) at the time of the testimony, so situated as an officer or employee as to have been able legally to bind the defendant regarding conduct constituting the offense; or

(ii) at the time of the offense, personally involved in the alleged conduct constituting the offense and so situated as an officer or employee as to have been able legally to bind the defendant regarding that alleged conduct in which the witness was involved.

(D) Codefendants. Upon a defendant's request, when the state decides to place codefendants on trial jointly, the state shall promptly furnish each defendant who has moved for discovery under this subdivision with all information discoverable under Rule 16(a)(1)(A), (B), and (C) as to each codefendant.

(E) Defendant's Prior Record. Upon a defendant's request, the state shall furnish the defendant with a copy of the defendant's prior criminal record, if any, that is within the state's possession, custody, or control if the district attorney general knows--or through due diligence could know--that the record exists.

(F) Documents and Objects. Upon a defendant's request, the state shall permit the defendant to inspect and copy or photograph books, papers, documents, photographs, tangible objects, buildings, or places, or copies or portions thereof, if the item is within the state's possession, custody, or control and:

(i) the item is material to preparing the defense;

(ii) the government intends to use the item in its case-in-chief at trial; or

(iii) the item was obtained from or belongs to the defendant.

(G) Reports of Examinations and Tests. Upon a defendant's request, the state shall permit the defendant to inspect and copy or photograph the results or reports of physical or mental examinations, and of scientific tests or experiments if:

(i) the item is within the state's possession, custody, or control;

(ii) the district attorney general knows--or through due diligence could know--that the item exists; and

(iii) the item is material to preparing the defense or the state intends to use the item in its case-in-chief at trial.

(2) *Information Not Subject to Disclosure.* Except as provided in paragraphs (A), (B), (E), and (G) of subdivision (a)(1), this rule does not authorize the discovery or inspection of reports, memoranda, or other internal state documents made by the district attorney general or other state agents or law enforcement officers in connection with investigating or prosecuting the case. Nor does this rule authorize discovery of statements made by state witnesses or prospective state witnesses.

(3) *Grand Jury Transcripts.* This rule does not apply to the discovery or inspection of a grand jury's recorded proceedings, except as provided in [Rule 6](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1008875&cite=TNRRCRPR6&originatingDoc=ND7B92FF003A411DCA094A3249C637898&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) and Rule 16(a)(1)(A), (B), and (C).

(4) *Failure to Call Witness.* The fact that a witness's name is furnished under this rule is not grounds for comment on a failure to call the witness.

**(b) Disclosure of Evidence by the Defendant.**

(1) *Information Subject to Disclosure.*

(A) Documents and Tangible Objects. If a defendant requests disclosure under subdivision (a)(1)(F) or (G) of this rule and the state complies, then the defendant shall permit the state, on request, to inspect and copy or photograph books, papers, documents, photographs, tangible objects, or copies or portions of these items if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to introduce the item as evidence in the defendant's case-in-chief at trial.

(B) Reports of Examinations and Tests. If the defendant requests disclosure under subdivision (a)(1)(F) or (G) of this rule and the state complies, the defendant shall permit the state, on request, to inspect and copy or photograph any results or reports of physical or mental examinations and of scientific tests or experiments made in connection with the particular case, or copies thereof, if:

(i) the item is within the defendant's possession, custody, or control; and

(ii) the defendant intends to introduce the item as evidence in the defendant's case-in-chief at trial; or

(iii) the defendant intends to call as a witness at trial the person who prepared the report, and the results or reports relate to the witness's testimony.

(2) *Information Not Subject to Disclosure.* Except as to scientific or medical reports, this subdivision does not authorize the discovery or inspection of:

(A) reports, memoranda, or other internal defense documents made by the defendant or the defendant's attorneys or agents in connection with the investigation or defense of the case; or

(B) a statement made by the defendant to the defendant's agents or attorneys or statements by actual or prospective state or defense witnesses made to the defendant or the defendant's agents or attorneys.

(3) *Failure to Call Witness.* The fact that a witness's name is on a list furnished under this rule is not grounds for comment on a failure to call the witness.

**(c) Continuing Duty to Disclose.** A party who discovers additional evidence or material before or during trial shall promptly disclose its existence to the other party, the other party's attorney, or the court if:

(1) the evidence is subject to discovery or inspection under this rule, and

(2) the other party previously requested, or the court ordered, its production.

**(d) Regulating Discovery.**

(1) *Protective and Modifying Orders.* At any time, for good cause shown, the court may deny, restrict, or defer discovery or inspection, or grant other appropriate relief. On a party's motion, the court may permit the party to make such showing, in whole or in part, by written statement that the court will inspect ex parte. If relief is granted following an ex parte submission, the court shall preserve under seal in the court records the entire text of the party's written statement.

(2) *Failure to Comply with a Request.* If a party fails to comply with this rule, the court may:

(A) order that party to permit the discovery or inspection; specify its time, place, and manner; and prescribe other just terms or conditions;

(B) grant a continuance;

(C) prohibit the party from introducing the undisclosed evidence; or

(D) enter such other order as it deems just under the circumstances.

(3) *Procedure in Child Pornography Cases.* In any criminal proceeding relating to the sexual exploitation of minors under title 39, chapter 17, part 10 that involves documents or objects discoverable pursuant to Rule 16(a)(1)(F), the court shall, on motion of the state:

(A) Deny any request by the defendant to copy or photograph any documents or objects depicting the sexual exploitation of minors under title 39, chapter 17, part 10, so long as the state shows that the documents or objects will be made reasonably available to the defendant throughout the proceeding.

(B) For the purposes of subdivision (d)(3)(A), documents or objects shall be deemed to be reasonably available to the defendant if the state provides ample opportunity for inspection, viewing, and examination at a state facility of the documents or objects by the defendant, the defendant's attorney, and any individual the defendant may seek to qualify to furnish expert testimony at trial. The Court may, in its discretion, permit other individuals to have access to the documents or objects if necessary to protect the rights of the defendant.

(C) If the state fails to demonstrate that the documents or objects will be made reasonably available to the defendant throughout the proceeding, or fails to make the documents or objects reasonably available to the defendant at any time during the proceeding, the trial court may order the state to permit the defendant to copy or photograph any documents or objects subject to terms and conditions set by the court in an appropriate protective order.

**(e) Alibi Witnesses.** Discovery of alibi witnesses is governed by [Rule 12.1](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1008875&cite=TNRRCRPR12.1&originatingDoc=ND7B92FF003A411DCA094A3249C637898&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

**Credits**

[Amended effective August 1, 1979; August 22, 1984; July 1, 1995; amended January 18, 2006, effective July 1, 2006; January 8, 2018, effective July 1, 2018.]

<**Research Note**>

<See Raybin, Tennessee Practice, volumes 9-11, for a comprehensive treatment of criminal practice and procedure.>

**Editors' Notes**

**ADVISORY COMMISSION COMMENT**

This rule substantially conforms to the new federal discovery Rule 16, and was adopted by the commission as a middle-ground reciprocal rule.

The reference in (a)(1)(B) to the discovery of recorded grand jury testimony of a defendant will not have the same utility in state court, because under state procedure a prospective defendant seldom is required to testify before a grand jury. The commission left this language in the rule because it might be useful in connection with the operation of Rule 6(j)(5) and (6), the immunity provisions. Grand jury proceedings in Tennessee are not presently regularly recorded, but could be.

The rule is always triggered by the defendant; where the defendant requests disclosure, the reciprocal rights of the state come into play.

The commission agrees that the defendant shall still receive advance notice of the names of the state's witnesses, as is now provided by [T.C.A. §§ 40-13-107](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS40-13-107&originatingDoc=ND7B92FF003A411DCA094A3249C637898&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), [40-17-106](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS40-17-106&originatingDoc=ND7B92FF003A411DCA094A3249C637898&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

It is intended that section (a)(1)(F), as it relates to the inspection of tangible objects, shall mean that in controlled substance cases the defendant upon request must be furnished a sufficient quantity of the substance to permit a scientific examination for identification purposes. The defendant has this right under existing case law. The commission considers that a meaningful “inspection” of a controlled substance means a scientific testing of a sample thereof. Results are subject to discovery by the state under section (b)(1)(B).

The continuing duty to disclose set out in section (c), and the flexibility of the court's regulation of discovery as set out in section (d), are deemed to be very important.

Rules 12.1 and 12.2, although not technically discovery rules, are closely related.

While we have heretofore had a substantial body of statutory and case law providing for discovery by the defendant, this rule for the first time provides the state with reciprocal discovery.

This rule is not the exclusive procedure for obtaining discovery, since discovery required by due process is not expressly structured into the rule. For example, for the rule as to the state's duty to disclose exculpatory evidence, *see*[*Brady v. Maryland*, 373 U.S. 83 (1963)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1963125353&pubNum=0000780&originatingDoc=ND7B92FF003A411DCA094A3249C637898&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)). The voluntary disclosure of evidence not within the ambit of this rule is encouraged by the commission. Under section (a)(1)(A), the commission originally provided that the defendant might obtain all of his or her statements, whether made to a law-enforcement official or to a lay witness. However, this was amended to conform to the federal rule, being limited by the language, “in response to interrogation by any person then known to the defendant to be a law-enforcement officer.”

The statements of a codefendant discoverable by the codefendant are likewise made discoverable by the defendant, if the codefendant and the defendant are scheduled to be tried jointly. Such statements of a codefendant may be reviewed to determine whether or not a severance under Rule 14(c) need be sought.

The procedure provided in 16(a)(1)(E) conforms to [T.C.A. § 40-17-120](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS40-17-120&originatingDoc=ND7B92FF003A411DCA094A3249C637898&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)). It is similar to the federal Jencks Act ([18 U.S.C. § 3500](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS3500&originatingDoc=ND7B92FF003A411DCA094A3249C637898&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))), but broader. This rule allows the defendant and the state to request a witness's statement from the presenting adverse party after the witness has testified on direct examination. Although it is technically a discovery device, its most important function is to promote the integrity of the fact-finding process, and is related to the due process requirements of *Brady* and its progeny. The commission deliberately did not incorporate that provision of subdivision (e)(3) of the federal Jencks Act, which applies to statements of witnesses before a grand jury, and such statements are not meant to be obtainable hereunder simply because a grand jury witness testifies for the state. Such statements may only be obtained under the limited provisions of existing law now embodied in Rule 6(k)(2).

**ADVISORY COMMISSION COMMENT [2018]**

Title 39, chapter 17, part 10 of the Tennessee Code Annotated prohibits conduct that involves child pornography. *See Sentencing Commission Comment* to [Tenn. Code Ann. § 39-17-1001](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-17-1001&originatingDoc=ND7B92FF003A411DCA094A3249C637898&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)). Consequently, evidence in those cases often will be material that constitutes child pornography. The amendment conforms Tennessee discovery practice to federal law concerning the reproduction of material constituting child pornography under [18 U.S.C. § 3509(m)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS3509&originatingDoc=ND7B92FF003A411DCA094A3249C637898&refType=RB&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_ea62000089cc6). Tennessee courts face this situation on a routine basis, and the absence of a clear procedural rule can lead to delay in a defendant's defense, time-consuming proceedings, and the expenditure of judicial resources. *See, e.g., State v. Re'Licka Dajuan Allen*, No. E2007-01018-CCA-R3-CD (Tenn. Crim. App., Feb. 12, 2009). The amendment provides the procedural means for trial courts to control the reproduction and dissemination of material constituting child pornography, while protecting a defendant's right to access the information for the purpose of a defense. A form for a protective order under section (d)(3)(C) is provided below as part of this comment.

|  |  |  |  |
| --- | --- | --- | --- |
| State of Tennessee | | PROTECTIVE ORDER | Case Number |
| Circuit / Criminal Court | | PURSUANT TO TENN. R. CRIM. P. 16(d)(3) |  |
| \_\_\_\_\_\_\_\_\_\_ | |  |  |
| County | |  |  |
|  | STATE OF TENNESSEE vs. | | |

|  |  |  |
| --- | --- | --- |
|  |  | [Defendant's Name] |
|  |  |  |

This matter is before the Court upon the motion of the State of Tennessee pursuant to Tenn. R. Crim. P. 16(d)(3) for a protective order governing the production in discovery of documents and objects relating to the sexual exploitation of minors under title 39, chapter 17, part 10. It is, therefore, ORDERED, that the following provisions of this Order shall control the disclosure, dissemination, and use of information in this action:

1. The state of Tennessee has failed to demonstrate that the documents or objects subject to discovery pursuant to Tenn. R. Crim. P. 16(a)(1)(F) will be made reasonably available to the defendant throughout the proceeding or has failed to make the property or material reasonably available to the defendant at any time during the proceeding. Therefore, the trial court orders the state to permit the defendant to copy or photograph any documents or objects that constitute “material” (hereinafter “Prima Facie Contraband”) as defined in [Tenn. Code Ann. § 39-17-1002](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-17-1002&originatingDoc=ND7B92FF003A411DCA094A3249C637898&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) and prohibited by [Tenn. Code Ann. §§ 39-17-1003](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-17-1003&originatingDoc=ND7B92FF003A411DCA094A3249C637898&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), -1004, and -1005, subject to the following conditions.

2. Defendant and Defendant's counsel acknowledged that the material that is subject to this order is prima facie contraband the possession of which is otherwise prohibited. Defendant and Defendant's counsel shall be authorized to possess the Prima Facie Contraband during the pendency of this proceeding as long as Defendant and Defendant's counsel comply with the terms of this order.

3. Defendant and Defendant's counsel may possess and use the Prima Facie Contraband only for purposes of this litigation and not for any personal, business, commercial, scientific, competitive, or any other purpose whatsoever.

4. Except as permitted by Paragraph 5, Defendant and Defendant's counsel shall not disclose the Prima Facie Contraband to any person. Any unauthorized disclosure shall be treated as contempt of this order and may result in criminal prosecution.

5. Defendant and Defendant's counsel may disclose the Prima Facie Contraband to the following Authorized Persons: (a) counsel of record for the parties; (b) the permanent or temporary attorneys, paralegals, clerical, and secretarial staff employed by or in practice with Defendants' counsel; (c) non-party experts or consultants (together with their associates, consultants and clerical and secretarial staff) retained to assist in the defense, settlement, or other disposition of this action; (d) court reporter(s) employed in this action; (e) court personnel; (f) a witness at any deposition or other proceeding in this action and counsel for that witness; and (g) third-party contractors engaged in one or more aspects of organizing, copying, imaging, filing, coding, converting, storing or retrieving data, documents, or other information, or designing programs for handling data connected with this litigation, including the performance of such duties in relation to a computerized litigation support system.

6. Before making any disclosure authorized by Paragraph 5, Defendant and Defendant's counsel shall deliver a copy of this Order to the Authorized Persons, shall explain its terms to the Authorized Persons, shall instruct the Authorized Persons to comply with this Order, and shall require the Authorized Persons to acknowledge receipt of a copy of this Order in writing.

7. Within 30 days of the final disposition of this action in the highest court to which an appeal is taken, or if no appeal is taken within 30 of entry of the judgment, Defendant, Defendant's counsel, and each Authorized Person shall return the Prima Facie Contraband to the state or certify under oath that the Prima Facie Contraband has been destroyed.

8. Defendant, Defendant's counsel, and each Authorized Person who receives Prima Facie Contraband shall maintain the Prima Facie Contraband in a safe and secure area consistent with the provisions of this Order to prevent unauthorized disclosure or dissemination.

9. This Order shall remain in effect after the final determination of this action, unless otherwise ordered by the Court.

10. Each person to whom any Prima Facie Contraband is disclosed agrees to be subject to the jurisdiction of this Court for the purpose of proceedings relating to compliance with or violation of this Order.

IT IS SO ORDERED.

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JUDGE

**Johnson v. State, 38 S.W.3d 912 (Tenn. 2001)**

**Johnson v. Tennessee**

38 S.W.3d 52

Supreme Court of **Tennessee**.

**Erskine Leroy JOHNSON**

**v.**

**STATE of Tennessee.**

No. W1997-00024-SC-R11-PD.

Jan. 19, **2001**.

**Synopsis**

Postconviction relief petitioner, who was convicted of felony murder and sentenced to death, filed petition alleging that **state** improperly withheld discoverable police report. The Criminal Court, Shelby County, [William H. Williams Sr](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0202209301&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I861e74a3e7b511d983e7e9deff98dc6f)., J., denied relief, and petitioner appealed. The Court of Criminal Appeals, [1999 WL 608861,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999191540&pubNum=999&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) reversed and vacated sentence. **State** appealed. The Supreme Court, [Barker](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0151945901&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I861e74a3e7b511d983e7e9deff98dc6f), J., held that: (1) police report withheld by **state** was favorable information material to issue at sentencing; (2) evidence was insufficient to justify application of aggravating factor; and (3) aggravating factor could not be applied vicariously.

Affirmed and remanded for new sentencing hearing.

**Attorneys and Law Firms**

**\*53** [Paul G. Summers,](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0172047301&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I861e74a3e7b511d983e7e9deff98dc6f) Attorney General and Reporter; [Michael E. Moore](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0184158601&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I861e74a3e7b511d983e7e9deff98dc6f), Solicitor General; [Amy L. Tarkington](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0156865501&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I861e74a3e7b511d983e7e9deff98dc6f), Senior Counsel Criminal Division, Nashville, TN, for the appellant, **State** of **Tennessee**.

[Joseph S. Ozment](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0281826101&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I861e74a3e7b511d983e7e9deff98dc6f), Memphis, TN; [Jonathan I. Blackman](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0107706301&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I861e74a3e7b511d983e7e9deff98dc6f), New York, NY; [David E. Brodsky](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0247213801&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I861e74a3e7b511d983e7e9deff98dc6f), New York, NY, for the appellee, Erskine Leroy **Johnson**.

[BARKER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0151945901&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I861e74a3e7b511d983e7e9deff98dc6f), J., delivered the opinion of the court, in which [ANDERSON](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0157496001&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I861e74a3e7b511d983e7e9deff98dc6f), C.J., and [DROWOTA](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0259789701&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I861e74a3e7b511d983e7e9deff98dc6f), [BIRCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0259809301&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I861e74a3e7b511d983e7e9deff98dc6f), and [HOLDER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0184016001&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I861e74a3e7b511d983e7e9deff98dc6f), JJ., joined.

**Opinion**

[BARKER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0151945901&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I861e74a3e7b511d983e7e9deff98dc6f), J.

The sole issue in this capital post-conviction appeal is whether the **State** improperly withheld material, exculpatory evidence at the appellee's capital sentencing hearing. The appellee was convicted of felony murder and sentenced to death in 1985, and in 1991, he filed a post-conviction petition alleging, among other things, that the **State**improperly withheld a police report that was discoverable under [*Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1963125353&pubNum=708&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). The post-conviction court denied relief, but the Court of Criminal Appeals reversed and vacated the capital sentence. Finding that the police report was exculpatory and material, the intermediate court held that a new sentencing hearing was constitutionally required. The **State** then appealed to this Court. For the reasons given herein, we hold that the **State** improperly withheld the police report, which was both “evidence favorable to the accused” and material as to the issue of sentencing. Accordingly, we affirm the judgment of the Court of Criminal Appeals vacating the appellee's sentence, and we remand this case to the Shelby County Criminal  **\*54** Court for a new capital sentencing hearing.

**OPINION**

This case comes before this Court on an appeal from a post-conviction petition filed by the appellee, Erskine Leroy **Johnson**, who was convicted of felony murder and sentenced to death by a jury in Shelby County in 1985. The events giving rise to this case occurred in early October of 1983 when the appellee and two other persons robbed a Food Rite Grocery Store in Memphis. Upon entering the store, the appellee approached the manager, who was working at the checkout counter, and the other two persons headed for the office where the safe was located. The appellee placed his pistol to the manager's head, and the manager turned around and threw up his hands. Witnesses testified that the manager hit or bumped into the appellee's pistol, causing it to fire a bullet into the ceiling of the store. After this shot was fired, the appellee shot the store manager twice, mortally wounding him. The appellee then went to the next open register, where he put his pistol close to the face of the manager's wife and demanded money. Meanwhile, the other two co-felons apprehended the security guard on the other side of the store, and one of them placed a pistol to his head. At some point during this episode, someone fired a bullet, known as the “Pac–Man” bullet, which went through a Pac–Man video-game machine and grazed a sixteen-year-old girl across her chest.

The appellee was tried and convicted of felony murder in December of 1985, and a jury sentenced him to die by electrocution. The jury found that the following three aggravating circumstances outweighed any mitigating circumstances: (1) that the defendant was previously convicted of one or more felonies that involved the use or threat of violence to the person, Tenn.Code Ann. § 39–2–203(i)(2) (1982); (2) that the defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder, Tenn.Code Ann. § 39–2–203(i)(3) (1982); and (3) that the murder was committed while the defendant was engaged in the commission of a robbery, Tenn.Code Ann. § 39–2–203(i)(7) (1982). The appellee's conviction and sentence were later affirmed by this Court in [***State****v.****Johnson****,* 762 S.W.2d 110 (**Tenn**.1988)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988157928&pubNum=713&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

On October 3, 1991, the appellee filed a *pro se* petition for post-conviction relief, and his appointed counsel later filed an amended petition in December of 1991. Eventually, additional attorneys were appointed to represent the appellee, and these attorneys filed a second amended petition in August of 1996.[1](https://1.next.westlaw.com/Document/I861e74a3e7b511d983e7e9deff98dc6f/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781edf912558bdcac7%3Fppcid%3D4e4ba17c967b4ea48810dd758860d768%26Nav%3DCASE%26fragmentIdentifier%3DI861e74a3e7b511d983e7e9deff98dc6f%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=809103cc0356e70872d12341c62b3553&list=CASE&rank=1&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=4e4ba17c967b4ea48810dd758860d768&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00112001080403) The trial court held a hearing lasting seven days between December 1996 and February 1997. During this hearing, the appellee introduced, among other things, proof showing that the **State** improperly withheld a police report at the sentencing hearing in violation of [*Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1963125353&pubNum=708&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). This police report, which was completed within days of the armed robbery, concluded that the “Pac–Man” bullet could not have been fired from the cash register area where the appellant was standing, due to the angle of the bullet entry into the machine. Moreover, photographs attached to the report showed that solid obstructions were between the cash register area and the Pac–Man machine. The appellee then argued that because he did not fire the bullet that grazed the sixteen-year-old girl, the proof was insufficient to establish the (i)(3) “great risk of death”  **\*55** aggravating circumstance.[2](https://1.next.westlaw.com/Document/I861e74a3e7b511d983e7e9deff98dc6f/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781edf912558bdcac7%3Fppcid%3D4e4ba17c967b4ea48810dd758860d768%26Nav%3DCASE%26fragmentIdentifier%3DI861e74a3e7b511d983e7e9deff98dc6f%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=809103cc0356e70872d12341c62b3553&list=CASE&rank=1&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=4e4ba17c967b4ea48810dd758860d768&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00222001080403)On April 22, 1997, the trial judge dismissed the appellee's petition, finding that “the petition for post conviction relief as amended is without merit.” Although the trial court found the felony murder aggravating circumstance inapplicable after this Court's decision in [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I657d2900e7d211d983e7e9deff98dc6f&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=43e7352145a44780b0c3e8715810f754&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[***State****v. Middlebrooks,* 840 S.W.2d 317 (**Tenn**.1992)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992167651&pubNum=713&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), the court found that the error was harmless given “the strong case supporting the other two aggravating circumstances found by the jury....” The trial court made no specific written findings with respect to the alleged [*Brady*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1963125353&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) violation concerning the withheld police report.

The Court of Criminal Appeals reversed the dismissal of the petition and remanded the case for a new capital sentencing hearing. The intermediate court found that the withheld police report was material exculpatory evidence within the meaning of [*Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1963125353&pubNum=708&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), and therefore, the report should have been disclosed to the appellee. This failure to disclose the police report, the court **stated**, resulted in an arguable misapplication of the (i)(3) aggravating circumstance. Viewing the withheld report in combination with the unconstitutional application of the felony murder aggravating circumstance, the court **stated**that it was “unable to conclude that the jury would have sentenced the Defendant to death based solely on the prior violent felonies aggravator.” Accordingly, while the Court of Criminal Appeals affirmed the judgment of the trial court in all other respects, it remanded the case for a new capital sentencing hearing.

The **State** then requested, and this Court granted, permission to appeal on the sole issue of whether the withheld police report was “material” as applied to the (i)(3) “great risk of death” aggravating circumstance. After reviewing the extensive record in this case, we conclude that the police report was both “evidence favorable to the accused” and “material” within the meaning of [*Brady v. Maryland.*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1963125353&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) We therefore hold that the report should have been disclosed to the appellee prior to his sentencing hearing, and because the **State's** failure to disclose this police report severely undermines our confidence in the jury's sentence of death, we remand this case to the Shelby County Criminal Court for a new capital sentencing hearing.

**ALLEGED *BRADY* VIOLATION DURING THE APPELLEE'S CAPITAL SENTENCING HEARING**

[1](https://1.next.westlaw.com/Document/I861e74a3e7b511d983e7e9deff98dc6f/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781edf912558bdcac7%3Fppcid%3D4e4ba17c967b4ea48810dd758860d768%26Nav%3DCASE%26fragmentIdentifier%3DI861e74a3e7b511d983e7e9deff98dc6f%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=809103cc0356e70872d12341c62b3553&list=CASE&rank=1&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=4e4ba17c967b4ea48810dd758860d768&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F12001080403)[2](https://1.next.westlaw.com/Document/I861e74a3e7b511d983e7e9deff98dc6f/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781edf912558bdcac7%3Fppcid%3D4e4ba17c967b4ea48810dd758860d768%26Nav%3DCASE%26fragmentIdentifier%3DI861e74a3e7b511d983e7e9deff98dc6f%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=809103cc0356e70872d12341c62b3553&list=CASE&rank=1&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=4e4ba17c967b4ea48810dd758860d768&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F22001080403)[3](https://1.next.westlaw.com/Document/I861e74a3e7b511d983e7e9deff98dc6f/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781edf912558bdcac7%3Fppcid%3D4e4ba17c967b4ea48810dd758860d768%26Nav%3DCASE%26fragmentIdentifier%3DI861e74a3e7b511d983e7e9deff98dc6f%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=809103cc0356e70872d12341c62b3553&list=CASE&rank=1&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=4e4ba17c967b4ea48810dd758860d768&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F32001080403)Every criminal defendant is guaranteed the right to a fair trial under the Due Process Clause of the Fourteenth Amendment to the United **States** Constitution and the “Law of the Land” Clause of [Article I, section 8 of the **Tennessee** Constitution](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S8&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). *See, e.g.,*[***State****ex rel. Anglin v. Mitchell,* 596 S.W.2d 779, 786 (**Tenn**.1980)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980110397&pubNum=713&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&fi=co_pp_sp_713_786&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_786). “To facilitate this right, a defendant has a constitutionally protected privilege to request and obtain from the prosecution evidence that is either material to guilt or relevant to punishment.” [***State****v. Ferguson,* 2 **S.W**.**3d** 912, 915 (**Tenn**.1999)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999214228&pubNum=4644&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&fi=co_pp_sp_4644_915&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_4644_915). This fundamental principle of law is derived from the landmark case, [*Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1963125353&pubNum=708&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), in which the United **States** Supreme Court held that “suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution,” [*id.* at 87, 83 S.Ct. 1194.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1963125353&pubNum=708&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))[3](https://1.next.westlaw.com/Document/I861e74a3e7b511d983e7e9deff98dc6f/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781edf912558bdcac7%3Fppcid%3D4e4ba17c967b4ea48810dd758860d768%26Nav%3DCASE%26fragmentIdentifier%3DI861e74a3e7b511d983e7e9deff98dc6f%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=809103cc0356e70872d12341c62b3553&list=CASE&rank=1&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=4e4ba17c967b4ea48810dd758860d768&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00332001080403) Evidence **\*56** “favorable to an accused” includes evidence deemed to be exculpatory in nature and evidence that could be used to impeach the **state's** witnesses. *See*[***State****v. Walker,* 910 S.W.2d 381, 389 (**Tenn**.1995)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995189102&pubNum=713&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&fi=co_pp_sp_713_389&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_389); [***State****v. Copeland,* 983 S.W.2d 703, 706 (Tenn.Crim.App.1998)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1998083642&pubNum=713&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&fi=co_pp_sp_713_706&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_706); *see also*[*United****States****v. Bagley,* 473 U.S. 667, 676, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985133735&pubNum=708&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

[4](https://1.next.westlaw.com/Document/I861e74a3e7b511d983e7e9deff98dc6f/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781edf912558bdcac7%3Fppcid%3D4e4ba17c967b4ea48810dd758860d768%26Nav%3DCASE%26fragmentIdentifier%3DI861e74a3e7b511d983e7e9deff98dc6f%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=809103cc0356e70872d12341c62b3553&list=CASE&rank=1&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=4e4ba17c967b4ea48810dd758860d768&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F42001080403)While the “prosecution is not required to disclose information that the accused already possesses or is able to obtain,” [***State****v.. Marshall,* 845 S.W.2d 228, 233 (Tenn.Crim.App.1992)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1993032172&pubNum=713&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&fi=co_pp_sp_713_233&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_233), the “prosecution's duty to disclose is not limited in scope to ‘competent evidence’ or ‘admissible evidence,’ ” [*id.* at 232;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1993032172&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) *see also*[***State****v. Brooks,* 386 So.2d 1348, 1351 (La.1980)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980152750&pubNum=735&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&fi=co_pp_sp_735_1351&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_735_1351) (“The [*Brady*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1963125353&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) rules of disclosure apply not just to information favorable to the accused which the **state** itself believes to be credible, but to any material information that is favorable to the accused.”). As the United **States** Supreme Court has recognized, “the prosecutor is responsible for ‘any favorable evidence known to the others acting on the government's behalf in the case, including the police.’ ” [*Strickler v. Greene,* 527 U.S. 263, 275 n. 12, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999142645&pubNum=708&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) (citing [*Kyles v. Whitley,* 514 U.S. 419, 437, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995091643&pubNum=708&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))). Despite this obligation, however, there is “ ‘no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case .’ ” [*Walker,* 910 S.W.2d at 389](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995189102&pubNum=713&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&fi=co_pp_sp_713_389&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_389) (quoting [*Moore v. Illinois,* 408 U.S. 786, 795, 92 S.Ct. 2562, 33 L.Ed.2d 706 (1972)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127183&pubNum=708&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))).

This Court has held on several occasions that in order to establish a [*Brady*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1963125353&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) violation, four elements must be shown by the defendant:

1) that the defendant requested the information (unless the evidence is obviously exculpatory, in which case the **State** is bound to release the information whether requested or not);

2) that the **State** suppressed the information;

3) that the information was favorable to the accused; and

4) that the information was material.

*See*[***State****v. Edgin,* 902 S.W.2d 387, 390 (**Tenn**.1995)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995134559&pubNum=713&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&fi=co_pp_sp_713_390&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_390); *see also*[*Walker,* 910 S.W.2d at 389.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995189102&pubNum=713&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&fi=co_pp_sp_713_389&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_389) In this case, there is no question that the first two requirements have been met. Before the appellee's trial in 1985, defense counsel made a general [*Brady*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1963125353&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) request seeking “copies of and the right to inspect any written statements given to the prosecution and/or any investigatory agencies which in whole or in part support the innocence of the accused and/or is exculpatory in nature....” Moreover, it is clear that the **State** has suppressed this police report given that it has had this report in its possession since its completion on October 8, 1983.[4](https://1.next.westlaw.com/Document/I861e74a3e7b511d983e7e9deff98dc6f/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781edf912558bdcac7%3Fppcid%3D4e4ba17c967b4ea48810dd758860d768%26Nav%3DCASE%26fragmentIdentifier%3DI861e74a3e7b511d983e7e9deff98dc6f%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=809103cc0356e70872d12341c62b3553&list=CASE&rank=1&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=4e4ba17c967b4ea48810dd758860d768&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00442001080403)

[5](https://1.next.westlaw.com/Document/I861e74a3e7b511d983e7e9deff98dc6f/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781edf912558bdcac7%3Fppcid%3D4e4ba17c967b4ea48810dd758860d768%26Nav%3DCASE%26fragmentIdentifier%3DI861e74a3e7b511d983e7e9deff98dc6f%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=809103cc0356e70872d12341c62b3553&list=CASE&rank=1&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=4e4ba17c967b4ea48810dd758860d768&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F52001080403)We also conclude that the police report is information favorable to the accused. Information that is favorable to the accused may consist of evidence that “could exonerate the accused, corroborate[ ] the accused's position in asserting his innocence, or possess[ ] favorable information that would have enabled defense counsel to conduct further and possibly fruitful investigation regarding the fact that someone other than the appellant killed the victim.” [*Marshall,* 845 S.W.2d at 233.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1993032172&pubNum=713&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&fi=co_pp_sp_713_233&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_233) As the Massachusetts Supreme Court has articulated the standard, “[t]he [*Brady*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1963125353&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))obligation comprehends evidence which provides some significant aid to the defendant's case, whether it furnishes corroboration **\*57** of the defendant's story, calls into question a material, although not indispensable, element of the prosecution's version of the events, or challenges the credibility of a key prosecution witness.” [*Commonwealth v. Ellison,* 376 Mass. 1, 379 N.E.2d 560, 571 (1978)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1978127261&pubNum=578&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&fi=co_pp_sp_578_571&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_578_571); *see also*[*Mazzan v. Warden, Ely****State****Prison,* 993 P.2d 25, 37 (Nev.2000)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000043064&pubNum=661&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&fi=co_pp_sp_661_37&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_661_37) (**stating** that evidence is favorable under [*Brady*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1963125353&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) if “it provides grounds for the defense to attack the reliability, thoroughness, and good faith of the police investigation, to impeach the credibility of the **state's**witnesses, or to bolster the defense case against prosecutorial attacks”). As we view the police report in the context of the **State's** theory supporting the death penalty at the sentencing hearing, we conclude that this third factor is easily met.

The **State's** principal theory as to the application of the (i)(3) aggravating circumstance was that the appellee fired the “Pac–Man” bullet that grazed a sixteen-year-old girl, Melinda Jordan,[5](https://1.next.westlaw.com/Document/I861e74a3e7b511d983e7e9deff98dc6f/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781edf912558bdcac7%3Fppcid%3D4e4ba17c967b4ea48810dd758860d768%26Nav%3DCASE%26fragmentIdentifier%3DI861e74a3e7b511d983e7e9deff98dc6f%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=809103cc0356e70872d12341c62b3553&list=CASE&rank=1&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=4e4ba17c967b4ea48810dd758860d768&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00552001080403) and the **State** made clear that it believed that the appellee alone fired the shots from the cash register area during the robbery. During the guilt phase of the trial, the **State's** attorney questioned Ms. Jordan about her wound, to which defense counsel objected on the ground that her testimony was irrelevant to the issue of the appellee's guilt for the murder. In response, the **State**argued that the evidence was relevant to establish the *res gestae* of the offense, and when asked by the Court as to whether anyone other than the appellee could have fired the bullets, counsel for the **State** responded:

Well, I think you have to be pretty speculative to think that though.... Let me submit to Your Honor what I thought that I had shown. All of the shots that everybody, all the witnesses who have testified from the store were asked if all the shots came from the same area.... And [Ms. Jordan] said that [the shots had come from the same area]. So I certainly think that we have shown that all—if all of the shots came from the same area and if there was only one gunman in that area, then that gun fired the shots.

As demonstrated by the **State's** answer, it believed that the appellee, as the only person firing shots from the cash register area, was solely responsible for firing the “Pac–Man” bullet that grazed Ms. Jordan.[6](https://1.next.westlaw.com/Document/I861e74a3e7b511d983e7e9deff98dc6f/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781edf912558bdcac7%3Fppcid%3D4e4ba17c967b4ea48810dd758860d768%26Nav%3DCASE%26fragmentIdentifier%3DI861e74a3e7b511d983e7e9deff98dc6f%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=809103cc0356e70872d12341c62b3553&list=CASE&rank=1&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=4e4ba17c967b4ea48810dd758860d768&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00662001080403) The **State** then later argued during the sentencing phase that because the appellee alone placed Ms. Jordan's life in danger, the “great-risk-of-death” aggravator applied to warrant the death sentence.

However, as the withheld police report demonstrates, not all of the shots fired during the offense came from the cash register area. In fact, with respect to the “Pac–Man” bullet itself, the withheld report concludes that

it was determined that the bullet struck and penetrated the cabinet side [of the “Pac–Man” machine] at an angle of 15.5° from the front, this angle [,] projected in an imaginary line westward[,] would *extend to the front door of the store* and the bullet was fired from some point along this line.

(emphasis added). It is undisputed that the cash register area where the defendant was standing was not along this “imaginary line” extending from the “Pac–Man” machine to the front doors of the store, and the **State** introduced no proof whatsoever that the appellee fired any shots from near the front door of the store. As such, the report directly contradicts the principal portion of the **State's** theory concerning the application of the (i)(3) aggravating  **\*58**circumstance: that the appellee fired the “Pac–Man” bullet that grazed Ms. Jordan, putting her in great risk of death.

When viewed in light of the **State's** theory, the withheld police report clearly tends to “corroborate the accused's position in asserting his innocence [in firing the ‘Pac–Man’ bullet].” *Cf.*[*Marshall,* 845 S.W.2d at 233.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1993032172&pubNum=713&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&fi=co_pp_sp_713_233&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_233) Moreover, because the report calls into question a key “element of the prosecution's version of events,” *i.e.,* that the appellee fired the “Pac–Man” bullet, *cf.*[*Ellison,* 379 N.E.2d at 571,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1978127261&pubNum=578&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&fi=co_pp_sp_578_571&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_578_571) this report constitutes “evidence favorable to the accused” within the meaning of [*Brady,*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1963125353&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and it should have been disclosed by the **State**. Accordingly, we conclude that the appellee has successfully established the third element needed to assert a constitutional violation under [*Brady.*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1963125353&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))

[6](https://1.next.westlaw.com/Document/I861e74a3e7b511d983e7e9deff98dc6f/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781edf912558bdcac7%3Fppcid%3D4e4ba17c967b4ea48810dd758860d768%26Nav%3DCASE%26fragmentIdentifier%3DI861e74a3e7b511d983e7e9deff98dc6f%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=809103cc0356e70872d12341c62b3553&list=CASE&rank=1&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=4e4ba17c967b4ea48810dd758860d768&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F62001080403)[7](https://1.next.westlaw.com/Document/I861e74a3e7b511d983e7e9deff98dc6f/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781edf912558bdcac7%3Fppcid%3D4e4ba17c967b4ea48810dd758860d768%26Nav%3DCASE%26fragmentIdentifier%3DI861e74a3e7b511d983e7e9deff98dc6f%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=809103cc0356e70872d12341c62b3553&list=CASE&rank=1&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=4e4ba17c967b4ea48810dd758860d768&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F72001080403)The only remaining issue, then, is whether the failure of the **State** to disclose the police report was “material” as to the sentence of death. Evidence is deemed to be material when “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.” [***State****v. Edgin,* 902 S.W.2d 387, 390 (**Tenn**.1995)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995134559&pubNum=713&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&fi=co_pp_sp_713_390&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_390); *see also*[***State****v. Walker,* 910 S.W.2d 381, 389 (**Tenn**.1995)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995189102&pubNum=713&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&fi=co_pp_sp_713_389&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_389); [***State****v. Copeland,* 983 S.W.2d 703, 706 (Tenn.Crim.App.1998)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1998083642&pubNum=713&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&fi=co_pp_sp_713_706&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_706). Despite the language of probabilities used in our cases, however, it must be emphasized that the test of materiality is not whether the defendant would more likely than not have received a different verdict had the evidence been disclosed. *See*[*Strickler v. Greene,* 527 U.S. 263, 275, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999142645&pubNum=708&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).[7](https://1.next.westlaw.com/Document/I861e74a3e7b511d983e7e9deff98dc6f/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781edf912558bdcac7%3Fppcid%3D4e4ba17c967b4ea48810dd758860d768%26Nav%3DCASE%26fragmentIdentifier%3DI861e74a3e7b511d983e7e9deff98dc6f%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=809103cc0356e70872d12341c62b3553&list=CASE&rank=1&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=4e4ba17c967b4ea48810dd758860d768&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00772001080403) Nor is the test of materiality equivalent to that of evidentiary sufficiency, such that we may affirm a conviction or sentence when, “after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions.” [*Id.;*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999142645&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))[*Kyles v. Whitley,* 514 U.S. 419, 435 n. 8, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995091643&pubNum=708&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) (“This rule is clear, and none of the [*Brady*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1963125353&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) cases has ever suggested that sufficiency of evidence (or insufficiency) is the touchstone [of materiality].”). Instead, a reviewing court must determine whether the defendant has shown that “the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine the confidence of the verdict.” [*Irick v.****State****,* 973 S.W.2d 643, 657 (Tenn.Crim.App.1998)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1998032125&pubNum=713&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&fi=co_pp_sp_713_657&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_657) (citing [*Edgin,* 902 S.W.2d at 390);](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995134559&pubNum=713&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&fi=co_pp_sp_713_390&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_390) *see also*[*Strickler,* 527 U.S. at 290, 119 S.Ct. 1936.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999142645&pubNum=708&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) In other words, evidence is material when, because of its absence, the defendant failed to receive a fair trial, “understood as a trial resulting in a verdict worthy of confidence.” [*Kyles,* 514 U.S. at 434, 115 S.Ct. 1555](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995091643&pubNum=708&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

After carefully reviewing the extensive record in this appeal, including the record of the original trial, we believe that the withheld police report “could reasonably be taken to put the whole case in such a different light as to undermine confidence in the [sentencing] verdict.” As in [*Kyles,* 514 U.S. at 445, 115 S.Ct. 1555](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995091643&pubNum=708&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) the “likely damage” from the **State's** suppression of the police report in this case “is best understood **\*59** by taking the word of the prosecutor” during his arguments to the jury. As the **State** concedes in its brief before this Court, “the prosecutor did rely heavily upon the Pac–Man bullet in closing argument to establish the great risk aggravator,” and the emphasis placed upon this critical factor by the **State** can first be seen from its opening statement to the jury at the sentencing phase:

And I think that all three of these statutory aggravating circumstance, there's no question that they've been proven, *especially the one where two or more people.* I think that the testimony was different as to the number of people that were in the store at the time Mr. Belenchia was killed. *We do know that one of the other witnesses was wounded herself.* Her name is Melinda Jordan, scraped across the chest by one of the bullets.... I mean, this is a frightening thing that happened out there. Melinda Jordan who's sixteen years old then, now she's eighteen. She's married. *How close did she come to dying? Maybe two inches, an inch?*

(emphasis added). Later in rebuttal argument during closing, the district attorney read all of the aggravating circumstances and the evidence supporting them. With regard to the (i)(3) aggravating circumstance, the full statement of the district attorney is as follows:

Number Three,

“The defendant knowingly created a great risk of death to two or more persons other than the victim murdered during his act of murder.”

Melinda Scott was shot. Melinda Scott came very near death, well, not death. She was shot. If the bullet had gone to a different area of the body close by, it could've caused death. She was shot. We all know the consequences of being shot, the potential consequences of that.

From these statements, it is clear that the **State** relied heavily—if not almost exclusively—upon the shooting of this one sixteen-year-old girl to justify finding the (i)(3) aggravating circumstance, and also to support the finding that this aggravating circumstance, when considered with the others, outweighed any mitigating circumstances. Indeed, in its rebuttal argument, the **State** summarized its proof before the jury *solely* in terms of the harm suffered by Ms. Jordan, thereby ignoring any great risk of death faced by others in the store. As is seen from its arguments at trial, the attention of the **State**, and likely that of the jury as well, was focused almost exclusively upon the harm suffered by this one girl.

We conclude that the disproportionate amount of attention devoted to showing that the appellee fired the infamous “Pac–Man” bullet, combined with the fact that the withheld police report seems to indicate that the appellee was never in a position to fire this bullet, certainly undermines confidence in the jury's sentence of death, as it significantly weakens confidence in the jury's finding and weighing of this particular aggravating circumstance.While the **State** is correct that the withheld report “does not remove the possibility that **Johnson** fired the Pac–Man bullet,” the withheld report substantially undermines that conclusion, especially in the absence of any proof that the appellee fired any bullets along the relevant line of fire. Under these circumstances, we cannot be reasonably confident that every single member of the jury, after considering the withheld report, would have applied this aggravating circumstance or that every member of the jury would have assigned it the same weight in relation to the other aggravating and mitigating circumstances. Accordingly, we hold that the withheld police report is “material” within the meaning of [*Brady.*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1963125353&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))

In response, the **State** argues that the withheld police report is not material because “it is clear that any reasonable juror would have applied the [ (i) (3) ] aggravator to **Johnson's** own actions even if the Pac–Man Bullet had never been fired.” More  **\*60** specifically, the **State** contends (1) that the other shots fired by the appellee were sufficient by themselves to establish the (i)(3) aggravating circumstance; and (2) that because the (i)(3) aggravating circumstance may be applied vicariously, the jury would have found and considered this aggravating circumstance even if the appellee did not fire the “Pac–Man” bullet. We disagree that either of these arguments renders the withheld police report immaterial for purposes of [*Brady.*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1963125353&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))

Upon examination of the substance of these arguments, it is clear that the **State** is attempting to make a sufficiency of the proof argument, *i.e.,* that because the proof is sufficient for a jury to find this aggravating circumstance on other grounds without the police report, the police report is not material to the appellee's case. The **State**misconstrues the nature of a [*Brady*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1963125353&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) materiality inquiry, because, as we **stated** earlier, the measure of materiality is not that of evidentiary sufficiency. *See*[*Strickler,* 527 U.S. at 275, 119 S.Ct. 1936.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999142645&pubNum=708&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) Rather, materiality is established “by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict,” [*Kyles,* 514 U.S. at 435, 115 S.Ct. 1555](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995091643&pubNum=708&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and the appellee has made this showing to our satisfaction. Nevertheless, because the proper application of the (i)(3) aggravating circumstance is an issue infrequently discussed in our opinions, we take the opportunity to discuss the **State's** arguments on their merits.[8](https://1.next.westlaw.com/Document/I861e74a3e7b511d983e7e9deff98dc6f/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781edf912558bdcac7%3Fppcid%3D4e4ba17c967b4ea48810dd758860d768%26Nav%3DCASE%26fragmentIdentifier%3DI861e74a3e7b511d983e7e9deff98dc6f%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=809103cc0356e70872d12341c62b3553&list=CASE&rank=1&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=4e4ba17c967b4ea48810dd758860d768&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00882001080403)

[8](https://1.next.westlaw.com/Document/I861e74a3e7b511d983e7e9deff98dc6f/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781edf912558bdcac7%3Fppcid%3D4e4ba17c967b4ea48810dd758860d768%26Nav%3DCASE%26fragmentIdentifier%3DI861e74a3e7b511d983e7e9deff98dc6f%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=809103cc0356e70872d12341c62b3553&list=CASE&rank=1&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=4e4ba17c967b4ea48810dd758860d768&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F82001080403)The **State** first argues that the other shots fired by the appellee were sufficient by themselves to establish the (i)(3) aggravating circumstance. This Court has previously held that this aggravating circumstance “contemplates either multiple murders or threats to several persons at or shortly prior to or shortly after an act of murder upon which the prosecution is based.” [***State****v. Cone,* 665 S.W.2d 87, 95 (**Tenn**.1984)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984107554&pubNum=713&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&fi=co_pp_sp_713_95&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_95).[9](https://1.next.westlaw.com/Document/I861e74a3e7b511d983e7e9deff98dc6f/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781edf912558bdcac7%3Fppcid%3D4e4ba17c967b4ea48810dd758860d768%26Nav%3DCASE%26fragmentIdentifier%3DI861e74a3e7b511d983e7e9deff98dc6f%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=809103cc0356e70872d12341c62b3553&list=CASE&rank=1&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=4e4ba17c967b4ea48810dd758860d768&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00992001080403) Most commonly, this aggravating circumstance “has been applied where a defendant fires multiple gunshots in the course of a robbery or other incident at which persons other than the victim are present.” [***State****v. Henderson,* 24 **S.W**.**3d** 307, 314 (**Tenn**.2000)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000432246&pubNum=4644&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&fi=co_pp_sp_4644_314&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_4644_314)(citing [***State****v. Burns,* 979 S.W.2d 276, 280 (**Tenn**.1998)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1998229393&pubNum=713&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&fi=co_pp_sp_713_280&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_280)). In many of the cases upholding application of the (i)(3) aggravator, the defendant fired random shots with others present or nearby,[10](https://1.next.westlaw.com/Document/I861e74a3e7b511d983e7e9deff98dc6f/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781edf912558bdcac7%3Fppcid%3D4e4ba17c967b4ea48810dd758860d768%26Nav%3DCASE%26fragmentIdentifier%3DI861e74a3e7b511d983e7e9deff98dc6f%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=809103cc0356e70872d12341c62b3553&list=CASE&rank=1&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=4e4ba17c967b4ea48810dd758860d768&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B010102001080403) the defendant engaged in a shoot-out with other parties,[11](https://1.next.westlaw.com/Document/I861e74a3e7b511d983e7e9deff98dc6f/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781edf912558bdcac7%3Fppcid%3D4e4ba17c967b4ea48810dd758860d768%26Nav%3DCASE%26fragmentIdentifier%3DI861e74a3e7b511d983e7e9deff98dc6f%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=809103cc0356e70872d12341c62b3553&list=CASE&rank=1&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=4e4ba17c967b4ea48810dd758860d768&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B011112001080403) or the defendant actually **\*61** shot people in addition to the murder victim.[12](https://1.next.westlaw.com/Document/I861e74a3e7b511d983e7e9deff98dc6f/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781edf912558bdcac7%3Fppcid%3D4e4ba17c967b4ea48810dd758860d768%26Nav%3DCASE%26fragmentIdentifier%3DI861e74a3e7b511d983e7e9deff98dc6f%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=809103cc0356e70872d12341c62b3553&list=CASE&rank=1&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=4e4ba17c967b4ea48810dd758860d768&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B012122001080403) In at least one case, this Court has affirmed application of the (i)(3) aggravating circumstance when the defendants fired two shots, one into the ceiling and a second into the victim, when the defendants also held others at gun point and the surrounding circumstances of the offense indicated that “the threat to their lives was very real.” [*King v.****State****,* 992 S.W.2d 946, 950–51 (**Tenn**.1999)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999134755&pubNum=713&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&fi=co_pp_sp_713_950&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_950).

We disagree with the **State's** assertion that the (i)(3) aggravating circumstance was present beyond a reasonable doubt in this case based on the appellee's actions without considering the “Pac–Man” bullet. The appellee fired three known shots: two into the store manager and one into the ceiling. The shots fired at the store manager were fired at point-blank range, and no other person was within the immediate vicinity or within the line of fire.[13](https://1.next.westlaw.com/Document/I861e74a3e7b511d983e7e9deff98dc6f/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781edf912558bdcac7%3Fppcid%3D4e4ba17c967b4ea48810dd758860d768%26Nav%3DCASE%26fragmentIdentifier%3DI861e74a3e7b511d983e7e9deff98dc6f%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=809103cc0356e70872d12341c62b3553&list=CASE&rank=1&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=4e4ba17c967b4ea48810dd758860d768&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B013132001080403)Moreover, the stray bullet fired into the ceiling was not an intentional shot fired by the appellee to intimidate the other customers, as was the case in [*King v.****State***](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999134755&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))*,* nor was the bullet fired by the appellee as part of a random shooting spree, as in [***State****v. Henderson*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000432246&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))*,*[***State****v. Burns,*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1998229393&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) or [***State****v. McKay.*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984156140&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))[14](https://1.next.westlaw.com/Document/I861e74a3e7b511d983e7e9deff98dc6f/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781edf912558bdcac7%3Fppcid%3D4e4ba17c967b4ea48810dd758860d768%26Nav%3DCASE%26fragmentIdentifier%3DI861e74a3e7b511d983e7e9deff98dc6f%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=809103cc0356e70872d12341c62b3553&list=CASE&rank=1&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=4e4ba17c967b4ea48810dd758860d768&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B014142001080403) We see no indication that the appellee threatened the lives of the other customers as did the defendants in [*King,*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999134755&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) nor did he actually shoot any other person, as was the case in [***State****v.****Johnson***](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1982123456&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))*,*[*McKay*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984156140&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))*,* or [***State****v. Workman.*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984113995&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))

From our review of the original trial transcript, we did find testimony that the appellee, after shooting the manager, held his pistol to the head of the store manager's wife and demanded money. While this fact could help provide a basis for finding the (i)(3) aggravating circumstance, we note that the great-risk-of-death aggravator requires that *two or more* people, other than the victim murdered, be placed in great risk of death.[15](https://1.next.westlaw.com/Document/I861e74a3e7b511d983e7e9deff98dc6f/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781edf912558bdcac7%3Fppcid%3D4e4ba17c967b4ea48810dd758860d768%26Nav%3DCASE%26fragmentIdentifier%3DI861e74a3e7b511d983e7e9deff98dc6f%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=809103cc0356e70872d12341c62b3553&list=CASE&rank=1&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=4e4ba17c967b4ea48810dd758860d768&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B015152001080403) *See* Tenn.Code Ann. § 39–2–203(i)(3). From our examination of the record, we cannot conclude that the **State** proved beyond a reasonable doubt that another person was placed in great risk of death by the appellee without the “Pac–Man” bullet, and we decline to adopt a *per se* rule that would automatically allow this aggravating circumstance in all felony murder cases where the defendant is armed with a pistol and others are present. Such a *per se* rule would not adequately provide for individualized sentencing, and it would unnecessarily broaden the (i)(3) aggravating circumstance to a point that it would fail in its essential function of narrowing the death-eligible class.

*Cf.*[***State****v. Keen,* 31 **S.W**.**3d** 196, 210 (**Tenn**.2000)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000561106&pubNum=4644&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&fi=co_pp_sp_4644_210&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_4644_210) (“The very purpose of the consideration of aggravating circumstances  **\*62** within a scheme of capital punishment is to provide some principled guidance for the sentencing authority to choose between death and a lesser sentence.”)

Even if the evidence did support a finding of this aggravating circumstance beyond a reasonable doubt without the “Pac–Man” bullet, however, such a finding would not render the withheld police report immaterial. Significantly, the **State** never argued that the (i)(3) aggravating circumstance applied because the appellee held his pistol to the head of the store manager's wife. Moreover, the **State** only briefly alluded to the fact at the sentencing hearing that others were present in the store, and the **State** *never* mentioned these other persons during its summary of the proof supporting the (i)(3) aggravator in rebuttal argument. Contrary to the **State's** assertions before this Court that the “Pac–Man” bullet was merely “gravy,” or additional proof not needed to establish this aggravator, the actions of the **State** at trial reveal that virtually its entire case for application of the (i)(3) aggravator was built on the fact that a sixteen-year-old girl was grazed by a random bullet. As such, it seems likely, even probable, that the jury gave considerable weight to the **State's** argument that the appellee fired the shot that grazed Ms. Jordan. Under these circumstances, we conclude that the withheld report is still material, even if other evidence supported application of the (i)(3) aggravating circumstance, because the fact of its suppression significantly undermines our confidence in the jury's sentence of death.[16](https://1.next.westlaw.com/Document/I861e74a3e7b511d983e7e9deff98dc6f/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781edf912558bdcac7%3Fppcid%3D4e4ba17c967b4ea48810dd758860d768%26Nav%3DCASE%26fragmentIdentifier%3DI861e74a3e7b511d983e7e9deff98dc6f%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=809103cc0356e70872d12341c62b3553&list=CASE&rank=1&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=4e4ba17c967b4ea48810dd758860d768&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B016162001080403)

[9](https://1.next.westlaw.com/Document/I861e74a3e7b511d983e7e9deff98dc6f/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781edf912558bdcac7%3Fppcid%3D4e4ba17c967b4ea48810dd758860d768%26Nav%3DCASE%26fragmentIdentifier%3DI861e74a3e7b511d983e7e9deff98dc6f%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=809103cc0356e70872d12341c62b3553&list=CASE&rank=1&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=4e4ba17c967b4ea48810dd758860d768&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F92001080403)The **State** also urges this Court to adopt the view that the (i)(3) aggravating circumstance may be applied vicariously, such that the jury could have found and considered this aggravating circumstance even if someone other than the appellee fired the “Pac–Man” bullet. Although no court in this **state** has ever held that the (i)(3) aggravating circumstance may be applied vicariously, the Court of Criminal Appeals has recently held that some statutory aggravating circumstances may be applied vicariously, consistent with the federal and **state** constitutions, where the statutory language permits vicarious application. *See*[*Owens v.****State****,* 13 **S.W**.**3d** 742, 760 (Tenn.Crim.App.1999)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000085494&pubNum=4644&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&fi=co_pp_sp_4644_760&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_4644_760).

At issue before the [*Owens*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000085494&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) Court was the vicarious application of the (i)(5) aggravating circumstance—that the murder is “especially heinous, atrocious, or cruel.” In conducting its analysis of the statutory language of this aggravator, the court first noted that “[c]ertain aggravators focus clearly on the defendant's *own actions or intent*and contemplate consideration of the defendant's *individual* actions in determining the most culpable capital defendants. Alternatively, other statutory aggravators, by their plain language, clearly encompass consideration of the *nature and circumstances of the crime itself,* permitting vicarious application.” [*Id.* at 763 n. 13](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000085494&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) (citations omitted) (emphasis in original). Concluding that the (i)(5) aggravating circumstance was one that fell within the latter category, the court **stated**,

After examination of this issue, we conclude that it was the legislature's intent that the (i)(5) aggravator impute liability upon a defendant for conduct for which he or she is criminally responsible. This aggravator, by its plain language, clearly encompasses consideration of the *nature and circumstances of the crime itself,* which would permit such a vicarious application. The emphasis in the (i)(5) aggravator is on the *manner of killing,* not on the defendant's actual participation.

[*Owens,* 13 **S.W**.**3d** at 763](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000085494&pubNum=4644&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&fi=co_pp_sp_4644_763&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_4644_763) (citations omitted) (emphasis in original).

**\*63** Following the analysis set forward in [*Owens,*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000085494&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and examining the statutory language of the (i)(3) aggravating circumstance, we must decline the **State's** invitation to allow vicarious application of this aggravator. At the time of the appellee's offense, the (i)(3) aggravating circumstance read as follows: “The defendant knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during his act of murder.” Tenn.Code Ann. § 39–2–203(i)(3) (1982 & Supp.1986). Unlike other aggravating circumstances, such as the (i)(5) aggravator, the statutory language of the (i)(3) aggravating circumstance simply does not permit application of this aggravating circumstance unless the defendant “knowingly created” the “great risk of death,” either by his or her own actions or by directing, aiding, or soliciting another to do the act, *i.e.,* to shoot the gun, that creates the great risk of death. Without some proof that the defendant in some way “knowingly created” the “great risk of death,” this aggravating circumstance does not apply, even though a great risk of death may have been created by someone during the course of the criminal episode. Because this aggravating circumstance focuses more upon the defendant's actions and intent rather than upon the actual circumstances surrounding the killing, we decline to accept the **State's**invitation to vicariously apply the (i)(3) aggravating circumstance,[17](https://1.next.westlaw.com/Document/I861e74a3e7b511d983e7e9deff98dc6f/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781edf912558bdcac7%3Fppcid%3D4e4ba17c967b4ea48810dd758860d768%26Nav%3DCASE%26fragmentIdentifier%3DI861e74a3e7b511d983e7e9deff98dc6f%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=809103cc0356e70872d12341c62b3553&list=CASE&rank=1&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=4e4ba17c967b4ea48810dd758860d768&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B017172001080403) and we continue to hold that the withheld police report is still material to the issue of the appellee's capital sentence.

Having found that all four elements necessary to establish a [*Brady*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1963125353&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) violation are present, including that the withheld police report reasonably undermines confidence in the jury's verdict, we must remand this case for a new capital sentencing hearing. The intermediate court in this case conducted further harmless error analysis to determine the effect that the [*Brady*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1963125353&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) error had upon the sentencing hearing. However, as the United **States** Supreme Court **stated** in [*Kyles v. Whitley*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995091643&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))*,*

once a reviewing court applying [*Bagley*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985133735&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) has found constitutional error there is no need for further harmless-error review. Assuming, arguendo, that a harmless-error inquiry were to apply, a [*Bagley*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985133735&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) error could not be treated as harmless, since “a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different,” necessarily entails the conclusion that the suppression must have had “substantial and injurious effect or influence in determining the jury's verdict.”

[514 U.S. at 435, 115 S.Ct. 1555](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995091643&pubNum=708&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) (internal citations omitted). Nevertheless, we agree with the conclusion of the Court of Criminal Appeals that a [*Brady*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1963125353&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) violation was established and that the violation was compounded by the jury's consideration of the felony murder aggravating circumstance in violation of this Court's decision in [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I657d2900e7d211d983e7e9deff98dc6f&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=43e7352145a44780b0c3e8715810f754&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[***State****v. Middlebrooks,* 840 S.W.2d 317 (**Tenn**.1992)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992167651&pubNum=713&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). The appellee's sentence, therefore, is vacated, and this case is remanded to the Shelby County Criminal Court for a new capital sentencing hearing.

**CONCLUSION**

In summary, we hold that the police report withheld by the **State** in the appellee's original trial is “favorable information” that is material to the issue of sentencing within the meaning of [*Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1963125353&pubNum=708&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), and its progeny. Because a finding of materiality obviates the need for further harmless error analysis, we affirm the judgment of the Court of Criminal Appeals and remand this case to  **\*64** the Shelby County Criminal Court for further proceedings consistent with this opinion.

Costs of this appeal shall be paid by the appellant, the **State** of **Tennessee**.

**West Headnotes:**

**Sentencing and Punishment**

Police report withheld by **state** following request by defense counsel for exculpatory information in prosecution for felony murder was favorable information material to issue of applicability of aggravating factor in capital sentencing, where withheld police report showed that defendant could not have fired bullet that grazed customer in grocery store robbery, and **state** relied on theory that defendant fired bullet that grazed customer in arguing for application of aggravating circumstance that defendant knowingly created great risk of death to two or more persons, other than victim murdered, during act of murder, and there was reasonable probability that had police report been disclosed, aggravating circumstance would not have been applied to defendant, as, absent evidence that defendant fired bullet, **state** failed to prove that defendant placed another person at great risk of death. [T.C.A. § 39-13-203](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-203&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))(i)(3) (1982).

**Criminal Law**

To facilitate the right to a fair trial, a defendant has a constitutionally protected privilege to request and obtain from the prosecution evidence that is either material to guilt or relevant to punishment. [U.S.C.A. Const.Amend. 14](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDXIV&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

**Criminal Law**

Evidence favorable to an accused, for purposes of Brady violation analysis, includes evidence deemed to be exculpatory in nature and evidence that could be used to impeach the **state's** witnesses.

**Criminal Law**

While the prosecution is not required to disclose information that the accused already possesses or is able to obtain, the prosecution's duty to disclose is not limited in scope to competent evidence or admissible evidence; however, there is no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case. [U.S.C.A. Const.Amend. 14](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDXIV&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

**Criminal Law**

Information that is favorable to the accused, for purposes of Brady analysis, may consist of evidence that could exonerate the accused, corroborate the accused's position in asserting his innocence, or possess favorable information that would have enabled defense counsel to conduct further and possibly fruitful investigation regarding the fact that someone other than the appellant killed the victim.

**Criminal Law**

Evidence is deemed to be material, for purposes of Brady analysis, when there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

**Criminal Law**

Evidence is material, for purposes of Bradyanalysis, when, because of its absence, the defendant failed to receive a fair trial, understood as a trial resulting in a verdict worthy of confidence.

**Sentencing and Punishment**

Shots fired by defendant convicted of felony murder during course of robbery were not sufficient to justify application in capital sentencing of aggravating circumstance that defendant knowingly created great risk of death to two or more persons, other than victim murdered, during act of murder, where defendant fired only three shots, two of which struck victim while other went into ceiling, no other person was within immediate vicinity when shots were fired, and stray bullet fired into ceiling was not intentionally fired into ceiling to intimidate other customers. [T.C.A. § 39-13-203](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-203&originatingDoc=I861e74a3e7b511d983e7e9deff98dc6f&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))(i)(3) (1982).

**Sentencing and Punishment**

Aggravating circumstance that defendant knowingly created great risk of death to two or more persons, other than victim murdered, during act of murder, could not be applied vicariously against felony murder defendant in capital sentencing based on showing that other robbery participant fired bullet that grazed customer, absent proof that defendant knowingly created great risk of death, as aggravator focused on defendant's own actions or intent, rather than nature and circumstances of crime itself. T.C.A. § 39–2–203(i)(3) (1982).

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Supreme Court of Tennessee, Western Section, At Jackson

January 19, 2001, Filed

No. W1997-00024-SC-R11-PD

**Reporter**  
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ERSKINE LEROY JOHNSON v. STATE OF TENNESSEE  
  
**Subsequent History:**

[[\*\*1]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) Released for Publication January 19, 2001.

**Prior History:**

Appeal by Permission from the Court of Criminal Appeals Criminal Court for Shelby County. No. P-9404. Hon. [William H. Williams, Sr.](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) Judge.

[Johnson v. State, 1999 Tenn. Crim. App. LEXIS 828 (Tenn. Crim. App., Aug. 12, 1999)](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)  
  
**Disposition:**

Tenn. R. App. P. 11 Application for Permission to Appeal; Judgment of the Court of Criminal Appeals Affirmed; Case Remanded for Re-Sentencing.

## Core Terms

aggravating circumstances, police report, bullet, fired, withheld, shots, sentencing, murder, aggravator, sentencing hearing, great risk, confidence, vicarious, felony, circumstances, death sentence, exculpatory, new capital, post-conviction, grazed, pistol, cash register, suppression, girl, sixteen-year-old, undermines, knowingly, shooting, machine, vacated

## Case Summary

**Procedural Posture**

The Shelby County Court of Criminal Appeals (Tennessee) reversed the dismissal of appellee's petition for post-conviction relief from his felony murder conviction and death sentence, on the ground that the State's failure to disclose a police report resulted in a misapplication of an aggravating circumstance during sentencing. The State appealed.

**Overview**

Appellee was convicted of felony murder and sentenced to death. Appellee sought post-conviction relief, alleging the State's failure to provide him a police report showing that he did not shoot the bullet that injured one of the victims caused the misapplication of Tenn. Code Ann. § 39-2-203(i)(3)'s aggravated circumstance during sentencing. The trial court dismissed appellee's motion; the appellate court reversed, holding the report was material and therefore appellee was entitled to a new sentencing hearing. On appeal the court affirmed, finding that all four elements necessary to establish a Brady violation were present. The report was information favorable to appellee because it showed that the bullet that injured the victim was fired from the front of the store, instead of the cash register area where appellee was standing. The report was material because the State relied on the fact that appellee injured the victim to justify application of the § 39-2-203(i)(3) aggravating circumstance.

**Outcome**

Judgment affirmed, appellee's death sentence vacated, and matter remanded for resentencing because the police report withheld by the State in appellee's original trial was favorable information that was material to the issue of sentencing, and therefore the dismissal of appellee's post-conviction relief motion was properly reversed.

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* Evidence > [Relevance](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) > [Preservation of Relevant Evidence](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) > [Exclusion & Preservation by Prosecutors](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)

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Every criminal defendant is guaranteed the right to a fair trial under the [Due Process Clause of U.S. Const. amend. XIV](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) and the "Law of the Land" Clause of [Tenn. Const. art. I, § 8](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27). To facilitate this right, a defendant has a constitutionally protected privilege to request and obtain from the prosecution evidence that is either material to guilt or relevant to punishment. This fundamental principle of law is derived from the landmark case, Brady v. Maryland, in which the United States Supreme Court held that suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. Evidence "favorable to an accused" includes evidence deemed to be exculpatory in nature and evidence that could be used to impeach the state's witnesses. [[](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)More like this Headnote](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)

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While the prosecution is not required to disclose information that the accused already possesses or is able to obtain, the prosecution's duty to disclose is not limited in scope to "competent evidence" or "admissible evidence." The Brady rules of disclosure apply not just to information favorable to the accused which the state itself believes to be credible, but to any material information that is favorable to the accused. As the United States Supreme Court has recognized, the prosecutor is responsible for any favorable evidence known to the others acting on the government's behalf in the case, including the police. Despite this obligation, however, there is no constitutional requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case. [[](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)More like this Headnote](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)

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[***HN4[](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)***](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) **Brady Materials, Brady Claims**  
In order to establish a Brady violation, four elements must be shown by the defendant: (1) that the defendant requested the information (unless the evidence is obviously exculpatory, in which case the State is bound to release the information whether requested or not); (2) that the State suppressed the information; (3) that the information was favorable to the accused; and (4) that the information was material. [[](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)More like this Headnote](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)

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[***HN5[](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)***](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) **Discovery & Inspection, Brady Materials**  
Information that is favorable to the accused may consist of evidence that could exonerate the accused, corroborate the accused's position in asserting his innocence, or possess favorable information that would have enabled defense counsel to conduct further and possibly fruitful investigation regarding the fact that someone other than the appellant killed the victim. The Brady obligation comprehends evidence which provides some significant aid to the defendant's case, whether it furnishes corroboration of the defendant's story, calls into question a material, although not indispensable, element of the prosecution's version of the events, or challenges the credibility of a key prosecution witness. [[](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)More like this Headnote](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)

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* Evidence > [Weight & Sufficiency](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)

[***HN6[](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)***](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) **Discovery & Inspection, Brady Materials**  
Evidence is deemed to be material when there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. Despite the language of probabilities used in Tennessee's cases, however, it must be emphasized that the test of materiality is not whether the defendant would more likely than not have received a different verdict had the evidence been disclosed. Nor is the test of materiality equivalent to that of evidentiary sufficiency, such that the court may affirm a conviction or sentence when, after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions. [[](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)More like this Headnote](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)

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[***HN7[](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)***](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) **Discovery & Inspection, Brady Materials**  
A reviewing court must determine whether the defendant has shown that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine the confidence of the verdict. In other words, evidence is material when, because of its absence, the defendant failed to receive a fair trial, understood as a trial resulting in a verdict worthy of confidence. [[](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)More like this Headnote](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)

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* Criminal Law & Procedure > ... > [Discovery & Inspection](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) > [Brady Materials](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) > [General Overview](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)

[***HN8[](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)***](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) **Discovery & Inspection, Brady Materials**  
The measure of materiality is not that of evidentiary sufficiency. Rather, materiality is established by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict. [[](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)More like this Headnote](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)

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* Criminal Law & Procedure > ... > [Reviewability](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) > [Preservation for Review](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) > [General Overview](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)

[***HN9[](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)***](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) **Reviewability, Preservation for Review**  
While the general rule is that a party may not litigate an issue on one ground, abandon that ground post-trial, and assert a new basis or ground for his contention in the Supreme Court of Tennessee, this rule is subject to some flexibility. If a question of law only is presented on the facts appearing in the record the change in theory may be permitted. But if the new theory contemplates a factual situation the consequences of which are open to controversy and were not put in issue or presented at the trial the opposing party should not be required to defend against it on appeal. [[](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)More like this Headnote](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)

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[***HN10[](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)***](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) **Capital Punishment, Aggravating Circumstances**  
The aggravating circumstance of Tenn. Code Ann. § 39-2-203(i)(3) contemplates either multiple murders or threats to several persons at or shortly prior to or shortly after an act of murder upon which the prosecution is based. Most commonly, this aggravating circumstance has been applied where defendant fires multiple gunshots in the course of a robbery or other incident at which persons other than the victim are present. In many of the cases upholding application of the (i)(3) aggravator, the defendant fired random shots with others present or nearby, the defendant engaged in a shoot-out with other parties, or the defendant actually shot people in addition to the murder victim. In at least one case, the Tennessee Supreme Court has affirmed application of the (i)(3) aggravating circumstance when the defendants fired two shots, one into the ceiling and a second into the victim, when the defendants also held others at gun point and the surrounding circumstances of the offense indicated that the threat to their lives was very real. [[](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)More like this Headnote](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)

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[***HN11[](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)***](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) **Capital Punishment, Aggravating Circumstances**  
The great-risk-of-death aggravator requires that two or more people, other than the victim murdered, be placed in great risk of death. Tenn. Code Ann. § 39-2-203(i)(3). [[](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)More like this Headnote](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)

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[***HN12[](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)***](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) **Capital Punishment, Aggravating Circumstances**  
Unlike other aggravating circumstances, such as the Tenn. Code Ann. § 39-2-203(i)(5) aggravator, the statutory language of the Tenn. Code Ann. § 39-2-203(i)(3) aggravating circumstance simply does not permit application of this aggravating circumstance unless the defendant "knowingly created" the "great risk of death," either by his or her own actions or by directing, aiding, or soliciting another to do the act, i.e., to shoot the gun, that creates the great risk of death. Without some proof that the defendant in some way "knowingly created" the "great risk of death," this aggravating circumstance does not apply, even though a great risk of death may have been created by someone during the course of the criminal episode. [[](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)More like this Headnote](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)

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**Counsel:** [Paul G. Summers](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27), Attorney General and Reporter; [Michael E. Moore](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27), Solicitor General; [Amy L. Tarkington](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27), Senior Counsel Criminal Division, Nashville, Tennessee, for the appellant, State of Tennessee.  
  
[Joseph S. Ozment](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27), Memphis, Tennessee; [Jonathan I. Blackman](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27), New York, New York; [David E. Brodsky](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27), New York, New York, for the appellee, Erskine Leroy Johnson.    
  
**Judges:** [WILLIAM M. BARKER](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27), J., delivered the opinion of the court, in which [E. RILEY ANDERSON](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27), C.J., and [FRANK F. DROWOTA, III](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27), [ADOLPHO A. BIRCH, JR.](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27), and JANICE M. [HOLDER](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27), JJ., joined.    
  
**Opinion by:** [WILLIAM M. BARKER](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)

## Opinion

The sole issue in this capital post-conviction appeal is whether the State improperly withheld material, exculpatory evidence at the appellee's capital sentencing hearing. The appellee was convicted of felony murder and sentenced to death in 1985, and in 1991, he filed[[\*\*2]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) a post-conviction petition alleging, among other things, that the State improperly withheld a police report that was discoverable under [Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27). The post-conviction court denied relief, but the Court of Criminal Appeals reversed and vacated the capital sentence. Finding that the police report was exculpatory and material, the intermediate court held that a new sentencing hearing was constitutionally required. The State then appealed to this Court. For the reasons given herein, we hold that the State improperly withheld the police report, which was both "evidence favorable to the accused" and material as to the issue of sentencing. Accordingly, we affirm the judgment of the Court of Criminal Appeals vacating the appellee's sentence, and we remand this case to the Shelby County Criminal Court for a new capital sentencing hearing.

[[\*53]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) The sole issue in this capital post-conviction appeal is whether the State improperly withheld material, exculpatory evidence at the appellee's capital sentencing hearing. The appellee was convicted of felony murder and sentenced to death in 1985, and in 1991, he[[\*\*3]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) filed a post-convictionpetition alleging, among other things, that the State improperly withheld a police report that was discoverable under [Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27). The postconviction court denied relief, but the Court of Criminal Appeals reversed and vacated the capital sentence. Finding that the police report was exculpatory and material, the intermediate court held that a new sentencing hearing was constitutionally required. The State then appealed to this Court. For the reasons given herein, we hold that the State improperly withheld the police report, which was both "evidence favorable to the accused" and material as to the issue of sentencing. Accordingly, we affirm the judgment of the Court of Criminal Appeals vacating the appellee's sentence, and we remand this case to the Shelby County Criminal [[\*54]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) Court for a new capital sentencing hearing.

OPINION

This case comes before this Court on an appeal from a post-conviction petition filed by the appellee, Erskine Leroy Johnson, who was convicted of felony murder and sentenced to death by a jury in Shelby County in 1985. The events giving rise to this case occurred[[\*\*4]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) in early October of 1983 when the appellee and two other persons robbed a Food Rite Grocery Store in Memphis. Upon entering the store, the appellee approached the manager, who was working at the checkout counter, and the other two persons headed for the office where the safe was located. The appellee placed his pistol to the manager's head, and the manager turned around and threw up his hands. Witnesses testified that the manager hit or bumped into the appellee's pistol, causing it to fire a bullet into the ceiling of the store. After this shot was fired, the appellee shot the store manager twice, mortally wounding him. The appellee then went to the next open register, where he put his pistol close to the face of the manager's wife and demanded money. Meanwhile, the other two co-felons apprehended the security guard on the other side of the store, and one of them placed a pistol to his head. At some point during this episode, someone fired a bullet, known as the "Pac-Man" bullet, which went through a Pac-Man video-game machine and grazed a sixteen-year-old girl across her chest.

The appellee was tried and convicted of felony murder in December of 1985, and a jury sentenced him to[[\*\*5]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) die by electrocution. The jury found that the following three aggravating circumstances outweighed any mitigating circumstances: (1) that the defendant was previously convicted of one or more felonies that involved the use or threat of violence to the person, Tenn. Code Ann. § 39-2-203(i)(2) (1982); (2) that the defendant knowingly created a great risk of death to two or more persons, other than the victim murdered, during his act of murder, Tenn. Code Ann. § 39-2-203(i)(3) (1982); and (3) that the murder was committed while the defendant was engaged in the commission of a robbery, Tenn. Code Ann. § 39-2-203(i)(7) (1982). The appellee's conviction and sentence were later affirmed by this Court in [State v. Johnson, 762 S.W.2d 110 (Tenn. 1988)](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27).

On October 3, 1991, the appellee filed a *pro se* petition for post-conviction relief, and his appointed counsel later filed an amended petition in December of 1991. Eventually, additional attorneys were appointed to represent the appellee, and these attorneys filed a second amended petition in August of 1996. [**1[Link to the text of the note](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)**](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) The trial court held a[[\*\*6]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) hearing lasting seven days between December 1996 and February 1997. During this hearing, the appellee introduced, among other things, proof showing that the State improperly withheld a police report at the sentencing hearing in violation of [Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27). This police report, which was completed within days of the armed robbery, concluded that the "Pac-Man" bullet could not have been fired from the cash register area where the appellant was standing, due to the angle of the bullet entry into the machine. Moreover, photographs attached to the report showed that solid obstructions were between the cash register area and the Pac-Man machine. The appellee then argued that because he did not fire the bullet that grazed the sixteen-year-old girl, the proof was insufficient to establish the (i)(3) "great risk of death" [[\*55]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)aggravating circumstance. [**2[Link to the text of the note](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)**](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) On April 22, 1997, the trial judge dismissed the appellee's petition, finding that "the petition for post conviction relief as amended is without merit." Although the trial court found the felony murder aggravating circumstance inapplicable after this Court's decision[[\*\*7]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) in [State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992)](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27), the court found that the error was harmless given "the strong case supporting the other two aggravating circumstances found by the jury . . . ." The trial court made no specific written findings with respect to the alleged Brady violation concerning the withheld police report.

[[\*\*8]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) The Court of Criminal Appeals reversed the dismissal of the petition and remanded the case for a new capital sentencing hearing. The intermediate court found that the withheld police report was material exculpatory evidence within the meaning of [Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27), and therefore, the report should have been disclosed to the appellee. This failure to disclose the police report, the court stated, resulted in an arguable misapplication of the (i)(3) aggravating circumstance. Viewing the withheld report in combination with the unconstitutional application of the felony murder aggravating circumstance, the court stated that it was "unable to conclude that the jury would have sentenced the Defendant to death based solely on the prior violent felonies aggravator." Accordingly, while the Court of Criminal Appeals affirmed the judgment of the trial court in all other respects, it remanded the case for a new capital sentencing hearing.

The State then requested, and this Court granted, permission to appeal on the sole issue of whether the withheld police report was "material" as applied to the (i)(3) "great risk of death"[[\*\*9]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) aggravating circumstance. After reviewing the extensive record in this case, we conclude that the police report was both "evidence favorable to the accused" and "material" within the meaning of Brady v. Maryland. We therefore hold that the report should have been disclosed to the appellee prior to his sentencing hearing, and because the State's failure to disclose this police report severely undermines our confidence in the jury's sentence of death, we remand this case to the Shelby County Criminal Court for a new capital sentencing hearing.

**ALLEGED *BRADY* VIOLATION DURING THE APPELLEE'S CAPITAL SENTENCING HEARING**

[***HN1[](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)***](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) Every criminal defendant is guaranteed the right to a fair trial under the [Due Process Clause of the Fourteenth Amendment to the United States Constitution](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) and the "Law of the Land" Clause of [Article I, section 8 of the Tennessee Constitution](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27). See, e.g., [State ex rel. Anglin v. Mitchell, 596 S.W.2d 779, 786 (Tenn. 1980)](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27). "To facilitate this right, a defendant has a constitutionally protected privilege to request and obtain from the prosecution[[\*\*10]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) evidence that is either material to guilt or relevant to punishment." [State v. Ferguson, 2 S.W.3d 912, 915 (Tenn. 1999)](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27). This fundamental principle of law is derived from the landmark case, [Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27), in which the United States Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution," [id. at 87](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27). [**3[Link to the text of the note](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)**](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) Evidence [[\*56]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) "favorable to an accused" includes evidence deemed to be exculpatory in nature and evidence that could be used to impeach the state's witnesses. See [State v. Walker, 910 S.W.2d 381, 389 (Tenn. 1995)](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27); [State v. Copeland, 983 S.W.2d 703, 706 (Tenn. Crim. App. 1998)](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27); see also [United States v. Bagley, 473 U.S. 667, 676, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985)](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27).

[[\*\*11]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) [***HN3[](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)***](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)

While the "prosecution is not required to disclose information that the accused already possesses or is able to obtain," [State v. Marshall, 845 S.W.2d 228, 233 (Tenn. Crim. App. 1992)](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27), the "prosecution's duty to disclose is not limited in scope to 'competent evidence' or 'admissible evidence,'" [id. at 232](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27); see also [State v. Brooks, 386 So. 2d 1348, 1351 (La. 1980)](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) ("The Brady rules of disclosure apply not just to information favorable to the accused which the state itself believes to be credible, but to any material information that is favorable to the accused."). As the United States Supreme Court has recognized, "the prosecutor is responsible for 'any favorable evidence known to the others acting on the government's behalf in the case, including the police.'" [Strickler v. Greene, 527 U.S. 263, 275 n.12, 144 L. Ed. 2d 286, 119 S. Ct. 1936 (1999)](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) (citing [Kyles v. Whitley, 514 U.S. 419, 437, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995))](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27). Despite this obligation, however, there is "'no constitutional[[\*\*12]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) requirement that the prosecution make a complete and detailed accounting to the defense of all police investigatory work on a case.'" [Walker, 910 S.W.2d at 389](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) (quoting [Moore v. Illinois, 408 U.S. 786, 795, 33 L. Ed. 2d 706, 92 S. Ct. 2562 (1972))](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27).

This Court has held on several occasions that [***HN4[](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)***](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) in order to establish a Brady violation, four elements must be shown by the defendant:

1) that the defendant requested the information (unless the evidence is obviously exculpatory, in which case the State is bound to release the information whether requested or not);

2) that the State suppressed the information;

3) that the information was favorable to the accused; and

4) that the information was material.

See [State v. Edgin, 902 S.W.2d 387, 390 (Tenn. 1995)](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27); see also [Walker, 910 S.W.2d at 389](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27). In this case, there is no question that the first two requirements have been met. Before the appellee's trial in 1985, defense counsel made a general Brady request seeking "copies of and the right to inspect any written[[\*\*13]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) statements given to the prosecution and/or any investigatory agencies which in whole or in part support the innocence of the accused and/or is exculpatory in nature . . . ." Moreover, it is clear that the State has suppressed this police report given that it has had this report in its possession since its completion on October 8, 1983. [**4[Link to the text of the note](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)**](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)

We also conclude that the police report is information favorable to the accused. [***HN5[](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)***](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) Information that is favorable to the accused may consist[[\*\*14]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) of evidence that "could exonerate the accused, corroborate[] the accused's position in asserting his innocence, or possess[] favorable information that would have enabled defense counsel to conduct further and possibly fruitful investigation regarding the fact that someone other than the appellant killed the victim." [Marshall, 845 S.W.2d at 233](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27). As the Massachusetts Supreme Court has articulated the standard, "the Brady obligation comprehends evidence which provides some significant aid to the defendant's case, whether it furnishes corroboration [[\*57]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) of the defendant's story, calls into question a material, although not indispensable, element of the prosecution's version of the events, or challenges the credibility of a key prosecution witness." [Commonwealth v. Ellison, 376 Mass. 1, 379 N.E.2d 560, 571 (Mass. 1978)](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27); see also [Mazzan v. Warden, Ely State Prison, 993 P.2d 25, 37 (Nev. 2000)](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) (stating that evidence is favorable under Brady if "it provides grounds for the defense to attack the reliability, thoroughness, and good faith of the police investigation, to impeach the credibility of the state's witnesses, or[[\*\*15]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) to bolster the defense case against prosecutorial attacks"). As we view the police report in the context of the State's theory supporting the death penalty at the sentencing hearing, we conclude that this third factor is easily met.

The State's principal theory as to the application of the (i)(3) aggravating circumstance was that the appellee fired the "Pac-Man" bullet that grazed a sixteen-year-old girl, Melinda Jordan, [**5[Link to the text of the note](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)**](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) and the State made clear that it believed that the appellee alone fired the shots from the cash register area during the robbery. During the guilt phase of the trial, the State's attorney questioned Ms. Jordan about her wound, to which defense counsel objected on the ground that her testimony was irrelevant to the issue of the appellee's guilt for the murder. In response, the State argued that the evidence was relevant to establish the *res gestae* of the offense, and when asked by the Court as to whether anyone other than the appellee could have fired the bullets, counsel for the State responded:

Well, I think you have to be pretty speculative to think that though. . . . Let me submit to Your Honor what I thought that I had shown. All of the shots that everybody, [[\*\*16]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) all the witnesses who have testified from the store were asked if all the shots came from the same area. . . . And [Ms. Jordan] said that [the shots had come from the same area]. So I certainly think that we have shown that all--if all of the shots came from the same area and if there was only one gunman in that area, then that gun fired the shots.

As demonstrated by the State's answer, it believed that the appellee, as the only person firing shots from the cash register area, was solely responsible for firing the "Pac-Man" bullet that grazed Ms. Jordan. [**6[Link to the text of the note](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)**](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)The State then later argued during the sentencing phase that because the appellee alone placed Ms. Jordan's life in danger, the "great-risk-of-death" aggravator applied to warrant the death sentence.

[[\*\*17]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) However, as the withheld police report demonstrates, not all of the shots fired during the offense came from the cash register area. In fact, with respect to the "Pac-Man" bullet itself, the withheld report concludes that

it was determined that the bullet struck and penetrated the cabinet side [of the "Pac- Man" machine] at an angle of 15.5 degrees from the front, this angle[,] projected in an imaginary line westward[,] would *extend to the front door of the store*and the bullet was fired from some point along this line.

(emphasis added). It is undisputed that the cash register area where the defendant was standing was not along this "imaginary line" extending from the "Pac-Man" machine to the front doors of the store, and the State introduced no proof whatsoever that the appellee fired any shots from near the front door of the store. As such, the report directly contradicts the principal portion of the State's theory concerning the application of the (i)(3) aggravating [[\*58]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) circumstance: that the appellee fired the "Pac-Man" bullet that grazed Ms. Jordan, putting her in great risk of death.

When viewed in light of the State's theory, the withheld police[[\*\*18]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) report clearly tends to "corroborate the accused's position in asserting his innocence [in firing the "Pac-Man" bullet]." Cf. [Marshall, 845 S.W.2d at 233](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27). Moreover, because the report calls into question a key "element of the prosecution's version of events," *i.e.*, that the appellee fired the "Pac-Man" bullet, cf.  [Ellison, 379 N.E.2d at 571](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27), this report constitutes "evidence favorable to the accused" within the meaning of Brady, and it should have been disclosed by the State. Accordingly, we conclude that the appellee has successfully established the third element needed to assert a constitutional violation under Brady.

The only remaining issue, then, is whether the failure of the State to disclose the police report was "material" as to the sentence of death. [***HN6[](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)***](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) Evidence is deemed to be material when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." [State v. Edgin, 902 S.W.2d 387, 390 (Tenn. 1995)](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27); see also [State v. Walker, 910 S.W.2d 381, 389 (Tenn. 1995)](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27);[[\*\*19]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) [State v. Copeland, 983 S.W.2d 703, 706 (Tenn. Crim. App. 1998)](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27). Despite the language of probabilities used in our cases, however, it must be emphasized that the test of materiality is not whether the defendant would more likely than not have received a different verdict had the evidence been disclosed. See [Strickler v. Greene, 527 U.S. 263, 275, 144 L. Ed. 2d 286, 119 S. Ct. 1936 (1999)](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27). [**7[Link to the text of the note](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)**](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) Nor is the test of materiality equivalent to that of evidentiary sufficiency, such that we may affirm a conviction or sentence when, "after discounting the inculpatory evidence in light of the undisclosed evidence, the remaining evidence is sufficient to support the jury's conclusions." Id.; [Kyles v. Whitley, 514 U.S. 419, 435 n.8, 131 L. Ed. 2d 490, 115 S. Ct. 1555 (1995)](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) ("This rule is clear, and none of the Brady cases has ever suggested that sufficiency of evidence (or insufficiency) is the touchstone [of materiality]."). Instead, [***HN7[](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)***](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) a reviewing court must determine whether the defendant has shown that "the favorable evidence could reasonably[[\*\*20]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) be taken to put the whole case in such a different light as to undermine the confidence of the verdict." [Irick v. State, 973 S.W.2d 643, 657 (Tenn. Crim. App. 1998)](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) (citing [Edgin, 902 S.W.2d at 390](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)); see also [Strickler, 527 U.S. at 290](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27). In other words, evidence is material when, because of its absence, the defendant failed to receive a fair trial, "understood as a trial resulting in a verdict worthy of confidence." [Kyles, 514 U.S. at 434](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27).

[[\*\*21]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) After carefully reviewing the extensive record in this appeal, including the record of the original trial, we believe that the withheld police report "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the [sentencing] verdict." As in [Kyles, 514 U.S. at 445](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27), the "likely damage" from the State's suppression of the police report in this case "is best understood [[\*59]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) by taking the word of the prosecutor" during his arguments to the jury. As the State concedes in its brief before this Court, "the prosecutor did rely heavily upon the Pac-Man bullet in closing argument to establish the great risk aggravator," and the emphasis placed upon this critical factor by the State can first be seen from its opening statement to the jury at the sentencing phase:

And I think that all three of these statutory aggravating circumstance, there's no question that they've been proven, *especially the one where two or more people.* I think that the testimony was different as to the number of people that were in the store at the time Mr. Belenchia was killed. *We do know that one of the other witnesses was wounded herself.* [[\*\*22]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) Her name is Melinda Jordan, scraped across the chest by one of the bullets. . . . I mean, this is a frightening thing that happened out there. Melinda Jordan who's sixteen years old then, now she's eighteen. She's married. *How close did she come to dying? Maybe two inches, an inch?*

(emphasis added). Later in rebuttal argument during closing, the district attorney read all of the aggravating circumstances and the evidence supporting them. With regard to the (i)(3) aggravating circumstance, the full statement of the district attorney is as follows:

Number Three,

"The defendant knowingly created a great risk of death to two or more persons other than the victim murdered during his act of murder."

Melinda Scott was shot. Melinda Scott came very near death, well, not death. She was shot. If the bullet had gone to a different area of the body close by, it could've caused death. She was shot. We all know the consequences of being shot, the potential consequences of that.

From these statements, it is clear that the State relied heavily--if not almost exclusively--upon the shooting of this one sixteen-year-old girl to justify finding the (i)(3) aggravating[[\*\*23]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) circumstance, and also to support the finding that this aggravating circumstance, when considered with the others, outweighed any mitigating circumstances. Indeed, in its rebuttal argument, the State summarized its proof before the jury *solely* in terms of the harm suffered by Ms. Jordan, thereby ignoring any great risk of death faced by others in the store. As is seen from its arguments at trial, the attention of the State, and likely that of the jury as well, was focused almost exclusively upon the harm suffered by this one girl.

We conclude that the disproportionate amount of attention devoted to showing that the appellee fired the infamous "Pac-Man" bullet, combined with the fact that the withheld police report seems to indicate that the appellee was never in a position to fire this bullet, certainly undermines confidence in the jury's sentence of death, as it significantly weakens confidence in the jury's finding and weighing of this particular aggravating circumstance. While the State is correct that the withheld report "does not remove the possibility that Johnson fired the PacMan bullet," the withheld report substantially undermines that conclusion, especially in the absence[[\*\*24]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) of any proof that the appellee fired any bullets along the relevant line of fire. Under these circumstances, we cannot be reasonably confident that every single member of the jury, after considering the withheld report, would have applied this aggravating circumstance or that every member of the jury would have assigned it the same weight in relation to the other aggravating and mitigating circumstances. Accordingly, we hold that the withheld police report is "material" within the meaning of Brady.

In response, the State argues that the withheld police report is not material because "it is clear that any reasonable juror would have applied the [(i)(3)] aggravator to Johnson's own actions even if the PacMan Bullet had never been fired." More [[\*60]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) specifically, the State contends (1) that the other shots fired by the appellee were sufficient by themselves to establish the (i)(3) aggravating circumstance; and (2) that because the (i)(3) aggravating circumstance may be applied vicariously, the jury would have found and considered this aggravating circumstance even if the appellee did not fire the "Pac-Man" bullet. We disagree that either of these arguments renders the withheld[[\*\*25]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) police report immaterial for purposes of Brady.

Upon examination of the substance of these arguments, it is clear that the State is attempting to make a sufficiency of the proof argument, *i.e.*, that because the proof is sufficient for a jury to find this aggravating circumstance on other grounds without the police report, the police report is not material to the appellee's case. The State misconstrues the nature of a Brady materiality inquiry, because, as we stated earlier, [***HN8[](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)***](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) the measure of materiality is not that of evidentiary sufficiency. See [Strickler, 527 U.S. at 275](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27). Rather, materiality is established "by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict," [Kyles, 514 U.S. at 435](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27), and the appellee has made this showing to our satisfaction. Nevertheless, because the proper application of the (i)(3) aggravating circumstance is an issue infrequently discussed in our opinions, we take the opportunity to discuss the State's arguments on their merits. [[\*\*26]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) [**8[Link to the text of the note](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)**](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)

[[\*\*27]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) The State first argues that the other shots fired by the appellee were sufficient by themselves to establish the (i)(3) aggravating circumstance. This Court has previously held that [***HN10[](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)***](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) this aggravating circumstance "contemplates either multiple murders or threats to several persons at or shortly prior to or shortly after an act of murder upon which the prosecution is based." [State v. Cone, 665 S.W.2d 87, 95 (Tenn. 1984)](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27). [**9[Link to the text of the note](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)**](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) Most commonly, this aggravating circumstance "has been applied where a defendant fires multiple gunshots in the course of a robbery or other incident at which persons other than the victim are present." [State v. Henderson, 24 S.W.3d 307, 314 (Tenn. 2000)](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) (citing [State v. Burns, 979 S.W.2d 276, 280 (Tenn. 1998))](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27). In many of the cases upholding application of the (i)(3) aggravator, the defendant fired random shots with others present or nearby, [**10[Link to the text of the note](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)** [\*\*29]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) the defendant engaged in a shoot-out with other parties, [**11[Link to the text of the note](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)**](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) or the defendant actually [[\*61]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) shot people in addition to the murder victim. [**12[Link to the text of the note](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)**](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) In at least one case, this[[\*\*28]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) Court has affirmed application of the (i)(3) aggravating circumstance when the defendants fired two shots, one into the ceiling and a second into the victim, when the defendants also held others at gun point and the surrounding circumstances of the offense indicated that "the threat to their lives was very real." [King v. State, 992 S.W.2d 946, 950-51 (Tenn. 1999)](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27).

We disagree with the State's assertion that the (i)(3) aggravating circumstance was present beyond a reasonable doubt in this case based on the appellee's actions without considering the "Pac- Man" bullet. The appellee fired three known shots: two into the store manager and one into the ceiling. The shots fired at the store manager were fired at point-blank range, and no other person was within the immediate vicinity or within the line of fire. [**13[Link to the text of the note](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)**](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) Moreover, the stray bullet fired into the ceiling was not an intentional shot[[\*\*30]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) fired by the appellee to intimidate the other customers, as was the case in State v. King, nor was the bullet fired by the appellee as part of a random shooting spree, as in State v. Henderson, State v. Burns, or State v. McKay. [**14[Link to the text of the note](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)**](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) We see no indication that the appellee threatened the lives of the other customers as did the defendants in King, nor did he actually shoot any other person, as was the case in State v. Johnson, McKay, or State v. Workman.

[[\*\*31]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) From our review of the original trial transcript, we did find testimony that the appellee, after shooting the manager, held his pistol to the head of the store manager's wife and demanded money. While this fact could help provide a basis for finding the (i)(3) aggravating circumstance, we note that [***HN11[](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)***](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) the great-risk-of-death aggravator requires that *two or more* people, other than the victim murdered, be placed in great risk of death. [**15[Link to the text of the note](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)**](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) See Tenn. Code Ann. § 39-2-203(i)(3). From our examination of the record, we cannot conclude that the State proved beyond a reasonable doubt that another person was placed in great risk of death by the appellee without the "Pac-Man" bullet, and we decline to adopt a *per se* rule that would automatically allow this aggravating circumstance in all felony murder cases where the defendant is armed with a pistol and others are present. Such a *per se* rule would not adequately provide for individualized sentencing, and it would unnecessarily broaden the (i)(3) aggravating circumstance to a point that it would fail in its[[\*\*32]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) essential function of narrowing the death-eligible class. Cf.  [State v. Keen, 31 S.W.3d 196,     (Tenn. 2000)](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) ("The very purpose of the consideration of aggravating circumstances [[\*62]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) within a scheme of capital punishment is to provide some principled guidance for the sentencing authority to choose between death and a lesser sentence.")

Even if the evidence did support a finding of this aggravating circumstance beyond a reasonable doubt without the "Pac-Man" bullet, however, such a finding would not render the withheld police report immaterial. Significantly, the State never argued that the (i)(3) aggravating circumstance[[\*\*33]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) applied because the appellee held his pistol to the head of the store manager's wife. Moreover, the State only briefly alluded to the fact at the sentencing hearing that others were present in the store, and the State *never*mentioned these other persons during its summary of the proof supporting the (i)(3) aggravator in rebuttal argument. Contrary to the State's assertions before this Court that the "Pac-Man" bullet was merely "gravy," or additional proof not needed to establish this aggravator, the actions of the State at trial reveal that virtually its entire case for application of the (i)(3) aggravator was built on the fact that a sixteen-year-old girl was grazed by a random bullet. As such, it seems likely, even probable, that the jury gave considerable weight to the State's argument that the appellee fired the shot that grazed Ms. Jordan. Under these circumstances, we conclude that the withheld report is still material, even if other evidence supported application of the (i)(3) aggravating circumstance, because the fact of its suppression significantly undermines our confidence in the jury's sentence of death. [**16[Link to the text of the note](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)**](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)

[[\*\*34]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) The State also urges this Court to adopt the view that the (i)(3) aggravating circumstance may be applied vicariously, such that the jury could have found and considered this aggravating circumstance even if someone other than the appellee fired the "Pac-Man" bullet. Although no court in this state has ever held that the (i)(3) aggravating circumstance may be applied vicariously, the Court of Criminal Appeals has recently held that some statutory aggravating circumstances may be applied vicariously, consistent with the federal and state constitutions, where the statutory language permits vicarious application. See [Owens v. State, 13 S.W.3d 742, 760 (Tenn. Crim. App. 1999)](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27).

At issue before the Owens Court was the vicarious application of the (i)(5) aggravating circumstance--that the murder is "especially heinous, atrocious, or cruel." In conducting its analysis of the statutory language of this aggravator, the court first noted that "certain aggravators focus clearly on the defendant's *own actions or intent* and contemplate consideration of the defendant's *individual* actions in determining the most culpable capital defendants. Alternatively, other statutory[[\*\*35]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) aggravators, by their plain language, clearly encompass consideration of the *nature and circumstances of the crime itself*, permitting vicarious application." [Id. at 763 n.13](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) (citations omitted) (emphasis in original). Concluding that the (i)(5) aggravating circumstance was one that fell within the latter category, the court stated,

After examination of this issue, we conclude that it was the legislature's intent that the (i)(5) aggravator impute liability upon a defendant for conduct for which he or she is criminally responsible. This aggravator, by its plain language, clearly encompasses consideration of the *nature and circumstances of the crime itself*, which would permit such a vicarious application. The emphasis in the (i)(5) aggravator is on the *manner of killing*, not on the defendant's actual participation.

[Owens, 13 S.W.3d at 763](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) (citations omitted) (emphasis in original).

[[\*63]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) Following the analysis set forward in Owens, and examining the statutory language of the (i)(3) aggravating circumstance, we must decline the State's invitation to allow vicarious application of this aggravator. At the time of[[\*\*36]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) the appellee's offense, the (i)(3) aggravating circumstance read as follows: "The defendant knowingly created a great risk of death to two (2) or more persons, other than the victim murdered, during his act of murder." Tenn. Code Ann. § 39-2-203(i)(3) (1982 & Supp. 1986). [***HN12[](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)***](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) Unlike other aggravating circumstances, such as the (i)(5) aggravator, the statutory language of the (i)(3) aggravating circumstance simply does not permit application of this aggravating circumstance unless the defendant "knowingly created" the "great risk of death," either by his or her own actions or by directing, aiding, or soliciting another to do the act, *i.e.*, to shoot the gun, that creates the great risk of death. Without some proof that the defendant in some way "knowingly created" the "great risk of death," this aggravating circumstance does not apply, even though a great risk of death may have been created by someone during the course of the criminal episode. Because this aggravating circumstance focuses more upon the defendant's actions and intent rather than upon the actual[[\*\*37]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) circumstances surrounding the killing, we decline to accept the State's invitation to vicariously apply the (i)(3) aggravating circumstance, [**17[Link to the text of the note](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27)**](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) and we continue to hold that the withheld police report is still material to the issue of the appellee's capital sentence.

Having found that all four elements necessary to establish a Brady violation are present, including that the withheld police report reasonably undermines confidence in the jury's verdict, we must remand this case for a new capital sentencing hearing. The intermediate court in this case conducted[[\*\*38]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) further harmless error analysis to determine the effect that the Brady error had upon the sentencing hearing. However, as the United States Supreme Court stated in Kyles v. Whitney,

once a reviewing court applying Bagley has found constitutional error there is no need for further harmless-error review. Assuming, arguendo, that a harmless-error enquiry were to apply, a Bagley error could not be treated as harmless, since "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different," necessarily entails the conclusion that the suppression must have had "substantial and injurious effect or influence in determining the jury's verdict."

[514 U.S. at 435](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) (internal citations omitted). Nevertheless, we agree with the conclusion of the Court of Criminal Appeals that a Brady violation was established and that the violation was compounded by the jury's consideration of the felony murder aggravating circumstance in violation of this Court's decision in [State v. Middlebrooks, 840 S.W.2d 317 (Tenn. 1992)](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27). The appellee's sentence, therefore, is vacated, and[[\*\*39]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) this case is remanded to the Shelby County Criminal Court for a new capital sentencing hearing.

**CONCLUSION**

In summary, we hold that the police report withheld by the State in the appellee's original trial is "favorable information" that is material to the issue of sentencing within the meaning of [Brady v. Maryland, 373 U.S. 83, 10 L. Ed. 2d 215, 83 S. Ct. 1194 (1963)](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27), and its progeny. Because a finding of materiality obviates the need for further harmless error analysis, we affirm the judgment of the Court of Criminal Appeals and remand this case to [[\*64]](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27) the Shelby County Criminal Court for further proceedings consistent with this opinion.

Costs of this appeal shall be paid by the appellant, the State of Tennessee.

[WILLIAM M. BARKER](https://plus.lexis.com/search/?pdmfid=1530671&crid=a91ad93b-9941-47a1-938d-f193ac9f23bf&pdsearchterms=Johnson+v.+State%2C+38+S.W.3d+52+(Tenn.+2001)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=998cf1db-18e6-46bd-963c-8cc0fc823d27), JUSTICE

**State v. Ferguson, 2 S.W.3d 912 (Tenn. 1999)**

# Tennessee v. Ferguson

2 S.W.3d 912

Supreme Court of **Tennessee**,

at Knoxville.

**STATE of Tennessee, Appellee,**

**v.**

**Marvin K. FERGUSON, Appellant.**

Sept. 20, **1999**.

**Synopsis**

Defendant was convicted in the trial court, Washington County, [Lynn W. Brown](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0144335301&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I26b420e6e7bb11d98ac8f235252e36df), J., of driving while intoxicated (DWI), second offense. Defendant appealed. The Court of Criminal Appeals affirmed. Appeal was taken.

The Supreme Court, [Birch](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0259809301&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I26b420e6e7bb11d98ac8f235252e36df), J., held that: (1) videotape of defendant's field sobriety tests was material to defendant's defense and might have led jury to entertain reasonable doubt as to his guilt by shedding light on his appearance and condition, and thus **state** had a duty to preserve videotape as potentially exculpatory evidence, under due process clause of **State** Constitution, but (**2**) **state's** breach of its duty to preserve videotape did not hinder full and complete exposition of defendant's theory that effects of his medical condition made it appear as if he were intoxicated, and thus, defendant received a fundamentally fair trial.

Affirmed.

## Attorneys and Law Firms

**\*914** Dennis L. Tomlin, Hendersonville, for Appellant.

[John Knox Walkup](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0322858001&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I26b420e6e7bb11d98ac8f235252e36df), Attorney General and Reporter, [Michael E. Moore](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0184158601&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I26b420e6e7bb11d98ac8f235252e36df), Solicitor General, [Michael W. Catalano](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0113045201&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I26b420e6e7bb11d98ac8f235252e36df), Assistant Attorney General, Nashville, [Joe C. Crumley, Jr.](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0219790501&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I26b420e6e7bb11d98ac8f235252e36df), District Attorney General, Johnson City, for Appellee.

**OPINION**

[BIRCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0259809301&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I26b420e6e7bb11d98ac8f235252e36df), J.

The question presented for our determination is: What are the factors which should guide the determination of the consequences that flow from the **State's** loss or destruction of evidence which the accused contends would be exculpatory? The **State** urges that we adopt the bad faith analysis announced in [Arizona v. Youngblood, 488 U.S. 51, 109 S.Ct. 333, 102 L.Ed.2d 281 (1988)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988152268&pubNum=708&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

[1](https://1.next.westlaw.com/Document/I26b420e6e7bb11d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781f1690cd58bdcd37%3Fppcid%3Dddf71329d85f46be8900a65182cae288%26Nav%3DCASE%26fragmentIdentifier%3DI26b420e6e7bb11d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=f70023fe7f2dd5965e53fca879ae9d36&list=CASE&rank=2&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=ddf71329d85f46be8900a65182cae288&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00111999214228) **Two** reasons prompt us to reject this analysis: (1) we find, under the circumstances, that the due process principles of the **Tennessee** Constitution are broader than those enunciated in the United **States** Constitution; and (**2**) fundamental fairness, as an element of due process, requires that the **State's**failure to preserve evidence that could be favorable to the defendant be evaluated in the context of the entire record.

[1](https://1.next.westlaw.com/Document/I26b420e6e7bb11d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781f1690cd58bdcd37%3Fppcid%3Dddf71329d85f46be8900a65182cae288%26Nav%3DCASE%26fragmentIdentifier%3DI26b420e6e7bb11d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=f70023fe7f2dd5965e53fca879ae9d36&list=CASE&rank=2&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=ddf71329d85f46be8900a65182cae288&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F11999214228)[**2**](https://1.next.westlaw.com/Document/I26b420e6e7bb11d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781f1690cd58bdcd37%3Fppcid%3Dddf71329d85f46be8900a65182cae288%26Nav%3DCASE%26fragmentIdentifier%3DI26b420e6e7bb11d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=f70023fe7f2dd5965e53fca879ae9d36&list=CASE&rank=2&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=ddf71329d85f46be8900a65182cae288&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F21999214228)Accordingly, we promulgate today an analysis in which the critical inquiry is: Whether a trial, conducted without the destroyed[2](https://1.next.westlaw.com/Document/I26b420e6e7bb11d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781f1690cd58bdcd37%3Fppcid%3Dddf71329d85f46be8900a65182cae288%26Nav%3DCASE%26fragmentIdentifier%3DI26b420e6e7bb11d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=f70023fe7f2dd5965e53fca879ae9d36&list=CASE&rank=2&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=ddf71329d85f46be8900a65182cae288&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00221999214228) evidence, would be fundamentally fair?[3](https://1.next.westlaw.com/Document/I26b420e6e7bb11d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781f1690cd58bdcd37%3Fppcid%3Dddf71329d85f46be8900a65182cae288%26Nav%3DCASE%26fragmentIdentifier%3DI26b420e6e7bb11d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=f70023fe7f2dd5965e53fca879ae9d36&list=CASE&rank=2&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=ddf71329d85f46be8900a65182cae288&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00331999214228) Using this analysis, we find that the appellant's trial was a fundamentally fair one despite the loss of the videotaped evidence. Accordingly, and for the reasons herein **stated**, the judgment of the Court of Criminal Appeals is affirmed.

**I**

At or near four o'clock on the morning of November 18, 1992, Officer Edwin A. Murray of the Johnson City Police Department observed a van parked on an I–181 ramp with its engine running. Murray approached the vehicle and observed Marvin K. **Ferguson**, the appellant, “slumped” over the steering wheel. Upon opening the door and awakening **Ferguson**, Murray smelled a strong odor of alcohol and noticed that **Ferguson's** speech was slurred. Murray administered **two** field sobriety tests: namely, heel-to-toe and horizontal gaze nystagmus.[4](https://1.next.westlaw.com/Document/I26b420e6e7bb11d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781f1690cd58bdcd37%3Fppcid%3Dddf71329d85f46be8900a65182cae288%26Nav%3DCASE%26fragmentIdentifier%3DI26b420e6e7bb11d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=f70023fe7f2dd5965e53fca879ae9d36&list=CASE&rank=2&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=ddf71329d85f46be8900a65182cae288&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00441999214228) Concluding from these  **\*915** tests and from his other observations that **Ferguson** was under the influence of an intoxicant, Murray arrested him and transported him to the police station where additional field sobriety tests were apparently conducted.[5](https://1.next.westlaw.com/Document/I26b420e6e7bb11d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781f1690cd58bdcd37%3Fppcid%3Dddf71329d85f46be8900a65182cae288%26Nav%3DCASE%26fragmentIdentifier%3DI26b420e6e7bb11d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=f70023fe7f2dd5965e53fca879ae9d36&list=CASE&rank=2&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=ddf71329d85f46be8900a65182cae288&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00551999214228) These additional tests were recorded on a videotape which was inadvertently “taped over” before anyone could view it.

At trial, **Ferguson's** theory was that he occasionally suffered from vascular or migraine-type headaches that included [*scotoma*](https://1.next.westlaw.com/Link/Document/FullText?entityType=disease&entityId=Ibacf8a0e475411db9765f9243f53508a&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)),[6](https://1.next.westlaw.com/Document/I26b420e6e7bb11d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781f1690cd58bdcd37%3Fppcid%3Dddf71329d85f46be8900a65182cae288%26Nav%3DCASE%26fragmentIdentifier%3DI26b420e6e7bb11d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=f70023fe7f2dd5965e53fca879ae9d36&list=CASE&rank=2&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=ddf71329d85f46be8900a65182cae288&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00661999214228) which affected his vision and coordination. He testified that he had suffered just such a headache prior to his arrest. To support his theory, **Ferguson** presented expert medical testimony describing this condition and explaining that during a “spell” **Ferguson's** conduct could be perceived by a layperson as the result of alcohol intoxication.

**II**

[3](https://1.next.westlaw.com/Document/I26b420e6e7bb11d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781f1690cd58bdcd37%3Fppcid%3Dddf71329d85f46be8900a65182cae288%26Nav%3DCASE%26fragmentIdentifier%3DI26b420e6e7bb11d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=f70023fe7f2dd5965e53fca879ae9d36&list=CASE&rank=2&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=ddf71329d85f46be8900a65182cae288&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F31999214228)[4](https://1.next.westlaw.com/Document/I26b420e6e7bb11d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781f1690cd58bdcd37%3Fppcid%3Dddf71329d85f46be8900a65182cae288%26Nav%3DCASE%26fragmentIdentifier%3DI26b420e6e7bb11d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=f70023fe7f2dd5965e53fca879ae9d36&list=CASE&rank=2&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=ddf71329d85f46be8900a65182cae288&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F41999214228)[5](https://1.next.westlaw.com/Document/I26b420e6e7bb11d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781f1690cd58bdcd37%3Fppcid%3Dddf71329d85f46be8900a65182cae288%26Nav%3DCASE%26fragmentIdentifier%3DI26b420e6e7bb11d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=f70023fe7f2dd5965e53fca879ae9d36&list=CASE&rank=2&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=ddf71329d85f46be8900a65182cae288&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F51999214228)The Due Process Clause of the Fourteenth Amendment to the United **States** Constitution provides for every defendant the right to a fair trial. To facilitate this right, a defendant has a constitutionally protected privilege to request and obtain from the prosecution evidence that is either material to guilt or relevant to punishment. [Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196, 10 L.Ed.2d 215, 218 (1963)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1963125353&pubNum=708&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RP&fi=co_pp_sp_708_1196&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_1196). Even in the absence of a specific request, the prosecution has a constitutional duty to turn over exculpatory evidence that would raise a reasonable doubt about a defendant's guilt. [United***States***v. Agurs, 427 U.S. 97, 110–11, 96 S.Ct. 2392, 2401, 49 L.Ed.2d 342, 353–54 (1976)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1976142416&pubNum=708&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RP&fi=co_pp_sp_708_2401&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_2401).

The analysis of both [Brady](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1963125353&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and [Agurs](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1976142416&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) concerns the prosecution's suppression of “plainly exculpatory” evidence. This strikes a sharp contrast to the case under review wherein the existence of the destroyed videotape was known to the defense but where its true nature (exculpatory, inculpatory, or neutral) can never be determined.

The question that we address today is what consequences flow from the **State's** loss or destruction of evidence alleged to have been exculpatory. **Ferguson** alleges that his due process rights were violated by the destruction of the videotape of the field sobriety tests administered at the police station. On the other hand, the **State's** contention is that because the evidentiary nature of the videotape can never be known, the appropriate analysis should inquire into the **State's** bad faith (or lack of it) in the destruction of the evidence. See[Arizona v. Youngblood, 488 U.S. at 57–58, 109 S.Ct. at 337, 102 L.Ed.2d at 289.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988152268&pubNum=708&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RP&fi=co_pp_sp_708_337&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_337)

[Youngblood](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988152268&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) is the leading federal case regarding the loss or destruction of evidence. In [Youngblood,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988152268&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) the police's failure to refrigerate a sodomy victim's semen-stained clothing precluded testing, the result of which might have exonerated the accused. The United **States** Supreme Court held that “unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law.” [Id. at 58, 109 S.Ct. at 337, 102 L.Ed.2d at 289.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988152268&pubNum=708&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RP&fi=co_pp_sp_708_337&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_337) Thus the Court concluded that the **State** had no constitutional duty to preserve the clothing even though testing may have been useful to the accused.

Several **states** have embraced the bad faith analysis of [Youngblood](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988152268&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and found that a similar showing of bad faith is required under their respective constitutions. See, e.g.,[Collins v. Commonwealth, 951 S.W.2d 569 (Ky.1997)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997186475&pubNum=713&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); [***State***v. Drdak, 330 N.C. 587, 411 S.E.2d 604 (1992)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992022162&pubNum=711&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I9595a669f5a211d9bf60c1d57ebc853e&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=a26449ef3554458b9bb823dd7ae65ae1&Rank=2&RuleBookModeDisplay=False&contextData=(sc.Search))[***State***v. Ortiz, 119 Wash.2d 294, 831 P.2d 1060 (1992)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992105723&pubNum=661&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) (holding that no analytic basis existed **\*916** to interpret Washington's due process clause more broadly than the federal provisions); accord[***State***v. Copeland, 130 Wash.2d 244, 922 P.2d 1304 (1996)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996212587&pubNum=661&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). The Georgia Supreme Court has agreed that to establish a due process violation a defendant must prove bad faith, but the court also required the trial court to consider the materiality of the lost or destroyed evidence. [Walker v.***State***, 264 Ga. 676, 449 S.E.2d 845, 848 (1994)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1994235114&pubNum=711&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RP&fi=co_pp_sp_711_848&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_711_848).

Other **states** have recognized that “[t]here may well be cases in which the defendant is unable to prove that the **State** acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defendant as to make a criminal trial fundamentally unfair.” [Youngblood, 488 U.S. at 61, 109 S.Ct. at 339, 102 L.Ed.2d at 291](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988152268&pubNum=708&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RP&fi=co_pp_sp_708_339&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_339)(Stevens, J., concurring in the result). These **states** have rejected a pure [Youngblood](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988152268&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) analysis, focusing instead on the materiality of the unavailable evidence in determining whether a due process violation has occurred. See, e.g.,[Ex parte Gingo, 605 So.2d 1237 (Ala.1992)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992076996&pubNum=735&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); [Thorne v. Department of Pub. Safety, 774 P.2d 1326 (Alaska 1989)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989082960&pubNum=661&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); [***State***v. Matafeo, 71 Haw. 183, 787 P.2d 671 (1990)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990041781&pubNum=661&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); [Commonwealth v. Henderson, 411 Mass. 309, 582 N.E.2d 496 (1991)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991199203&pubNum=578&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); [***State***v. Osakalumi, 194 W.Va. 758, 461 S.E.2d 504 (1995)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995152238&pubNum=711&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

Several of these **states** have determined that due process claims arising out of lost or destroyed evidence must be evaluated using a “balancing” approach. As an example, the Delaware Supreme Court, after having determined that the **state** breached a duty to preserve evidence, employed a balancing approach which focuses on the following three factors: (1) the degree of negligence or bad faith involved; (**2**) the importance of the missing evidence, considering the probative value and reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence used at trial to sustain the conviction. [Hammond v.***State***, 569 A.2d 81, 87 (Del.1989)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990019663&pubNum=162&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RP&fi=co_pp_sp_162_87&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_162_87).[7](https://1.next.westlaw.com/Document/I26b420e6e7bb11d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781f1690cd58bdcd37%3Fppcid%3Dddf71329d85f46be8900a65182cae288%26Nav%3DCASE%26fragmentIdentifier%3DI26b420e6e7bb11d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=f70023fe7f2dd5965e53fca879ae9d36&list=CASE&rank=2&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=ddf71329d85f46be8900a65182cae288&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00771999214228)

We now must determine whether the bad faith analysis of [Youngblood](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988152268&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) adequately protects the right to a fair trial under the due process clause of the **Tennessee** Constitution. See **Tenn**. Const. art. I, [§ 8](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S8&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).[8](https://1.next.westlaw.com/Document/I26b420e6e7bb11d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781f1690cd58bdcd37%3Fppcid%3Dddf71329d85f46be8900a65182cae288%26Nav%3DCASE%26fragmentIdentifier%3DI26b420e6e7bb11d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=f70023fe7f2dd5965e53fca879ae9d36&list=CASE&rank=2&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=ddf71329d85f46be8900a65182cae288&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00881999214228) Although this Court has previously construed **Tenn**. Const. art. I, [§ 8](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S8&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), as “synonymous with the ‘due process of law’ provisions of the federal constitution,” [***State***ex rel. Anglin v. Mitchell, 596 S.W.2d 779, 786 (**Tenn**.1980)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980110397&pubNum=713&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RP&fi=co_pp_sp_713_786&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_786), we have also recognized that “this Court, as the final arbiter of the **Tennessee** Constitution, is always free to expand the minimum level of protection mandated by the federal constitution.” [Burford v.***State***, 845 S.W.2d 204, 207 (**Tenn**.1992)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1993027672&pubNum=713&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RP&fi=co_pp_sp_713_207&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_207). Thus, we will examine [Youngblood](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988152268&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and explain why we reject its analysis.

According to [Youngblood,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988152268&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law. In this regard, proving bad faith on the part of the police would be, in the least, extremely difficult. In addition, the [Youngblood](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988152268&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) analysis apparently permits no consideration of the materiality of the missing evidence or its effect on the defendant's case. The conclusion is that this analysis substantially **\*917** increases the defendant's burden while reducing the prosecution's burden at the expense of the defendant's fundamental right to a fair trial.

Because we deem the preservation of the defendant's fundamental right to a fair trial to be a paramount consideration here, we join today those jurisdictions which have rejected the [Youngblood](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988152268&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) analysis in its pure form. In so doing, we adopt for **Tennessee** a balancing approach similar to the one espoused by the Supreme Court of Delaware in [Hammond v.***State***, 569 A.2d 81, 87 (Del.1989)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990019663&pubNum=162&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RP&fi=co_pp_sp_162_87&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_162_87).

[6](https://1.next.westlaw.com/Document/I26b420e6e7bb11d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781f1690cd58bdcd37%3Fppcid%3Dddf71329d85f46be8900a65182cae288%26Nav%3DCASE%26fragmentIdentifier%3DI26b420e6e7bb11d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=f70023fe7f2dd5965e53fca879ae9d36&list=CASE&rank=2&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=ddf71329d85f46be8900a65182cae288&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F61999214228)The first step in this analysis is to determine whether the **State** had a duty to preserve the evidence. Generally speaking, the **State** has a duty to preserve all evidence subject to discovery and inspection under [**Tenn**. R.Crim. P. 16](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1008875&cite=TNRRCRPR16&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), or other applicable law.[9](https://1.next.westlaw.com/Document/I26b420e6e7bb11d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781f1690cd58bdcd37%3Fppcid%3Dddf71329d85f46be8900a65182cae288%26Nav%3DCASE%26fragmentIdentifier%3DI26b420e6e7bb11d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=f70023fe7f2dd5965e53fca879ae9d36&list=CASE&rank=2&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=ddf71329d85f46be8900a65182cae288&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00991999214228) It is, however, difficult to define the boundaries of the **State's** duty to preserve evidence. This difficulty is recognized in [California v. Trombetta, 467 U.S. 479, 488–89, 104 S.Ct. 2528, 2533–34, 81 L.Ed.2d 413 (1984)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984128231&pubNum=708&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RP&fi=co_pp_sp_708_2533&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_2533). It held:

Whatever duty the Constitution imposes on the **States** to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

[7](https://1.next.westlaw.com/Document/I26b420e6e7bb11d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781f1690cd58bdcd37%3Fppcid%3Dddf71329d85f46be8900a65182cae288%26Nav%3DCASE%26fragmentIdentifier%3DI26b420e6e7bb11d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=f70023fe7f2dd5965e53fca879ae9d36&list=CASE&rank=2&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=ddf71329d85f46be8900a65182cae288&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F71999214228)If the proof demonstrates the existence of a duty to preserve and further shows that the **State** has failed in that duty, the analysis moves to a consideration of several factors which should guide the decision regarding the consequences of the breach. Those factors include:

1. The degree of negligence involved;[10](https://1.next.westlaw.com/Document/I26b420e6e7bb11d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781f1690cd58bdcd37%3Fppcid%3Dddf71329d85f46be8900a65182cae288%26Nav%3DCASE%26fragmentIdentifier%3DI26b420e6e7bb11d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=f70023fe7f2dd5965e53fca879ae9d36&list=CASE&rank=2&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=ddf71329d85f46be8900a65182cae288&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B010101999214228)

**2**. The significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available; and

3. The sufficiency of the other evidence used at trial to support the conviction.

Of course, as previously **stated**, the central objective is to protect the defendant's right to a fundamentally fair trial. If, after considering all the factors, the trial judge concludes that a trial without the missing evidence would not be fundamentally fair, then the trial court may dismiss the charges. Dismissal is, however, but one of the trial judge's options. The trial judge may craft such orders as may be appropriate to protect the defendant's fair trial rights. As an example, the trial judge may determine, under the facts and circumstances of the case, that the defendant's rights would best be protected by a jury instruction.[11](https://1.next.westlaw.com/Document/I26b420e6e7bb11d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781f1690cd58bdcd37%3Fppcid%3Dddf71329d85f46be8900a65182cae288%26Nav%3DCASE%26fragmentIdentifier%3DI26b420e6e7bb11d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=f70023fe7f2dd5965e53fca879ae9d36&list=CASE&rank=2&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=ddf71329d85f46be8900a65182cae288&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B011111999214228)

**\*918 III**

[8](https://1.next.westlaw.com/Document/I26b420e6e7bb11d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781f1690cd58bdcd37%3Fppcid%3Dddf71329d85f46be8900a65182cae288%26Nav%3DCASE%26fragmentIdentifier%3DI26b420e6e7bb11d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=f70023fe7f2dd5965e53fca879ae9d36&list=CASE&rank=2&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=ddf71329d85f46be8900a65182cae288&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F81999214228)[9](https://1.next.westlaw.com/Document/I26b420e6e7bb11d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781f1690cd58bdcd37%3Fppcid%3Dddf71329d85f46be8900a65182cae288%26Nav%3DCASE%26fragmentIdentifier%3DI26b420e6e7bb11d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=f70023fe7f2dd5965e53fca879ae9d36&list=CASE&rank=2&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=ddf71329d85f46be8900a65182cae288&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F91999214228)We now examine the case under submission in light of the considerations mentioned above. Initially, the question is whether the **State** had a duty to preserve the videotape. The exculpatory nature of the evidence has considerable significance in resolving that question. The exculpatory value of the videotape is, in our view, tenuous.

If the videotape showed **Ferguson** performing poorly on the sobriety tests at the police station, then the cause of the poor performance could either be intoxication, as urged by the **State**, or a medical condition, as urged by **Ferguson**. If, on the other hand, the videotape showed **Ferguson** performing satisfactorily on the sobriety tests, then **Ferguson's** theory that medical problems caused him to appear intoxicated would be of questionable validity.[12](https://1.next.westlaw.com/Document/I26b420e6e7bb11d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62af0000001781f1690cd58bdcd37%3Fppcid%3Dddf71329d85f46be8900a65182cae288%26Nav%3DCASE%26fragmentIdentifier%3DI26b420e6e7bb11d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=f70023fe7f2dd5965e53fca879ae9d36&list=CASE&rank=2&sessionScopeId=a2952a1ffbb7a07c3010142fd3456463faa90e53a0b4a87530fe942c05fa51a5&ppcid=ddf71329d85f46be8900a65182cae288&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B012121999214228)Though the videotape was probably of marginal exculpatory value, it was at least “material to the preparation of the defendant's defense” and might have led the jury to entertain a reasonable doubt about **Ferguson's** guilt. Because the videotape may have shed light on his appearance and condition on the morning in question, the **State** had a duty to preserve the videotape as potentially exculpatory evidence. In erasing the tape before the defendant had an opportunity to view it, the **State** breached this duty. Therefore, we must determine what consequences should flow from this breach of duty.

The first factor to consider in determining consequences is the degree of negligence involved. Unquestionably, **Ferguson** has failed to prove the **State** acted in bad faith in the destruction of the evidence. The only conclusion remaining is that the evidence was negligently destroyed, and we think the conduct was simple negligence, as distinguished from gross negligence.

The second factor addresses the significance of the missing evidence. Given the defendant's contention that his medical condition caused him to appear intoxicated, the videotape may not have been probative of intoxication. As to the availability of secondary evidence probative of the intoxication issue, **Ferguson** adduced expert medical testimony. His expert witness explained why the physical effects of his condition would have looked like intoxication to the officer. **Ferguson** testified about how his condition affected his balance and coordination, and he related long-term problems with his lower extremities. In spite of the unavailability of the videotape, **Ferguson** presented his defense in as complete a manner as was possible without the videotape.

The third factor to consider is the sufficiency of the convicting evidence. The arresting officer smelled alcohol on **Ferguson's** breath and concluded from his observation that **Ferguson's** physical appearance and speech were indicative of intoxication. Additionally, the arresting officer testified about failed on-scene field sobriety tests that were not videotaped. Thus, the evidence adduced was sufficient, as a matter of law, for conviction.

Thus, it is abundantly clear to us that **Ferguson** was not hindered in the full and complete exposition of his theory to the jury. We conclude that he received a fundamentally fair trial and that he experienced no measurable disadvantage because of the unavailability of the videotaped evidence.

Accordingly, the judgment of the Court of Criminal Appeals is affirmed, and the costs are taxed against the appellant.

[ANDERSON](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0157496001&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I26b420e6e7bb11d98ac8f235252e36df), C.J. [HOLDER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0184016001&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I26b420e6e7bb11d98ac8f235252e36df), [BARKER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0459300201&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I26b420e6e7bb11d98ac8f235252e36df), JJ., concur.

[DROWOTA](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0259789701&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I26b420e6e7bb11d98ac8f235252e36df), J., not participating.

**West Headnotes:**

**Criminal Law**

“Destroyed evidence,” as term is used in context of analysis of whether a trial conducted without such evidence is fundamentally fair, includes lost evidence as well as evidence which was not preserved.

**Criminal Law**

As a general rule, a trial lacks fundamental fairness where there are errors which call into question the reliability of the outcome.

**Constitutional Law**

The Due Process Clause of the Fourteenth Amendment to the United **States**Constitution provides for every defendant the right to a fair trial. [U.S.C.A. Const.Amend. 14](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDXIV&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

**Criminal Law**

To facilitate a defendant's right to a fair trial, a defendant has a constitutionally protected privilege to request and obtain from the prosecution evidence that is either material to guilt or relevant to punishment. [U.S.C.A. Const.Amend. 14](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDXIV&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

**Criminal Law**

Even in the absence of a specific request, the prosecution has a constitutional duty to turn over exculpatory evidence that would raise a reasonable doubt about a defendant's guilt. [U.S.C.A. Const.Amend. 14](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOAMENDXIV&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

**Criminal Law**

In determining whether a defendant's right to fair trial under **State** Constitution was violated by destruction of evidence, the first step is to determine whether **state**had a duty to preserve the evidence; if so, and if proof shows that **state** failed in that duty, the following factors guide the decision regarding the consequences of the breach: (1) degree of negligence involved, (**2**) significance of the destroyed evidence, considered in light of probative value and reliability of secondary or substitute evidence that remains available, and (3) sufficiency of other trial evidence to support conviction; if, after consideration of all the factors, a trial without the missing evidence would not be fundamentally unfair, the trial court may dismiss the charges or may craft such orders as may be appropriate to protect the defendant's fair trial rights. [Const. Art. 1, § 8](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S8&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

**Criminal Law**

Should the proof show bad faith, rather than negligence, on part of **state** in the loss or destruction of evidence, the trial judge may consider such action as may be necessary to protect the defendant's fair trial rights. [Const. Art. 1, § 8](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S8&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

**Criminal Law**

Videotape of defendant's field sobriety tests conducted at police station was material to the preparation of defendant's defense to prosecution driving while intoxicated (DWI), second offense, and might have led the jury to entertain reasonable doubt as to his guilt by shedding light on his appearance and condition, and thus **state** had a duty to preserve the videotape as potentially exculpatory evidence, under due process clause of **State** Constitution. [Const. Art. 1, § 8](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S8&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

**Criminal Law**

**State's** breach of its duty to preserve videotape of defendant's field sobriety tests as potentially exculpatory evidence did not hinder the full and complete exposition of defendant's theory that the effects of his medical condition made it appear as if he were intoxicated, and thus, defendant received a fundamentally fair trial in prosecution for driving while intoxicated (DWI), second offense, considering that **state's** inadvertently taping over the videotape was simple negligence, defendant adduced medical testimony as to his medical condition, defendant himself testified how condition affected his balance and coordination, but arresting officer testified that he smelled alcohol on defendant's breath and that defendant failed on-scene sobriety tests. [Const. Art. 1, § 8](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNCNART1S8&originatingDoc=I26b420e6e7bb11d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

**Rule of Law:**

**If a trial without the lost or destroyed evidence would be unfair, the trial judge may dismiss the charges, provide a jury instruction, or take other steps necessary to protect the defendant's right to a fair trial.**

**Issue:**

Whether a trial, conducted without the destroyed evidence, would be fundamentally fair

**Notes from Jamie on State v. Ferguson**

**Case cited:** Arizona v. Youngblood, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988).

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**Judges:** [ADOLPHO A. BIRCH, JR.](https://plus.lexis.com/search/?pdmfid=1530671&crid=4475b564-f2fd-4989-a2b6-746c8c05bc4f&pdsearchterms=state+v+ferguson+2+SW+3d+912&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=74ae0065-3bb4-4a0c-977f-a5d481d1c750), Justice. CONCUR: [Anderson](https://plus.lexis.com/search/?pdmfid=1530671&crid=4475b564-f2fd-4989-a2b6-746c8c05bc4f&pdsearchterms=state+v+ferguson+2+SW+3d+912&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=74ae0065-3bb4-4a0c-977f-a5d481d1c750), C.J., [Holder](https://plus.lexis.com/search/?pdmfid=1530671&crid=4475b564-f2fd-4989-a2b6-746c8c05bc4f&pdsearchterms=state+v+ferguson+2+SW+3d+912&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=74ae0065-3bb4-4a0c-977f-a5d481d1c750), [Barker](https://plus.lexis.com/search/?pdmfid=1530671&crid=4475b564-f2fd-4989-a2b6-746c8c05bc4f&pdsearchterms=state+v+ferguson+2+SW+3d+912&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=74ae0065-3bb4-4a0c-977f-a5d481d1c750), JJ., [Drowota](https://plus.lexis.com/search/?pdmfid=1530671&crid=4475b564-f2fd-4989-a2b6-746c8c05bc4f&pdsearchterms=state+v+ferguson+2+SW+3d+912&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=74ae0065-3bb4-4a0c-977f-a5d481d1c750), J., not participating.    
  
**Opinion by:** [ADOLPHO A. BIRCH, JR.](https://plus.lexis.com/search/?pdmfid=1530671&crid=4475b564-f2fd-4989-a2b6-746c8c05bc4f&pdsearchterms=state+v+ferguson+2+SW+3d+912&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=74ae0065-3bb4-4a0c-977f-a5d481d1c750)

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides for every defendant the right to a fair trial. To facilitate this right, a defendant has a constitutionally protected privilege to request and obtain from the prosecution evidence that is either material to guilt or relevant to punishment.

In **State v. Ferguson**, 2 S.W.3d 912 (Tenn. 1999), the defendant argued that the videotape could have supported his claim that he was suffering from a medical condition rather than exhibiting signs of intoxication.

The supreme court characterized the issue as follows:

"The analysis of both ***Brady v. Maryland*** and ***United States v. Agurs*** concerns the prosecution's suppression of "plainly exculpatory" evidence. This strikes a sharp contrast to the case under review wherein the existence of the destroyed videotape was known to the defense but where its true nature (exculpatory, inculpatory, or neutral) can never be determined." (Ferguson, 2 S.W.3d at 915.)

In Ferguson, the Court concluded that the due process principles of the Tennessee Constitution are broader than those enunciated in the United States Constitution and that fundamental fairness, as an element of due process, requires that the state's failure to preserve evidence which could be favorable to the defendant be evaluated in the context of the entire record.

The **balancing test** is **based upon the following factors**:

**(1) whether the state had a duty to preserve the evidence;**

**(2) the degree of negligence involved;**

**(3) the significance of the destroyed evidence, considered in light of the probative value and reliability of secondary or substitute evidence that remains available;**

**(4) the sufficiency of the other evidence against the defendant.** (Ferguson, 2 S.W.3d at 916.)

If a trial without the lost or destroyed evidence would be unfair, the trial judge may dismiss the charges, provide a jury instruction, or take other steps necessary to protect the defendant's right to a fair trial. Ferguson, 2 S.W.3d at 917.

In Ferguson, the Court ultimately determined that the defendant had not been deprived of his right to a fair trial based on the loss of the videotape.

**LexisNexis**

**Overview**  
Defendant was arrested for driving under the influence after the arresting officer observed a van parked with its engine running. The officer approached the vehicle and observed defendant slumped over the wheel. The officer conducted two field sobriety tests and then transported defendant to police station where additional sobriety tests were apparently conducted and recorded on videotape; however, the video was taped over before anyone could view it. At issue on appeal was what consequences should flow from the state's loss or destruction of evidence alleged to have been exculpatory. The court held that the state had a duty to preserve the videotape as potentially exculpatory evidence. **However, the court concluded that defendant received a fundamentally fair trial.**

**Issue**: Whether a trial, conducted without the destroyed evidence, would be fundamentally fair

**Rule of Law:** **If a trial without the lost or destroyed evidence would be unfair, the trial judge may dismiss the charges, provide a jury instruction, or take other steps necessary to protect the defendant's right to a fair trial.**

Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

If the proof demonstrates the existence of a duty to preserve and further shows that the State has failed in that duty, the analysis moves to a consideration of several factors which should guide the decision regarding the consequences of the breach.

Those factors include:

1. The degree of negligence involved;

2. The significance of the destroyed evidence, considered in

light of the probative value and reliability of secondary or substitute evidence that remains available; and

3. The sufficiency of the other evidence used at trial to support the conviction.

Of course, as previously stated, the central objective is to protect the defendant's right to a fundamentally fair trial. If, after considering all the factors, the trial judge concludes that a trial without the missing evidence would not be fundamentally fair, then the trial court may dismiss the charges. Dismissal is, however, but one of the trial judge's options. The trial judge may craft such orders as may be appropriate to protect the defendant's fair trial rights. As an example, the trial judge may determine, under the facts and circumstances of the case, that the defendant's rights would best be protected by a jury instruction.

**Outcome**  
The court affirmed defendant's conviction for driving under the influence because defendant's trial was fundamentally fair despite the loss of the videotaped evidence.

**OPINION**

BIRCH, J.

The question presented for our determination is:

What are the factors which should guide the determination of the consequences that flow from the State's loss or destruction of evidence which the accused contends would be exculpatory?

The State urges that we adopt the bad faith analysis announced in Arizona v. Youngblood, 488 U.S. 51, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988). **1**

Two reasons prompt us to reject this analysis:

1. we find, under the circumstances, that the due process principles of the Tennessee Constitution are broader than those enunciated in the United States Constitution; and
2. fundamental fairness, as an element of due process, requires that the State's failure to preserve evidence that could be favorable to the defendant be evaluated in the context of the entire record.

Accordingly, we promulgate today an analysis in which the critical inquiry is:

**Whether a trial, conducted without the destroyed evidence, would be fundamentally fair**? Using this analysis, we find that the appellant's trial was a fundamentally fair one despite the loss of the videotaped evidence. Accordingly, and for the reasons herein stated, the **judgment of the Court of Criminal Appeals is affirmed.**

At or near four o'clock on the morning of November 18, 1992, Officer Edwin A. Murray of the Johnson City Police Department observed a van parked on an I-181 ramp with its engine running. Murray approached the vehicle and observed Marvin K. Ferguson, the appellant, "slumped" over the steering wheel. Upon opening the door and awakening Ferguson, Murray smelled a strong odor of alcohol and noticed that Ferguson's speech was slurred. Murray administered two field sobriety tests: namely, heel-to-toe and horizontal gaze nystagmus. Concluding from these tests and from his other observations that Ferguson was under the influence of an intoxicant, Murray arrested him and transported him to the police station where additional field sobriety tests were apparently conducted. These additional tests were recorded on a videotape which was inadvertently "taped over" before anyone could view it.

  At trial, Ferguson's theory was that he occasionally suffered from vascular or migraine-type headaches that included *scotoma*, which affected his vision and coordination. He testified that he had suffered just such a headache prior to his arrest. To support his theory, Ferguson presented expert medical testimony describing this condition and explaining that during a "spell" Ferguson's conduct could be perceived by a layperson as the result of alcohol intoxication.

II

*HN3* The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides for every defendant the right to a fair trial. To facilitate this right, a defendant has a constitutionally protected privilege to request and obtain from the prosecution evidence that is either material to guilt or relevant to punishment. Brady v. Maryland, 373 U.S. 83, 87, 83 S. Ct. 1194, 1196, 10 L. Ed. 2d 215, 218 (1963). [\*\*5]  *HN4* Even in the absence of a specific request, the prosecution has a constitutional duty to turn over exculpatory evidence that would raise a reasonable doubt about a defendant's guilt. United States v. Agurs, 427 U.S. 97, 110-11, 96 S. Ct. 2392, 2401, 49 L. Ed. 2d 342, 353-54 (1976).

The analysis of both Brady and Agurs concerns the prosecution's suppression of "plainly exculpatory" evidence. This strikes a sharp contrast to the case under review wherein the existence of the destroyed videotape was known to the defense but where its true nature (exculpatory, inculpatory, or neutral) can never be determined.

The question that we address today is what consequences flow from the State's loss or destruction of evidence alleged to have been exculpatory. Ferguson alleges that his due process rights were violated by the destruction of the videotape of the field sobriety tests administered at the police station. On the other hand, the State's contention is that because the evidentiary nature of the videotape can never be known, the appropriate analysis should inquire into the State's bad faith (or lack of it) in the destruction of the evidence. See Arizona v. Youngblood, 488 U.S. at 57-58, 109 S. Ct. at 337, 102 L. Ed. 2d at 289. [\*\*6]

**Youngblood is the leading federal case regarding the loss or destruction of evidence**. **In Youngblood, the police's failure to refrigerate a sodomy victim's semen-stained clothing precluded testing, the result of which might have exonerated the accused. The United States Supreme Court held that "unless *HN5* a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law**." Id. at 58, 109 S. Ct. at 337, 102 L. Ed. 2d at 289. Thus the Court concluded that the State had no constitutional duty to preserve the clothing even though testing may have been useful to the accused.

Several states have embraced the bad faith analysis of Youngblood and found that a similar showing of bad faith is required under their respective constitutions. See, e.g., Collins v. Commonwealth, 951 S.W.2d 569 (Ky. 1997); State v. Drdak, 330 N.C. 587, 411 S.E.2d 604 (N.C. 1992); State v. Ortiz, 119 Wash. 2d 294, 831 P.2d 1060 (Wash. 1992) (holding that no analytic basis existed **[\*916]** to interpret Washington's due process clause more broadly [\*\*7]  than the federal provisions); accord State v. Copeland, 130 Wash. 2d 244, 922 P.2d 1304 (Wash. 1996). The Georgia Supreme Court has agreed that to establish a due process violation a defendant must prove bad faith, but the court also required the trial court to consider the materiality of the lost or destroyed evidence. Walker v. State, 264 Ga. 676, 449 S.E.2d 845, 848 (Ga. 1994).

Other states have recognized that "there may well be cases in which the defendant is unable to prove that the State acted in bad faith but in which the loss or destruction of evidence is nonetheless so critical to the defendant as to make a criminal trial fundamentally unfair." Youngblood, 488 U.S. at 61, 109 S. Ct. at 339, 102 L. Ed. 2d at 291 (Stevens, J., concurring in the result). These states have rejected a pure Youngblood analysis, focusing instead on the materiality of the unavailable evidence in determining whether a due process violation has occurred. See, e.g., Ex parte Gingo, 605 So. 2d 1237 (Ala. 1992); Thorne v. Department of Pub. Safety, 774 P.2d 1326 (Alaska 1989); State v. Matafeo, 71 Haw. 183, 787 P.2d 671 (Haw. 1990); [\*\*8]  Commonwealth v. Henderson, 411 Mass. 309, 582 N.E.2d 496 (Mass. 1991); State v. Osakalumi, 194 W. Va. 758, 461 S.E.2d 504 (W. Va. 1995).

Several of these states have determined that due process claims arising out of lost or destroyed evidence must be evaluated using a "balancing" approach. As an example, the Delaware Supreme Court, after having determined that the state breached a duty to preserve evidence, employed a balancing approach which focuses on the following three factors: (1) the degree of negligence or bad faith involved; (2) the importance of the missing evidence, considering the probative value and reliability of secondary or substitute evidence that remains available; and (3) the sufficiency of the other evidence used at trial to sustain the conviction. Hammond v. State, 569 A.2d 81, 87 (Del. 1989). **7**

 [\*\*9]  We now must determine whether the bad faith analysis of Youngblood adequately protects the right to a fair trial under the due process clause of the Tennessee Constitution. See Tenn. Const. art. I, § 8 **8** . Although this Court has previously construed Tenn. Const. art. I, § 8, as "synonymous with the 'due process of law' provisions of the federal constitution," State ex rel. Anglin v. Mitchell, 596 S.W.2d 779, 786 (Tenn. 1980), we have also recognized that "this *HN6* Court, as the final arbiter of the Tennessee Constitution, is always free to expand the minimum level of protection mandated by the federal constitution." Burford v. State, 845 S.W.2d 204, 207 (Tenn. 1992). Thus, we will examine Youngblood and explain why we reject its analysis.

 [\*\*10]  According to Youngblood, unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law. In this regard, proving bad faith on the part of the police would be, in the least, extremely difficult. In addition, the Youngblood analysis apparently permits no consideration of the materiality of the missing evidence or its effect on the defendant's case. The conclusion is that this analysis substantially increases the defendant's burden while reducing the prosecution's burden at the expense of the defendant's fundamental right to a fair trial.

Because we deem the preservation of the defendant's fundamental right to a fair trial to be a paramount consideration here, we join today those jurisdictions which have rejected the Youngblood analysis in its pure form. In so doing, we adopt for Tennessee a balancing approach similar to the one espoused by the Supreme Court of Delaware in Hammond v. State, 569 A.2d 81, 87 (Del. 1989).

The first step in this analysis is to determine whether the State had a duty to preserve the evidence. Generally speaking, the State has a duty to preserve all evidence subject to discovery and inspection under Tenn. R. Crim. P. 16, or other applicable law. **9** It is, however, difficult to define the boundaries of the State's duty to preserve evidence. This difficulty is recognized in California v. Trombetta, 467 U.S. 479, 488-89, 104 S. Ct. 2528, 2533-34, 81 L. Ed. 2d 413 (1984). It held:

Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

If the proof demonstrates the existence of a duty to preserve and further shows that the State has failed in that duty, the analysis moves to a consideration of several factors which should guide the decision regarding the consequences of the breach. Those factors include:

1. The degree of negligence involved;

2. The significance of the destroyed evidence, considered in

light of the probative value and reliability of secondary or substitute evidence that remains available; and

3. The sufficiency of the other evidence used at trial to support the conviction.

Of course, as previously stated, the central objective is to protect the defendant's right to a fundamentally fair trial. If, after considering all the factors, the trial judge concludes that a trial without the missing evidence would not be fundamentally fair, then the trial court may dismiss the charges. Dismissal is, however, but one of the trial judge's options. The trial judge may craft such orders as may be appropriate to protect the defendant's fair trial rights. As an example, the trial judge may determine, under the facts and circumstances of the case, that the defendant's rights would best be protected by a jury instruction.

We now examine the case under submission in light of the considerations mentioned above. **Initially, the question is whether the State had a duty to preserve the videotape**. The exculpatory nature of the evidence has considerable significance in resolving that question. The exculpatory value of the videotape is, in our view, tenuous. **If the videotape showed Ferguson performing poorly on the sobriety tests at the police station, then the cause of the poor performance could either be intoxication, as urged by the State, or a medical condition, as urged by Ferguson. If, on the other hand, the videotape showed Ferguson performing satisfactorily on the sobriety tests, then Ferguson's theory that medical problems caused him to appear intoxicated would be of questionable validity.** Though the videotape was probably of marginal exculpatory value, it was at least "material to the preparation of the defendant's defense" and might have led the jury to entertain a reasonable doubt about Ferguson's guilt. Because the videotape may have shed light on his appearance and condition on the morning in question, the State had a duty to preserve the videotape as potentially exculpatory evidence.

In erasing the tape before the defendant had an opportunity to view it, the State breached this duty. **Therefore, we must determine what consequences should flow from this breach of duty.**

1.) The first factor to consider in determining consequences is the degree of negligence involved. Unquestionably, Ferguson has failed to prove the State acted in bad faith in the destruction of the evidence. The only conclusion remaining is that the evidence was negligently destroyed, and we think the conduct was simple negligence, as distinguished from gross negligence.

2.) The second factor addresses the significance of the missing evidence. Given the defendant's contention that his medical condition caused him to appear intoxicated, the videotape may not have been probative of intoxication. As to the availability of secondary evidence probative of the intoxication issue, Ferguson adduced expert medical testimony.  His expert witness explained why the physical effects of his condition would have looked like intoxication to the officer. Ferguson testified about how his condition affected his balance and coordination, and he related long-term problems with his lower extremities. In spite of the unavailability of the videotape, Ferguson presented his defense in as complete a manner as was possible without the videotape.

3.) The third factor to consider is the sufficiency of the convicting evidence. The arresting officer smelled alcohol on Ferguson's breath and concluded from his observation that Ferguson's physical appearance and speech were indicative of intoxication. Additionally, the arresting officer testified about failed on-scene field sobriety tests that were not videotaped. Thus, the evidence adduced was sufficient, as a matter of law, for conviction.

**Thus, it is abundantly clear to us that Ferguson was not hindered in the full and complete exposition of his theory to the jury. We conclude that he received a fundamentally fair trial and that he experienced no measurable disadvantage because of the unavailability of the videotaped** **evidence.**

**Accordingly, the judgment of the Court of Criminal [\*\*17]  Appeals is affirmed, and the costs are taxed against the appellant.**

ADOLPHO A. BIRCH, JR., Justice

CONCUR: Anderson, C.J., Holder, Barker, JJ.

Drowota, J., not participating

**Arizona v. Youngblood** - Quimbee

**Rule of Law: The failure of a state to preserve physical evidence that could have been useful to the defendant is not a violation of due process unless bad faith on the part of the police is shown.**

**Facts:** A ten-year-old boy was kidnapped from a church carnival and assaulted for one and a half hours. When the boy finally got home, his mother took him to the hospital where the doctor collected evidence using a sexual-assault kit the police department supplied to the hospital. In addition to the blood samples, hair samples, saliva samples, and swabs and smears the doctor took, the boy’s underwear and T-shirt were given over to the police. The police examined the sexual-assault kit to determine that sexual contact had occurred but did not perform any tests to help identify the assailant. Nine days after the incident, the boy identified Youngblood (defendant) in a photographic lineup shown to him by police. Youngblood was arrested about four weeks later. About two years later, the police examined the boy’s clothing for the first time and found two semen stains. The police tried to identify the assailant by testing the semen stains but were unable to do so. The clothing had not been refrigerated during the intervening two years. The police had followed standard department procedures regarding the preservation and testing of evidence. At trial, Youngblood called an expert witness who testified to what could have been shown if further tests had been conducted on the samples or the clothing had been refrigerated. Nonetheless, the jury found Youngblood guilty. The court of appeals reversed the conviction, holding that the destruction of evidence that could have exonerated the defendant was a violation of due process. The United States Supreme Court granted certiorari.

**Issue:** Is the failure of a state to preserve physical evidence that could be useful to a criminal defendant a violation of due process?

**Holding and Reasoning (Rehnquist, C.J.)** No. The defendant’s due process rights are not violated when the state fails to preserve physical evidence that may have been helpful to the defendant. In past cases dealing with the constitutional ramifications of lost evidence, emphasis has been placed on whether the government acted in good or bad faith. In *United States v. Valenzuela-Bernal* (1982), a prompt deportation of a witness was justified because the agents had acted in good faith. Furthermore, in *California v. Trombetta* (1984), the defense wanted a breathalyzer test excluded from evidence because the state had not preserved the breath sample that was used in the test. Nevertheless, the test was admissible in part because the officers had acted in good faith. It is true that the state must disclose exculpatory evidence to the defendant and failure to do so, even in good faith, is a violation of the defendant’s due process rights. However, this need not be the standard when the state fails to preserve material that may have been helpful to the defendant. A good faith test is more appropriate in such situations because otherwise the courts must determine the importance of the lost, potentially exculpatory evidence. This is almost impossible when the nature and contents of the evidence are often unknown and disputed. In addition, the police are not charged with finding and preserving all evidence that could possibly be important to any prosecution. The police must only act in good faith. This requires that they preserve evidence where it is reasonable to do so and where justice requires it because the police realize the evidence could exonerate the defendant. In this case, the police collected the necessary evidence but Youngblood was not arrested until weeks later. All evidence was properly made available to Youngblood. While the police may have acted negligently, they acted in good faith. Accordingly, the judgment of the court of appeals is reversed and the case is remanded.

**Concurrence (Stevens, J.):** The Court is right that in this case there has been no violation of Youngblood’s due process rights. First, when the police failed to refrigerate the victim’s clothing, they were hurting themselves more than they were the defendant. At that time, the police still had to find a suspect and the prosecution bears the burden of proving that the future defendant is in fact guilty. Second, it is unlikely that Youngblood was prejudiced by the lost evidence. The jury was instructed to interpret any lost evidence in favor of the defendant. Finally, in the end, the lost evidence was immaterial. Despite being instructed that it may do so, the jury found the rest of the state’s case so persuasive that no juror believed that proper preservation of the evidence would have proven that Youngblood was not the assailant.

**Dissent (Blackmun, J.)**

The Court’s “bad faith” test is vague and inconsistent the importance of properly preserving the evidence. Finally, the semen would have been with prior due process cases. Instead, the defendant’s due process rights are violated when the police do not preserve physical evidence where they reasonably should know that the evidence has the potential to reveal immutable characteristics of the criminal, and no comparable evidence is likely to be available to the defendant. In this case, Youngblood’s due process rights were clearly violated when the police did not properly preserve the criminal’s semen. First, this evidence was relevant and material. The court of appeals even held that tests on the semen would have been more conclusive than the samples collected in the assault kit. Second, had the semen been tested by available methods, it would have revealed an immutable characteristic of the assailant. The police should have recognized this and seen independently exculpatory. While Youngblood had other evidence proving his innocence, the semen would have shown that it was impossible that he had been the assailant.

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**March 18, 2021**

**Chapter 14 – Guilty Pleas**

**Tenn. R. Crim. P. Rule 11**

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**Chapter 14 – Guilty Pleas**

**\*\*BORDENKIRCHER v. HAYES\*\***

United States Supreme Court  
434 U.S. 357 (1978)

**Rule of Law**

**The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution is not violated when a prosecutor exercises discretion in whether or not to prosecute and what charge to bring before a grand jury so long as the decision is not intentionally based on race, religion, or some other unjustifiable classification.**

**Facts**

Paul Lewis Hayes (defendant) was indicted on a charge of uttering a forged instrument in the amount of $88.30, punishable by up to 10 years imprisonment. Thereafter, Hayes and his attorney met with the prosecutor to discuss a possible plea agreement. The prosecutor offered Hayes a sentence of five years in prison if he pled guilty to the uttering charge and “saved the court the inconvenience and necessity of a trial.” However, if Hayes chose not to plead guilty the prosecutor would go back to the grand jury and re-indict Hayes as a habitual offender, subjecting him to a possible mandatory term of life imprisonment due to Hayes’ two previous felony convictions. Hayes chose not to plead guilty and the prosecutor obtained an indictment charging him under the state’s Habitual Criminal Act. Hayes was subsequently found guilty of the uttering offense and sentenced to life imprisonment. The Kentucky Court of Appeals affirmed the sentence. Hayes then filed a petition for a federal writ of habeas corpus. The court of appeals held that the prosecutor’s conduct during the plea negotiations had violated the principles which “protected defendants from the vindictive exercise of a prosecutor’s discretion,” and ordered Hayes’ sentence to be reduced to a lawful sentence imposed only for the uttering crime. The United States Supreme Court granted certiorari to review.

**Issue**

Is the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution violated when a prosecutor exercises discretion in whether or not to prosecute and what charge to bring before a grand jury?

**Holding and Reasoning (Stewart, J.)**

No. In *North Carolina v. Pearce*, 395 U.S. 711, 725 (1969), the Court held that the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution “requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial.” However, there is no retaliation involved during the course of plea negotiations so long as the accused is free to accept or reject the prosecutor’s offer. Although the prosecutor confronted Hayes with a possible life sentence if he chose to pursue his constitutional right to trial for the uttering charge, Hayes was free to make that decision. So long as the prosecutor has probable cause to believe that Hayes committed the uttering offense, the decision whether or not to prosecute, and what charge to file or bring before a grand jury, generally rests entirely in his discretion. The court of appeals’ order reducing Hayes’ sentence is reversed.

**Dissent (Blackmun, J.)**

The prosecutor in this case admitted that the sole reason for the new indictment against Hayes was to discourage him from exercising his right to a jury trial. Vindictiveness was clearly present and the Court’s holding approves the prosecutor’s methods. However, a contrary result might encourage prosecutors to bring the more serious charge initially in every case only thereafter to bargain with the defendant. The defendant would still be on the losing side because at that point he would have to bargain against the more serious charge. Nonetheless, it is far preferable to hold the prosecution to the charge it was originally inclined to bring against a defendant.

**Dissent (Powell, J.)**

Here, the prosecutor made a reasonable, responsible judgment not to subject Hayes to a mandatory life sentence when his only new offense was uttering an $88 forged check. The prosecutor likely deemed it unreasonable and not in the public interest to put Hayes in jeopardy of a sentence of life imprisonment. If the plea bargaining system is to work effectively, prosecutors must be accorded the widest discretion within constitutional limits. However, the implementation of the prosecutor’s strategy solely to deter the exercise of Hayes’ constitutional right to a jury trial is not a permissible exercise of a prosecutor’s discretion.

**Key Terms:**

**Plea Bargain -** A negotiation between a criminal defendant via his attorney and the prosecutor in which the defendant agrees to plead guilty to a crime in exchange for a reduction of the severity of the charges.

**Blackledge v. Perry**

United States Supreme Court  
417 U.S. 21 (1974)

**Rule of Law**

**The Due Process Clause of the Fourteenth Amendment is violated if an increased punishment after appeal has a real likelihood of being the result of vindictiveness.**

**Facts**

Perry (defendant) was in prison when he got into a fight with another inmate. Perry was charged with the misdemeanor of assault with a deadly weapon. He was convicted in the district court. Under North Carolina law, a defendant convicted in the district court has a right to a trial de novo in the superior court. Perry therefore filed notice of appeal to the superior court. However, the prosecutor then obtained an indictment charging Perry with felony assault with a deadly weapon with intent to kill or cause serious injury. Perry entered a plea of guilty. Perry subsequently filed a writ of habeas corpus in federal district court. He argued that his felony indictment was a penalty for exercising his right to a trial de novo and therefore violated the Due Process Clause of the Fourteenth Amendment. The district court granted the writ, and the court of appeals affirmed. The United States Supreme Court granted certiorari.

**Issue**

Is the Due Process Clause of the Fourteenth Amendment violated if a defendant has the right to a trial de novo after being convicted of a misdemeanor, but before he can execute this right, the prosecution charges him with a felony covering the same conduct for which he had already been tried and convicted?

**Holding and Reasoning (Stewart, J.)**

Yes. If a defendant invokes his right to a trial de novo after being convicted of a misdemeanor, but the prosecutor then charges him with a felony offense based on the same conduct, the potential for prosecutorial vindictiveness makes the more severe charge a violation of the defendant’s due process rights. This Court’s holding in *North Carolina v. Pearce*, 395 U.S. 711 (1969), established that due process is violated where an increased punishment, motivated by vindictiveness, results from the defendant's pursuit of his right to appeal. A prosecutor does not want a convicted misdemeanant to appeal his conviction, especially if seeking de novo review, because the additional proceedings are expensive and time consuming for the prosecution. There is therefore a risk that a prosecutor will attempt to discourage appeals by retaliating against appealing defendants. If the prosecution can discourage appeals by charging defendants with more serious offenses after an appeal, then few defendants will exercise their statutory right to appeal. Whether or not the prosecutor in this case actually acted maliciously is not at issue. In *Pearce*, this Court held that the defendant’s fear of retaliation in response to an appeal can have a chilling effect and violates the Due Process Clause. Therefore, it was unconstitutional for the prosecutor to bring more serious charges against Perry before his de novo trial. The judgment of the court of appeals is affirmed.

**Dissent (Rehnquist, J.)**

The bringing of more serious charges against Perry does not violate due process as outlined in *Pearce*. Even assuming it does, Perry should not be able to assert his claim under *Pearce* after he has pleaded guilty to the new charges.

**Key Terms:**

**Fourteenth Amendment Due Process** **Clause** - The provision set forth at Amendment XIV, Section 1 of the United States Constitution prohibiting states from depriving any person of life, liberty, or property by means that are arbitrary or fundamentally unfair.

**De Novo Review -** Allows the appellate court to review an issue of law or a mixed issue of law and fact without giving deference to the lower court's decision. In other words, under de novo review, the appellate court reviews the issue as if it were deciding the issue for the first time.

**North Carolina v. Pearce**

United States Supreme Court  
395 U.S. 711 (1969)

**Rule of Law**

**When a criminal defendant is reconvicted of an offense after being granted a new trial, it is unconstitutional to deny credit for time already served and it is unconstitutional for the court to impose a longer sentence in the absence of a finding of conduct subsequent to the original conviction that will justify imposing a longer sentence.**

**Facts**

Pearce (defendant) was convicted of criminal charges in the state courts of North Carolina. Pearce was sentenced to a term of 12 to 15 years in prison. Several years after his conviction, Pearce’s conviction was reversed and he was afforded a new trial. Pearce was reconvicted at the new trial and given an eight-year prison sentence. The state court would not grant credit for time already served. The new sentence, combined with time already served, amounted to a longer prison term than the original sentence. Pearce appealed and the federal district court and court of appeals held that the longer sentence was unconstitutional. The state of North Carolina petitioned the United States Supreme Court for review, and Pearce’s case was consolidated with the case of Rice. Rice pled guilty to criminal charges in the state courts of Alabama and was sentenced to 10 years in prison. Rice was retried after his original convictions were vacated. At the new trial, Rice was convicted again and sentenced to a total of 25 years in prison. Rice was not granted credit for time served. Rice appealed and both the federal district court and court of appeals held that the longer sentence was unconstitutional. The state of Alabama petitioned the United States Supreme Court for review.

**Issue**

When a criminal defendant is reconvicted of an offense after being granted a new trial, is it unconstitutional to deny credit for time already served and for the court to impose a longer sentence in the absence of a finding of conduct subsequent to the original conviction that will justify imposing a longer sentence?

**Holding and Reasoning (Stewart, J.)**

Yes. When a criminal defendant is reconvicted of an offense after being granted a new trial, it is unconstitutional to deny credit for time already served and it is unconstitutional for the court to impose a longer sentence in the absence of a finding of conduct subsequent to the original conviction that will justify imposing a longer sentence. In addition to protecting against prosecution for the same offense after acquittal or conviction, the double jeopardy guarantee of the Fifth Amendment prohibits the imposition of multiple punishments for the same offense. Failure to credit time served against the punishment imposed after retrial violates the Fifth Amendment. By contrast, the double jeopardy guarantee does not foreclose the imposition of a harsher sentence upon retrial. The rationale underlying this doctrine recognizes that the grant of a new trial effectively nullifies both the original conviction and the original sentence. The trial judge has discretion to impose a more severe sentence based upon evidence of the defendant’s conduct subsequent to the original conviction. The state may not impose a stricter punishment for the sole purpose of penalizing a defendant for exercising constitutional rights. The threat of such a penalty would unconstitutionally deter defendants from pursuing their rights to appeal convictions. In order to justify the imposition of a stricter sentence upon retrial, the trial judge must set forth on the record objective information regarding specific conduct of the defendant subsequent to the original conviction. In the two cases before the Court, neither state has offered any evidence justifying the increase in the defendants’ sentences. As such, the judgment of the court of appeals in each case is affirmed.

**Concurrence (White, J.)**

I concur in the opinion but I believe that the trial court should be able to consider any objective evidence not considered at the original conviction as justification for imposing a stricter sentence upon reconviction.

**Concurrence (Douglas, J.)**

When a defendant successfully overturns a conviction for which he has already served the full sentence, the state may not impose an additional sentence upon reconviction. Accordingly, the state may not impose a longer sentence upon reconviction which amounts to an additional sentence on top of the sentence already being served.

**Concurrence/Dissent (Harlan, J.)**

I believe the Court’s decision in *Green v. United States*, 355 U.S. 184 (1957), stands for the proposition that the Double Jeopardy Clause prohibits both the refusal to grant credit for time served and the imposition of a more severe sentence upon reconviction. *Green* held that a defendant convicted of a lesser included offense at trial may only be retried for the lesser offense and may not be subjected to retrial for the more serious offense of which the defendant has already been implicitly acquitted. The same reasoning applies to the imposition of sentence on retrial. In both cases, it has already been determined that the defendant committed a crime of particular severity deserving of a particular punishment. The threat of a potentially harsher sentence will have the same deterrent effect against the exercise of constitutional rights as the denial of credit for time served.

**Concurrence/Dissent (Black, J.)**

The Court has the authority to vacate a sentence upon a factual finding that a stricter sentence has been imposed solely for punitive motives. The Court does not have the authority to dictate the procedures that state courts must follow in order to guarantee the absence of punitive motives.

**Key Terms:**

**Fourteenth Amendment Due Process** **Clause** - The provision set forth at Amendment XIV, Section 1 of the United States Constitution prohibiting states from depriving any person of life, liberty, or property by means that are arbitrary or fundamentally unfair.

**Fifth Amendment** - An amendment added to the U.S. Constitution as part of the Bill of Rights that provides important protections from government actions, including a guarantee that no person will be required to answer for a capital crime unless first indicted by a grand jury; no one will suffer double jeopardy; no one must testify against himself or herself; no one will be deprived of life, liberty, or property without due process of law; and no property will be taken for public use without just compensation.

**Double Jeopardy Clause** - A portion of the Fifth Amendment to the United States Constitution incorporated in the Bill of Rights that prohibits the government from trying a person more than once for the same offense.

**Brady v. United States**

United States Supreme Court  
397 U.S. 742 (1970)

**Rule of Law**

**A defendant’s guilty plea is not invalid under the Fifth Amendment if it is voluntary, knowing, and intelligent and done to avoid the risk of a harsher penalty.**

**Facts**

Brady (defendant) was charged with kidnapping in violation of 18 U.S.C. § 1201(a) and faced the possibility of the death penalty if convicted by a jury. After learning that his co-defendant may testify against him, Brady changed his previous plea of not guilty to guilty. Brady’s plea was accepted by the trial judge after he questioned Brady twice as to the voluntariness of his plea. Brady was sentenced to 50 years imprisonment, later reduced to 30 years, and thereafter sought post-conviction relief claiming that his plea was not voluntary because he faced the death penalty if he exercised his right to a jury trial. The lower courts denied Brady’s requested relief, and the U.S. Supreme Court granted certiorari to review.

**Issue**

Is a defendant’s guilty plea invalid under the Fifth Amendment if it is voluntary, knowing, and intelligent and done to avoid the risk of a harsher penalty?

**Holding and Reasoning (White, J.)**

No. A waiver of an individual’s constitutional rights must not only be voluntary, but must be knowing, intelligent acts done with sufficient awareness of the relevant circumstances and likely consequences. The prosecution often utilizes plea bargaining to obtain guilty pleas to reduce the burdens on the court, staff, and community. Moreover, in many cases the defendant may never plead guilty unless assured that the plea will result in a lesser penalty than he might receive after a jury trial and subsequent conviction. The state may not, however, obtain a plea by actual or threatened physical harm or by mental coercion from the defendant. But that did not occur here. Guilty pleas are not unconstitutional because, on one hand, the criminal law extends to a judge or jury a range of choices in setting the sentence in individual cases and, on the other, because the prosecution and defendant both find advantages in avoiding the possibility of the maximum penalty authorized by law. Nearly 75 percent of the criminal convictions in the United States are secured by guilty pleas entered by the defendants. It is not unconstitutional for a state to provide a benefit to the defendant which also happens to be a benefit for the state as well. In *Bram v. United States*, 168 U.S. 532 (1897), the Court held that the admissibility of a defendant’s confession depended on whether it was compelled within the meaning of the Fifth Amendment. To be admissible, the confession must be “free and voluntary,” i.e. must not be obtained by use of threats or violence or by direct or indirect promises of any sort. Even a suggested promise of leniency was deemed sufficient to bar the confession, because, at the time of the confession and subsequent implicit promise, the defendant was too sensitive to such an inducement. Here, Brady was not in such a position. Rather, Brady was represented by competent counsel and advised of the advantages and disadvantages of going to trial and of pleading guilty. Brady’s plea was entered in open court and before a judge sensitive to the requirements of law with respect to guilty pleas. It was voluntary. A guilty plea is voluntary if it is entered by a defendant who is fully aware of the direct consequences, and not induced by threats or promises. Under this standard, a plea of guilty is not invalid merely because it is entered to avoid the possibility of the death penalty. Brady’s plea was also intelligently made. Brady was advised by counsel and made aware of the charges against him. There is nothing to indicate that he was incompetent or otherwise not in control of his mental faculties. The judgment of conviction is affirmed and Brady’s request for post-conviction relief is denied.

**Key Terms:**

**Plea Bargain -** A negotiation between a criminal defendant via his attorney and the prosecutor in which the defendant agrees to plead guilty to a crime in exchange for a reduction of the severity of the charges.

# \*\*SANTOBELLO v. NEW YORK\*\*

#### United States Supreme Court 404 U.S. 257 (1971)

#### Rule of Law

**When a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled.**

#### Facts

Santobello (defendant) was indicted on two felony counts. After negotiations, Santobello entered a plea of guilty to a lesser included offense. The offense carried a maximum sentence of one year in jail. The prosecutor promised to make no sentencing recommendations to the judge. At the sentencing hearing, a new prosecutor represented the state and recommended the maximum one-year sentence. Santobello’s attorney objected, citing the other prosecutor’s promise to make no sentencing recommendation. The sentencing judge said that he was not influenced by the prosecutor’s recommendation and that based on Santobello’s long criminal record the maximum sentence is appropriate. Santobello was sentenced to one year in jail.

#### Issue

Where a defendant pleads guilty, in part relying on a promise made by the prosecutor during their plea-bargaining, may the prosecution later go back on its promise?

#### Holding and Reasoning (Burger, C.J.)

No. Where the prosecution makes a promise to the defendant during plea negotiations, and this promise acts as an inducement to the defendant to accept the plea agreement, the prosecution is bound by its promise. Plea agreements are an important part of the criminal justice system, preserving the state interest and a defendant’s rights in a highly efficient manner. However, the agreements must be fair and entered into knowingly and voluntarily by the defendant. Therefore, when a prosecutor makes a promise that the defendant relies on in accepting the plea agreement, the prosecution is bound by this promise. In this case, while the sentencing judge claims his decision was not influenced by the prosecutor’s recommendation, in the interest of justice, the case must be remanded. The state court may decide if specific performance of the plea agreement is appropriate or whether the defendant should be given the opportunity to withdraw his guilty plea. Accordingly, the judgment below is vacated.

#### Concurrence (Douglas, J.)

When the prosecution does not hold up his end of a plea agreement, the court must decide whether specific performance or the withdrawal of the defendant’s guilty plea is the appropriate remedy. In making its decision, the court should give the defendant’s preference substantial weight.

#### Concurrence/Dissent (Marshall, J.)

When the prosecution breaks its agreement, the basis for the waiver of the defendant’s constitutional right to a trial has been undercut. Therefore, the defendant may rescind his guilty plea if he so chooses.

**Key Terms:**

**Specific Performance -** An equitable remedy that requires a specific action when monetary damages are inappropriate or too difficult to ascertain.

**Brady v. United States**

United States Supreme Court  
397 U.S. 742 (1970)

**Rule of Law**

**A defendant’s guilty plea is not invalid under the Fifth Amendment if it is voluntary, knowing, and intelligent and done to avoid the risk of a harsher penalty.**

# \*\*MISSOURI v. FRYE\*\*

#### United States Supreme Court 132 S.Ct. 1399 (2012)

#### Rule of Law

**The Sixth Amendment requires defense counsel to communicate to a defendant formal plea offers from the prosecution.**

#### Facts

Galin Frye (defendant) was charged with driving with a revoked license. Because he had been convicted for the same offense on three other occasions, Frye was indicted for a Class D felony that carried a maximum of four years in prison. The prosecutor sent a letter to Frye’s counsel offering a choice of two plea bargains, one being a three-year sentence but with a recommendation that Frye only serve 10 days in jail and the other reducing the charge to a misdemeanor and 90 days to serve in jail. However, the letter stated that the plea offers expired within a few weeks. Frye’s attorney never communicated the plea bargain offers to him and the offers lapsed. Eventually, Frye pled guilty to the offense without a plea bargain offer. The trial court sentenced Frye to three years in prison. Frye subsequently filed for post-conviction relief in state court alleging that his attorney’s failure to communicate the plea offers to him denied him effective assistance of counsel in violation of the Sixth Amendment. The trial court denied Frye’s motion for relief. The court of appeals reversed and held that Frye met the requirements for a showing of a Sixth Amendment violation under *Strickland v. Washington*, 466 U.S. 668 (1984). The U.S. Supreme Court granted certiorari to review.

#### Issue

Does the Sixth Amendment require defense counsel to communicate to a defendant formal plea offers from the prosecution?

#### Holding and Reasoning (Kennedy, J.)

Yes. In *Strickland*, the Court held that (1) a defense counsel’s performance must be deficient and (2) the deficiency must have prejudiced the defendant in order to find that the defendant did not receive a fair trial as guaranteed by the Constitution. In addition to the Court’s holding in *Strickland*, the Missouri Court of Appeals relied on *Hill v. Lockhart*, 474 U.S. 52 (1985), and *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), when it concluded that Frye’s attorney was ineffective because he failed to communicate the prosecution’s formal plea offers to Frye. In those decisions, the Court makes clear that defense counsel has a duty to communicate to a criminal defendant plea offers provided by the prosecution. Here, the State argues that a criminal defendant has no right to a plea offer. *Weatherford v. Bursey*, 429 U.S. 545 (1977). Nevertheless, plea offers and deals are integral to the criminal justice system. There are more plea offers accepted by criminal defendants than there are trials. To show that he has been prejudiced from ineffective assistance of counsel due to an un-communicated plea offer, a defendant must demonstrate a reasonable probability he would have accepted the prosecution’s plea offer had it actually been communicated to him. Additionally, the defendant must show a reasonable probability that the plea offer would have been accepted by the trial court without the prosecution first revoking the offer. Under *Hill*¸ a defendant must demonstrate that but for defense counsel’s errors, the defendant would not have pled guilty and instead would have gone to trial. The same logic may be applied to acceptance of plea offers. While the Missouri Court of Appeals correctly held that Frye’s attorney was deficient by failing to communicate the plea offer to Frye it did not articulate the correct standard for prejudice. Although there is a strong likelihood that Frye would have accepted the plea offer provided by the prosecution, it is less certain that the trial court would have permitted the plea offer to become final. The judgment of the Missouri Court of Appeals is reversed and the matter is remanded for further determination utilizing the correct standard for prejudice.

#### Dissent (Scalia, J.)

The Court mistakenly believes that defense counsel’s failure to inform Frye of the plea offers somehow deprived Frye of some substantive or procedural right. In doing so, the majority uses a crystal ball process whereby the Court must first determine whether the defendant would have accepted the plea that was offered. Then, the Court must determine whether the prosecution would have withdrawn the offer at some point. Finally, the Court must somehow figure out whether the trial court would have accepted the plea offer as provided by the prosecution and accepted by the defendant. Such a process is overly burdensome and too speculative to implement.

**Key Terms:**

**Right to Effective Assistance of Counsel -** The right to counsel guaranteed by the Sixth Amendment to the U.S. Constitution and some state laws.

# Hill v. Lockhart

#### United States Supreme Court 474 U.S. 52 (1985)

#### Rule of Law

**A guilty plea will only be deemed involuntary on the basis of ineffective assistance of counsel if the defendant can show actual prejudice.**

#### Facts

William Lloyd Hill (defendant) was charged with first-degree murder and theft, which carries a sentence of five to 50 years or life imprisonment under Arkansas law. Hill’s attorney secured a plea deal in which Hill would plead guilty in exchange for the prosecutor’s recommendation of concurrent sentences of 35 years for murder and 10 years for theft. Hill signed an agreement that the guilty plea was knowing and voluntary, that there was no coercion, and that Hill understood his rights and wanted to plead guilty. At the hearing, Hill again stated that the plea was voluntary. The judge and Hill’s attorney told Hill that he would not be eligible for parole until serving 1/3 of the sentence. Because Hill was a second offender, Hill would not actually be eligible for parole until serving ½ of the sentence. On the basis of the attorney’s mistake as to parole eligibility, Hill filed a habeas corpus petition in federal court claiming that his plea was involuntary due to ineffective assistance of counsel. The district court denied the petition. The United States Supreme Court granted certiorari.

#### Issue

Is a guilty plea voluntary and constitutionally valid if the defendant’s attorney misinformed him about parole eligibility?

#### Holding and Reasoning (Rehnquist, J.)

Yes. In order for a guilty plea to be set aside as involuntary on the basis of ineffective assistance of counsel, the defendant must show actual prejudice. To make such a showing, the defendant must prove that a reasonable probability exists that the defendant would not have pled guilty if the attorney had not erred. A guilty plea must be knowing and voluntary. The Constitution does not require defendants to be advised of parole eligibility in order for pleas to be voluntary. Rather, Hill claims that the plea in this case was involuntary because the attorney provided incorrect information about eligibility. When a defendant pleads guilty based upon the advice of his attorney, the plea will be considered voluntary if the attorney’s advice “was within the range of competence demanded of attorneys in criminal cases.” An error is not enough; the defendant must prove that the error was prejudicial. Most convictions result from guilty pleas, and creating new bases for setting aside those pleas undermines judicial economy and certainty in justice. In this case, Hill does not claim that parole eligibility was a key factor in his entering the plea agreement or that he would have pled not guilty and gone to trial if he had been accurately informed of Arkansas’s parole laws. Because Hill did not made the required showing of prejudice, the ruling of the district court is affirmed.

**Key Terms:**

**Due Process -** A constitutional guarantee that a law shall not be unreasonable, arbitrary, or capricious and that individuals will be given notice of legal proceedings conducted fairly with an opportunity for an individual to be heard before the government may impose sanctions on one’s life, liberty, or property.

**Guilty Plea -** A defendant’s official confession to the crime and waiver of the right to trial by jury.

# Padilla v. Kentucky

#### United States Supreme Court 559 U.S. 356 (2010)

#### Rule of Law

**The Sixth Amendment’s requirement of effective assistance of counsel requires an attorney to provide accurate advice concerning the potential deportation consequences of a noncitizen defendant’s guilty plea to a crime.**

# Strickland v. Washington

#### United States Supreme Court 466 U.S. 668 (1984)

#### Rule of Law

**To establish the ineffective assistance of counsel, a convicted defendant must show that his counsel’s performance was deficient because the lawyer did not act as a reasonably competent attorney, and that he was prejudiced by the deficiency because there is a reasonable probability that, but for his attorney’s unprofessional errors, the result of the proceeding would have been different.**

**Weatherford v. Bursey**

97 S.Ct. 837

Supreme Court of the United States

**Jack M. WEATHERFORD, etc., et al., Petitioners,**

**v.**

**Brett Allen BURSEY.**

No. 75-1510.

Argued Dec. 7, 1976.Decided Feb. 22, 1977.

## Synopsis

After plaintiff and defendant, an undercover agent, were arrested for a state criminal offense, defendant had two pretrial meetings with plaintiff and plaintiff's counsel, in neither of which discussions concerning plaintiff's trial strategy or the pending criminal action occurred. After defendant, who had told plaintiff that he would not be a prosecution witness, nonetheless testified for the prosecution, plaintiff was convicted; after serving his sentence, he brought a civil rights action for damages against defendant, alleging that defendant's participation in the two meetings with plaintiff's counsel had deprived plaintiff of effective assistance of counsel and a fair trial. The District Court found for defendant, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I9b1ec9d190ef11d98e8fb00d6c6a02dd&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[and the Court of Appeals, 528 F.2d 483,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1976144796&pubNum=350&originatingDoc=Ic1d69dc29c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) without disturbing the district court's factual findings, reversed. The United States Supreme Court, Mr. Justice White, held that plaintiff was neither deprived of his right to effective counsel nor denied a fair trial, and that the Sixth Amendment does not establish a per se rule forbidding an undercover agent from meeting with a defendant's counsel.

Reversed.

Mr. Justice Marshall dissented and filed opinion in which Mr. Justice Brennan joined.

# Premo v. Moore

#### United States Supreme Court 569 U.S. \_\_\_ (2011)

#### Rule of Law

**Habeas relief for a claim of ineffective assistance of counsel is inappropriate if there is any reasonable argument that the counsel's assistance was effective or that the defendant was not prejudiced by counsel's ineffective assistance.**

#### Facts

Randy Moore (defendant) and two accomplices kidnapped Kenneth Rogers. Ultimately Moore shot Rogers, killing him. Moore told his brother and an accomplice's girlfriend about the incident, stating that they had kidnapped Rogers and taken him to the woods, but that Moore had slipped and his gun had discharged accidentally. Moore said the same thing to police during questioning. Moore's counsel considered filing a motion to suppress the confession to police, but ultimately decided against it in lieu of a plea bargain. At the advice of his counsel, Moore pled no contest to felony murder and was sentenced to 300 months, the minimum sentence. The prosecution had been considering a capital murder charge. After his conviction, Moore filed a habeas corpus petition, claiming that his counsel's failure to file a motion to suppress the confession amounted to ineffective assistance of counsel. The trial court ruled against Moore under *Strickland v. Washington*, 466 U.S. 668 (1984), based on Moore's counsel's explanation that even if the confession to the police were suppressed, the prosecution still could call Moore's brother or his accomplice's girlfriend to testify to Moore's confession to them. Moore appealed, and the United Court of Appeals for the Ninth Circuit reversed. The United States Supreme Court granted certiorari.

#### Issue

Is habeas relief for a claim of ineffective assistance of counsel appropriate if there is any reasonable argument that the counsel's assistance was effective or that the defendant was not prejudiced by the counsel's ineffective assistance?

#### Holding and Reasoning (Kennedy, J.)

No. A party seeking to prove ineffective assistance of counsel must demonstrate (1) that the counsel was ineffective and (2) that such ineffectiveness was prejudicial to the party. Habeas relief for a claim of ineffective assistance of counsel is appropriate if the state court decision denying an ineffective assistance of counsel claim was based on an unreasonable application of this standard. In other words, the question is not whether the counsel's decisions were reasonable, but whether there is any reasonable argument that the counsel satisfied the *Strickland* standard. In making such a determination, *Strickland*'s requirements must be especially adhered to if the counsel's decision came at the early plea bargain stage of the prosecution. At that stage, there are many uncertainties in the case, because a full record has not yet been developed. Under *Strickland*, counsels have wide latitude to risk consequences and make decisions without being subjected to second-guessing after a full record is formed. If such latitude is not given, the entire system of plea bargaining would be at risk. Here, the trial court found that Moore's counsel was not ineffective, because Moore's counsel explained that even if the confession to the police were suppressed, the prosecution still could call a witness to testify to Moore's confession. It was reasonable for the trial court to base its decision on this explanation. Given the possibility of a capital murder charge and that there were two witnesses who heard the same confession, Moore's counsel made a reasonable judgment that the motion to suppress would not have been fruitful and that the plea bargain was Moore's best option. This is particularly so given that the decision was made at an early stage of the prosecution. The trial court's determination that Moore's counsel was not ineffective was a reasonable application of *Strickland*. The court of appeals is reversed, and the case is remanded.

#### Concurrence (Ginsburg, J.)

Moore never claimed that but for his counsel's decision to forgo a motion to suppress the confession, he would not have pled guilty. Accordingly, Moore cannot meet the prejudice requirement of *Strickland*.

#### Key Terms:

**Sixth Amendment Right to Counsel** - Right of a person accused of a crime to have the help of an attorney throughout any criminal prosecution.

**Ineffective Assistance of Counsel -** Representation by an attorney that is so unreasonable as to deny the defendant the right to a fair trial.

# Lafler v. Cooper

#### United States Supreme Court 566 U.S. 156 (2012)

#### Rule of Law

**The Sixth Amendment guarantees effective assistance of counsel during the plea-bargaining process even if the defendant ultimately receives a fair trial.**

# \*\*UNITED STATES v. RUIZ\*\*

#### United States Supreme Court 536 U.S. 622 (2002)

#### Rule of Law

**Federal prosecutors are not constitutionally obligated to disclose impeachment information relating to any informants or other witnesses before entering into a binding plea agreement with a criminal defendant.**

#### Facts

After immigration agents found marijuana in luggage belonging to Ruiz (defendant), federal prosecutors offered her a “fast track” plea bargain, whereby a defendant will waive indictment, trial and an appeal in return for a lesser sentence. The agreement stated that any information establishing the defendant’s innocence would be turned over to the defendant. Moreover, the defendant must “waive the right” to receive “impeachment information relating to any informants or other witnesses” and the right to receive information supporting possible affirmative defenses if the case goes to trial. Ruiz refused the last condition, the government indicted her, but Ruiz ultimately pleaded guilty to the drug change. At sentencing, Ruiz asked for the same sentence that prosecutors would have given her had she signed the “fast track” plea bargain agreement, but the government opposed the request and the district court denied it, giving her instead the typical longer sentence. Ruiz appealed to the United States Court of Appeals for the Ninth Circuit, and that court vacated the lower court’s judgment, pointing out that the Constitution requires that prosecutors make certain impeachment information available to defendants before trial. The Ninth Circuit said that this obligation requires that a defendant receive the same information before a plea bargain. The same court said the Constitution prohibits defendants from waiving their right to that information and invalidated the “fast track” plea bargain because it included the waiver.

#### Issue

Are federal prosecutors constitutionally obligated to disclose impeachment information relating to any informants or other witnesses before entering into a binding plea agreement with a criminal defendant?

#### Holding and Reasoning (Breyer, J)

No. Federal prosecutors are not constitutionally obligated to disclose impeachment information relating to any informants or other witnesses before entering into a binding plea agreement with a criminal defendant. It is true that the Constitution, as part of its “fair trial” guarantee, provides that defendants have a right to exculpatory impeachment information. But a plea bargain is not a trial. The Ninth Circuit said that a guilty plea is not truly voluntary unless the prosecutors provided the same type of impeachment information that they would have provided to a defendant going to trial. We decide today whether the Constitution requires the pre-guilty plea disclosure of impeachment information. First, impeachment information is relevant to the fairness of a trial, not to the question of whether a plea has been voluntarily made. The Constitution does not require that a prosecutor make available to a defendant all possible useful information, including impeachment information. Also, one cannot characterize impeachment information as critical information to which the defendant is absolutely entitled, because of the nature of the information and the fact that the defendant may use it, or may decide not to use it. A defendant may use the impeachment information, but this fact depends on his knowledge of the prosecutor’s potential case, and the Constitution does not require the prosecutors to disclose such information. Next, there is no authority that would support the Ninth Circuit’s decision. On the contrary, our prior decisions have shown that the Constitution does not require the defendant’s complete knowledge of the relevant circumstances surrounding his case, but will allow a court to accept a guilty plea, with a waiver of certain constitutional rights, even if the defendant is unaware of certain circumstances. Furthermore, the Ninth Circuit spoke of the defendant’s trial-related “rights,” but those rights are sometimes limited, as in this case. Here, Ruiz’s “rights” depend on her having independent knowledge of the prosecutor’s case, and we think that this goes too far. In the plea agreement Ruiz considered, the prosecutor was obligated to turn over to her any information establishing the defendant’s innocence. We think that this is enough of a safeguard of Ruiz’s rights. Finally, we feel that having a constitutional obligation to provide impeachment information will interfere with the government’s interest in securing guilty pleas that are factually justified, desired by the defendants, and serve the ends of justice. Forcing the government to reveal impeachment information might result in witnesses’ and informants’ identities being revealed and concomitant harm to them. The government might also start to abandon its heavy reliance on plea bargaining, which is a resource-saving device. We see no reason why due process concerns require us to change the requirement in the way demanded by the defendant. For the foregoing reasons, we reverse the decision of the Ninth Circuit.

# Brady v. Maryland

#### United States Supreme Court 373 U.S. 83 (1963)

#### Rule of Law

**Under the Due Process Clause, the prosecution must turn over evidence favorable to the defense upon request if the evidence is material to either culpability or punishment.**

# United States v. Agurs

#### United States Supreme Court 427 U.S. 97 (1976)

#### Rule of Law

**A prosecutor’s failure to provide information to defense counsel will not deprive a defendant of a fair trial unless specific information was requested by defense counsel or if the withheld information contained perjured testimony.**

# Kyles v. Whitley

#### United States Supreme Court 514 U.S. 419 (1995)

#### Rule of Law

**A defendant is entitled to a new trial under *Brady v. Maryland*, 373 U.S. 83 (1964), if the prosecution withheld multiple pieces of favorable evidence that, taken together, undermine confidence in the verdict.**

# Giglio v. United States

#### United States Supreme Court 405 U.S. 150 (1972)

#### Rule of Law

**Under *Brady*, evidence that might impeach the prosecution’s witness is material exculpatory evidence that must be turned over to the defense.**

#### Facts

Giglio (defendant) and Taliento were suspected of forgery. The prosecution offered Taliento immunity in exchange for his testimony against Giglio. At trial, Taliento said that the prosecution never offered leniency for his testimony. A different prosecutor handling the trial did not correct Taliento’s testimony. Giglio was convicted and sentenced to five years in prison. After filing an appeal, Giglio learned of Taliento’s immunity. The Supreme Court granted certiorari to determine whether the evidence should have been turned over as a matter of due process under *Brady v. Maryland*, 373 U.S. 83 (1963).

#### Issue

Under *Brady*, is evidence that might impeach the prosecution’s witness material exculpatory evidence that must be turned over to the defense?

#### Holding and Reasoning (Burger, C.J.)

Yes. In a line of cases from *Mooney v. Holohan*, 294 U.S. 103 (1935), to*Napue v. Illinois*, 360 U.S. 264 (1959), to *Brady v. Maryland*, 373 U.S. 83 (1964), this Court has outlined the responsibilities of the prosecution under the Due Process Clause. It is a violation of due process for prosecutors to present false evidence, allow unsolicited false evidence to go uncorrected, or withhold material evidence favorable to the defense—even if the prosecutor acted in good faith. Evidence that may impeach a prosecutorial witness whose testimony relates to the defendant’s culpability must be turned over to the defense under *Brady*. A new trial is only required in cases where the evidence suppressed was material and likely to affect the outcome. The acts of one prosecutor, like the immunity offered by the first prosecutor in this case, are attributable to the government. Taliento’s testimony was the key evidence against Giglio, and thus any evidence that would impeach Taliento’s credibility is material. Giglio’s due process rights were violated. Giglio is entitled to a new trial.

#### Key Terms:

**Due Process -** A constitutional guarantee that a law shall not be unreasonable, arbitrary, or capricious and that individuals will be given notice of legal proceedings conducted fairly with an opportunity for an individual to be heard before the government may impose sanctions on one’s life, liberty, or property.

# Boykin v. Alabama

#### United States Supreme Court 395 U.S. 238 (1969)

#### Rule of Law

**A guilty plea is only constitutionally valid if it is apparent from the record that the plea was knowing and voluntary.**

#### Facts

Boykin (defendant) was indicted for string of armed robberies. At arraignment, Boykin pled guilty to all charges. The judge did not ask Boykin any questions, and Boykin did not make any statements into the record.

#### Issue

Is a guilty plea constitutionally valid if there is no indication in the record that the plea was voluntary?

#### Holding and Reasoning (Douglas, J.)

No. A guilty plea will only be effective if it is clear from the record that the plea was knowing and voluntary. A guilty plea is both an admission and a conviction. A confession is only admissible under the Constitution if it is voluntary. As a rule, the prosecution may be required to demonstrate a defendant’s knowing and voluntary waiver of a constitutional right on the record in order for that waiver to be effective. This is the standard that must be required for an effective guilty plea. Because constitutional rights are at issue, federal law controls state courts in such cases. A guilty plea involves the waiver of the defendant’s Fifth and Fourteenth Amendment privilege against self-incrimination, the defendant’s right to a jury trial, and the defendant’s right to confront all witnesses against him. Waiver of such significant rights must be explicit in the record. Courts have a duty to make sure that the defendant is fully aware of what a guilty plea means. If that duty is fulfilled, the record will satisfy later review. Since the judge did not ensure that Boykin’s guilty plea was knowing and voluntary, the conviction is reversed.

#### Dissent (Harlan, J.)

The Court reverses Boykin’s conviction as a matter of due process simply because the record does not demonstrate the voluntariness of the plea. In so doing, the Court is requiring states to adhere to Rule 11 of the Federal Rules of Criminal Procedure as a matter of due process. Boykin has never claimed that his plea was not voluntary, and the conviction should not be reversed simply because the record is deficient.

#### Key Terms:

**Due Process -** A constitutional guarantee that a law shall not be unreasonable, arbitrary, or capricious and that individuals will be given notice of legal proceedings conducted fairly with an opportunity for an individual to be heard before the government may impose sanctions on one’s life, liberty, or property.

**Guilty Plea -** A defendant’s official confession to the crime and waiver of the right to trial by jury.

**Brady v. United States**

United States Supreme Court  
397 U.S. 742 (1970)

**Rule of Law**

**A defendant’s guilty plea is not invalid under the Fifth Amendment if it is voluntary, knowing, and intelligent and done to avoid the risk of a harsher penalty.**

# Colorado v. Spring

#### United States Supreme Court 479 U.S. 564 (1987)

#### Rule of Law

**A suspect’s awareness of all the possible subjects of questioning in advance of interrogation is not relevant to determining whether the suspect voluntarily, knowingly, and intelligently waived his Fifth Amendment privilege.**

# Miranda v. Arizona

#### United States Supreme Court 384 U.S. 436 (1966)

#### Rule of Law

**Without certain hallmark warnings regarding the right to remain silent and the right to counsel, statements made during custodial interrogation are inadmissible at trial.**

# McMann v. Richardson

#### United States Supreme Court 397 U.S. 759 (1970)

#### Rule of Law

**A defendant who alleges that he pleaded guilty because of a prior coerced confession is not, without more, entitled to a hearing on his petition for habeas corpus.**

# United States v. Broce

#### United States Supreme Court 488 U.S. 563 (1989)

#### Rule of Law

**When a defendant enters a valid guilty plea to charges, he relinquishes his right to later raise defenses against those charges even if he was not aware of the defense at the time he pled guilty.**

#### Facts

The United States government (plaintiff) charged Broce and Broce’s construction company (defendants) with two separate counts of conspiring to rig bids in violation of the Sherman Antitrust Act. Broce and his company entered guilty pleas as to both conspiracy charges and were convicted of both counts of conspiracy. In a separate lawsuit, Robert Beachner and a company he owned faced similar bid-rigging conspiracy charges. Beachner and his company were acquitted at trial and then charged again with different bid-rigging conspiracy charges. Beachner successfully argued that the new charges were part of the earlier conspiracy for which he was acquitted. The court found that the new charges were thus barred by double jeopardy which prevents more than one conviction for a single crime. Broce became aware of Beachner’s case and attempted to make the same argument in his case, claiming that there was only one conspiracy so the second charge of conspiracy should be set aside. The Supreme Court granted certiorari.

#### Issue

Does a defendant relinquish his right to raise a defense to charges against him when he enters a valid guilty plea as to those charges if the defendant was not aware of the defense at the time he pled guilty?

#### Holding and Reasoning (Kennedy, J.)

Yes. When Broce entered a guilty plea to the two conspiracy charges, he admitted guilt and waived his right to go to trial. He had the right to challenge the charges against him and raised a defense of double jeopardy instead of pleading guilty. Instead, he chose to plead guilty to both conspiracy charges and, in doing so, relinquished his right to a double jeopardy claim. Broce submits an affidavit from his attorney stating that the attorney did not discuss raising a double jeopardy defense before Broce pled guilty. Broce claims that he did not relinquish his right to raise a double jeopardy claim because he was not aware of his right to raise such a defense. While this may be the basis for an ineffective assistance of counsel claim, it has no bearing on the rights Broce relinquished when he pled guilty. Relinquishment does not turn on the defendant’s awareness of every possible defense for which he is waiving his right to raise. Relinquishment turns admissions the defendant makes when he pleads guilty. The trial court advised Broce that he was admitting guilt and waiving his right to a trial by pleading guilty. Broce has not presented evidence to show that his guilty plea was not of a voluntary and intelligent character. Thus, Broce’s entry of a valid guilty plea to both charges bars him from now raising a double jeopardy defense. There is an exception to the rule that bars setting aside a valid guilty plea. If the government did not have the authority to bring the defendant into court on the charge in the first place, then conviction on the charge may be set aside even if the defendant entered a valid guilty plea. This exception does not apply in Broce’s case because he pled guilty to two separate conspiracies. Broce’s claim that double jeopardy requires that the second conspiracy conviction be set aside is dismissed.

#### Key Terms:

#### Double Jeopardy - A prohibition against a second prosecution for the same offense after an acquittal or conviction for that offense in a prior proceeding or against multiple punishments for the same offense.

#### Sherman Antitrust Act - A federal statute passed in 1890 to prevent monopolies and restrictions on free and open interstate and foreign commerce.

#### Tollett v. Henderson

93 S.Ct. 1602

Supreme Court of the United States

**Lewis S. TOLLETT, Warden, Petitioner,**

**v.**

**Willie Lee HENDERSON.**

No. 72—95.

Argued Feb. 20, 1973.Decided April 17, 1973.

## Synopsis

Proceedings on petition by state prisoner for habeas corpus relief. The United States District Court for the Middle District of Tennessee, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Id75e5a7d550611d997e0acd5cbb90d3f&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[342 F.Supp. 113,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971108058&pubNum=345&originatingDoc=Id8e2583d9c1c11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) granted writ, and the state warden appealed. The Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I65d3b29d8fdc11d98e8fb00d6c6a02dd&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[459 F.2d 237,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972109671&pubNum=350&originatingDoc=Id8e2583d9c1c11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed, and certiorari was granted. The Supreme Court, Mr. Justice Rehnquist, held that a guilty plea represents a break in the chain of events which has preceded it in the criminal process; when a criminal defendant, on advice of counsel, has solemnly admitted in open court that he is guilty of a charged offense he may not thereafter raise independent claims relating to deprivation of constitutional rights that antedated plea, such as infirmities in grand jury selection process, but may only attack the voluntary and intelligent character of the plea by showing that counsel's advice was not within the standards of governing Supreme Court decision. In addition, the Court held that in order to obtain relief by way of federal habeas corpus petitioner was required not only to establish the unconstitutional discrimination in selection of grand jurors but also that his attorney's advice to plead guilty without having made inquiry into the composition of the grand jury rendered that advice outside the range of competence demanded of attorneys in criminal cases.

Reversed and remanded for further proceedings.

Mr. Justice Marshall dissented and filed opinion in which Mr. Justice Douglas and Mr. Justice Brennan joined.

**Procedural Posture(s):** On Appeal.

# Ake v. Oklahoma

#### United States Supreme Court 470 U.S. 68 (1985)

#### Rule of Law

**When the sanity of a defendant is likely to be at issue in criminal proceedings, the Constitution requires the state to provide the services of a psychiatrist.**

#### Facts

Ake (defendant) was charged with murder and attempted murder. Because of his erratic behavior during court proceedings, the trial judge ordered a psychiatric evaluation. Based on the findings of the evaluation, Ake was committed to a psychiatric hospital. After receiving treatment and medication, Ake was deemed competent to stand trial. Ake’s attorney requested that the state provide funding for a psychiatric evaluation to assess Ake’s sanity at the time of the crime. The trial court declined to provide a state-subsidized evaluation. At trial, there was no expert witness who could testify as to Ake’s mental state during the commission of the crime. The jury was instructed that Ake bore the burden of proving that he could be found not guilty by reason of insanity. The jury found Ake guilty on all counts. At Ake’s sentencing hearing, doctors testified about his mental condition and his continuing danger to society. Ake had no expert witness to rebut the doctors’ testimony. Ake was sentenced to death. Ake appealed and argued that he should have been provided a court-appointed psychiatrist. The court of appeals affirmed Ake’s conviction and sentence. Ake petitioned the United States Supreme Court for review.

#### Issue

Does the Constitution require the state to provide the services of a psychiatrist when the sanity of a defendant is likely to be at issue in criminal proceedings?

#### Holding and Reasoning (Marshall, J.)

Yes. The Constitution requires the state to provide the services of a psychiatrist when the sanity of a defendant is likely to be at issue in criminal proceedings. The state must afford a fair opportunity for an individual to defend against criminal charges. The Fourteenth Amendment prohibits the state from depriving any individual of the opportunity to meaningfully participate in his own defense on the basis of poverty. A person charged with a crime has a fundamental interest in the preservation of his life or liberty. The state has a compelling interest in achieving the fair and accurate disposition of criminal cases. The state’s financial concerns related to the provision of psychiatric assistance are not substantial when compared against the state’s interest in criminal procedure and the individual’s liberty interests. When a defendant’s guilt or innocence depends upon his mental state, the services of a psychiatrist may be critical to his defense. Ultimately, the jury must decide whether a defendant’s mental condition relieves the defendant of culpability. A defendant’s inability to present his own psychiatric evidence poses a high risk of an erroneous jury assessment of the defendant’s mental state. The defendant must make a threshold showing that his mental state is likely to be a significant issue at trial. When a defendant makes that threshold showing, the state must provide access to a psychiatrist. The defendant does not have a constitutional right to choose a particular psychiatrist, but the state must ensure that the defendant receives the services of a competent professional. During the trial phase, Ake’s sole defense relied upon evidence of his mental state at the time of the offense. Ake’s mental state was clearly a significant issue at trial. In the absence of psychiatric assistance, Ake could not rebut the evidence of danger to society that was presented at his sentencing hearing. A defendant continues to have a compelling interest in fairness during the sentencing phase of criminal proceedings. The denial of psychiatric assistance deprived Ake of due process under the law. The judgment of conviction is reversed.

#### Concurrence (Burger, J.)

This case involves capital punishment and therefore demands heightened protections of the defendant’s due process rights. This opinion does not apply to non-capital cases.

#### Key Terms:

**Fourteenth Amendment –** Provides that all persons born or naturalized in the United States are U.S. citizens. Also provides that no state shall: (1) abridge the privileges or immunities of a U.S. citizen; (2) deprive any person of life, liberty, or property, without due process of law; or (3) deny equal protection of the laws to anyone within its jurisdiction.

**Due Process -** A constitutional guarantee that a law shall not be unreasonable, arbitrary, or capricious and that individuals will be given notice of legal proceedings conducted fairly with an opportunity for an individual to be heard before the government may impose sanctions on one’s life, liberty, or property.

**McCarthy v. United States**

89 S.Ct. 1166

Supreme Court of the **United** **States**

**William J. McCARTHY, Petitioner,**

**v.**

**UNITED STATES.**

No. 43.

Argued Dec. 9, 1968.Decided April 2, **1969**.

**Synopsis**

Defendant was charged with three counts of willfully and knowingly attempting to evade tax payments, and upon his plea of guilty to one count, the **United** **States** District Court for the Northern District of Illinois, Eastern Division, entered a judgment of conviction and the defendant appealed.

 The **United** **States** Court of Appeals for the Seventh Circuit, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Iefa3d5fc8fb311d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=35c4ee3d598b41079ec542f64bd2a1a5&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[387 F.2d 838,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1968116065&pubNum=350&originatingDoc=Ida8cfef09bf011d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed and certiorari was granted. The Supreme Court, Mr. Chief Justice Warren, held that district judge who accepted defendant's plea of guilty without personally addressing defendant and determining that the plea was made voluntarily with understanding of nature of charge failed to comply with rule as to procedures on acceptance of pleas although defendant's attorney had represented that he had explained the charge to defendant, and guilty plea would be set aside and case remanded to give defendant an opportunity to plead anew.

Reversed and remanded.

# \*\*BOYKIN v. ALABAMA\*\*

#### United States Supreme Court 395 U.S. 238 (1969)

#### Rule of Law

**A guilty plea is only constitutionally valid if it is apparent from the record that the plea was knowing and voluntary.**

#### Facts

Boykin (defendant) was indicted for string of armed robberies. At arraignment, Boykin pled guilty to all charges. The judge did not ask Boykin any questions, and Boykin did not make any statements into the record.

#### Issue

Is a guilty plea constitutionally valid if there is no indication in the record that the plea was voluntary?

#### Holding and Reasoning (Douglas, J.)

No. A guilty plea will only be effective if it is clear from the record that the plea was knowing and voluntary. A guilty plea is both an admission and a conviction. A confession is only admissible under the Constitution if it is voluntary. As a rule, the prosecution may be required to demonstrate a defendant’s knowing and voluntary waiver of a constitutional right on the record in order for that waiver to be effective. This is the standard that must be required for an effective guilty plea. Because constitutional rights are at issue, federal law controls state courts in such cases. A guilty plea involves the waiver of the defendant’s Fifth and Fourteenth Amendment privilege against self-incrimination, the defendant’s right to a jury trial, and the defendant’s right to confront all witnesses against him. Waiver of such significant rights must be explicit in the record. Courts have a duty to make sure that the defendant is fully aware of what a guilty plea means. If that duty is fulfilled, the record will satisfy later review. Since the judge did not ensure that Boykin’s guilty plea was knowing and voluntary, the conviction is reversed.

#### Dissent (Harlan, J.)

The Court reverses Boykin’s conviction as a matter of due process simply because the record does not demonstrate the voluntariness of the plea. In so doing, the Court is requiring states to adhere to Rule 11 of the Federal Rules of Criminal Procedure as a matter of due process. Boykin has never claimed that his plea was not voluntary, and the conviction should not be reversed simply because the record is deficient.

**Key Terms:**

**Due Process -** A constitutional guarantee that a law shall not be unreasonable, arbitrary, or capricious and that individuals will be given notice of legal proceedings conducted fairly with an opportunity for an individual to be heard before the government may impose sanctions on one’s life, liberty, or property.

**Guilty Plea -** A defendant’s official confession to the crime and waiver of the right to trial by jury.

# United States v. Davila

133 S.Ct. 2139

Supreme Court of the **United** **States**

**UNITED STATES, Petitioner**

**v.**

**Anthony DAVILA.**

No. 12–167.

Argued April 15, **2013**.Decided June 13, **2013**.

## Synopsis

**Background:** Defendant moved to vacate his guilty plea to conspiracy to defraud **United** **States** by filing false income tax returns. The **United** **States** District Court for the Southern District of Georgia, J. [Randal Hall](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0399542301&originatingDoc=I37437412d41711e2981ea20c4f198a69&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I37437412d41711e2981ea20c4f198a69), J., No. 10–15310, 11–10224, denied motion. Defendant appealed. The **United** **States** Court of Appeals for the Eleventh Circuit, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I5f63300b2c0511e1a84ff3e97352c397&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=f87d90e478db44dea95ff8c96c9004ac&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[664 F.3d 1355,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2026714657&pubNum=506&originatingDoc=I37437412d41711e2981ea20c4f198a69&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))vacated plea. Certiorari was granted.

[**Holding:**](https://1.next.westlaw.com/Document/I37437412d41711e2981ea20c4f198a69/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178285304a274a2dc0a%3Fppcid%3D105bd592dc834939abed7864b7b5ec03%26Nav%3DCASE%26fragmentIdentifier%3DI37437412d41711e2981ea20c4f198a69%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=09a210384221587c79104c0d03edc028&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=105bd592dc834939abed7864b7b5ec03&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F22030717668) The Supreme Court, Justice [Ginsburg](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I37437412d41711e2981ea20c4f198a69&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I37437412d41711e2981ea20c4f198a69), held that improper participation by court in plea discussions does not in itself demand automatic vacatur of plea; abrogating [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ia393e6d8957d11d9a707f4371c9c34f0&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=f87d90e478db44dea95ff8c96c9004ac&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[***United******States***v. Anderson, 993 F.2d 1435,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1993108102&pubNum=350&originatingDoc=I37437412d41711e2981ea20c4f198a69&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))[](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ief7ddfe4957011d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=f87d90e478db44dea95ff8c96c9004ac&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[***UnitedStates***v. Barrett, 982 F.2d 193](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992220652&pubNum=0000350&originatingDoc=I37437412d41711e2981ea20c4f198a69&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

Vacated and remanded.

Justice [Scalia](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254763301&originatingDoc=I37437412d41711e2981ea20c4f198a69&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I37437412d41711e2981ea20c4f198a69) concurred in part, and in the judgment, and filed opinion, in which Justice [Thomas](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I37437412d41711e2981ea20c4f198a69&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I37437412d41711e2981ea20c4f198a69) joined.

# Mitchell v. United States

#### United States Supreme Court 526 U.S. 314 (1999)

#### Rule of Law

**A defendant who pleads guilty does not waive the Fifth Amendment right against self-incrimination at the sentencing hearing.**

#### Facts

In 1995, Amanda Mitchell (defendant) pled guilty in federal court to distributing cocaine. Mitchell did not have a plea agreement and reserved the right at sentencing to challenge the drug quantity for which she was responsible. During the guilty plea, the district court advised Mitchell that she was waiving her Fifth Amendment right to remain silent at trial by pleading guilty. When asked if she had committed the acts necessary to be found guilty, Mitchell responded, “Some of it.” At the sentencing hearing, the United States government (plaintiff) offered witnesses who testified regarding Mitchell’s role in drug dealing and generally to the amounts she handled. Mitchell did not testify or offer evidence at sentencing, but her counsel argued that the prosecution could only attribute a minimal amount of drugs to her. The district court ruled that Mitchell did not have the right to remain silent at sentencing and expressly held her silence against her in sentencing her to the mandatory 10-year sentence for selling more than five kilograms of cocaine. The United States Court of Appeals for the Third Circuit affirmed. The United States Supreme Court granted certiorari.

#### Issue

Does a defendant who pleads guilty waive the Fifth Amendment right against self-incrimination at the sentencing hearing?

#### Holding and Reasoning (Kennedy, J.)

No. A defendant who pleads guilty maintains the right against self-incrimination at sentencing. The Fifth Amendment to the United States Constitution provides that no person can be compelled to be a witness against himself or herself in any criminal case. A witness may not, however, testify voluntarily about a subject and then invoke the right to remain silent when questioned further about the details. *Rogers v. United States*, 340 U.S. 367, 373 (1951). To allow otherwise would permit a witness to distort the facts by controlling what testimony is given. Here, if Mitchell had testified at trial that she did “some of it,” she would have been subject to cross-examination on the details. The concerns of selected trial testimony are not present, however, during a guilty-plea colloquy, where the defendant is admitting to the charges. The limited, necessary inquiry of a plea colloquy cannot reasonably be considered a waiver of the important right against self-incrimination. Rule 11 of the Federal Rules of Criminal Procedure governs pleas and directs that a court may question a defendant during a guilty plea to establish a factual basis for the plea. A defendant who invokes Fifth Amendment rights during a plea runs the risk that the court rejects the plea. The court of appeals incorrectly held that Mitchell’s guilty plea extinguished her right against self-incrimination on the basis that the incrimination was then complete. While the privilege does terminate when a sentence has been given and the conviction becomes final, incrimination is not complete prior to sentencing. *Estelle v. Smith*, 451 U.S. 454 (1981). A defendant who is compelled to testify at sentencing certainly could incriminate himself or herself and receive a lengthier sentence as a result. The prosecution argues that even if the right to remain silent continues through sentencing, the invocation of this privilege can be used against a defendant. However, *Griffin v. California*, 380 U.S. 609 (1965), establishes that no negative inference can be drawn from a defendant’s failure to testify at trial, and no exception to this rule exists for a defendant who invokes the privilege at sentencing. Accordingly, the judgment of the court of appeals is reversed, and the case is remanded for further proceedings.

#### Dissent (Thomas, J.)

Justice Scalia’s dissent is correct and demonstrates that the holding in *Griffin* should be reexamined.

#### Dissent (Scalia, J.)

Although Mitchell should have been permitted to invoke her right against self-incrimination at the sentencing hearing, the court should be able to draw an inference from her failure to testify. Although *Griffin* should not be overruled, its logic runs counter to commonsense; in everyday life, a negative inference is drawn if a person is silent upon being asked if he or she did something wrong. Therefore, the rule in *Griffin* should not be extended beyond use at trial.

**Key Terms:**

**Fifth Amendment Privilege Against Self-Incrimination** - Constitutional protection that prevents the government from compelling a person to give testimony against himself.

**Guilt-Plea Colloquy -** An inquiry by the court to a defendant to ensure that the defendant’s guilty plea to criminal charges is knowing, voluntary, and based upon facts sufficient to support a finding of guilt.

# Halliday v. United States

89 S.Ct. 1498

Supreme Court of the **United** **States**

**Russell T. HALLIDAY**

**v.**

**UNITED STATES.**

No. 642, Misc.

Decided May 5, **1969**.Rehearing Denied June 16, **1969**.See [395 **U.S**. 971, 89 S.Ct. 2106.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&pubNum=708&cite=89SCT2106&originatingDoc=I64e7605d9c1d11d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))

**Synopsis**

Motion for postconviction relief.

 The **United** **States** District Court for the District of Massachusetts, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I42715c4254cb11d997e0acd5cbb90d3f&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=e9af4aa4a0304d60bef49f83ba370e8a&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[262 F.Supp. 325,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1967112167&pubNum=345&originatingDoc=I64e7605d9c1d11d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) denied relief and petitioner appealed. The Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ie5904ba98f8d11d98e8fb00d6c6a02dd&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=e9af4aa4a0304d60bef49f83ba370e8a&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[380 F.2d 270,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1967117380&pubNum=350&originatingDoc=I64e7605d9c1d11d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) vacated judgment and remanded case for further proceedings. The District Court, [274 F.Supp. 737](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1967114154&pubNum=345&originatingDoc=I64e7605d9c1d11d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) denied relief, and petitioner appealed. The Court of Appeals, [**394** F.2d 149,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1968117456&pubNum=350&originatingDoc=I64e7605d9c1d11d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed. On certiorari, the Supreme Court held that its decision holding that when a guilty plea is accepted in violation of rule prescribing procedure for acceptance of pleas of guilty the defendant must be afforded an opportunity to plead anew should not be applied retroactively, and thus only those defendants whose guilty pleas were accepted after April 2, **1969** are entitled to plead anew if their pleas were accepted without full compliance with rule.

Affirmed.

Mr. Justice Black and Mr. Justice Douglas dissented.

# \*\*HENDERSON v. MORGAN\*\*

#### United States Supreme Court 426 U.S. 637 (1976)

#### Rule of Law

**Under the Due Process Clause, a guilty plea is not knowing and voluntary if the defendant is not advised of an important element of the offense.**

#### Facts

Morgan (defendant) was labeled “retarded” and confined to an institution at a young age. Upon release, Morgan went to work on Ada Francisco’s farm. After arguing with Francisco, Morgan went to collect his pay and leave. An altercation ensued, and Morgan stabbed Francisco to death. Morgan was charged with first-degree murder. The prosecution offered a plea deal of 25 years imprisonment in exchange for a guilty plea to second-degree murder. Morgan’s attorneys did not clarify the intent required for that offense. Morgan entered a guilty plea. The judge did not explain the elements of the offense or ask if Morgan had been so advised. At sentencing, Morgan’s attorneys claimed that Morgan never intended to harm Francisco. Morgan later secured an evidentiary hearing to challenge the validity of the guilty plea. Morgan claimed he would not have plead guilty if he knew that intent to cause the victim’s death was an element of second-degree murder.

#### Issue

Under the Due Process Clause, is a guilty plea knowing and voluntary if the defendant is not advised of an important element of the offense?

#### Holding and Reasoning (Stevens, J.)

No. A defendant’s guilty plea to second-degree murder is not knowing and voluntary if the defendant was not informed that intent to cause the victim to die is an element of the offense. Whether the prosecution had sufficient proof of guilt is irrelevant. A guilty plea must be voluntary to be constitutionally valid. As a matter of due process, voluntariness requires a knowing admission of guilt after advisement of the nature of the charged offense. Because Morgan was charged with first-degree murder, the indictment did not contain the elements of second-degree murder. Morgan’s confession to killing Francisco is not the same as a confession to the charged offense. Neither Morgan nor his attorneys ever said that Morgan intended to kill Francisco. While informing a defendant of each element of an offense is not always required to give notice of the nature of the charged offense, intent is a significant element of second-degree murder and must be explained. Since the element was not explained to Morgan, the plea cannot be deemed voluntary. This case is unusual, because the judge made a finding of fact that Morgan was not informed of the intent requirement. Morgan’s mental deficiency would likely give credence to a manslaughter charge, and therefore the error in this case cannot be deemed harmless. Because Morgan was not advised of the nature of the offense, his guilty plea is invalid.

#### Dissent (Rehnquist, J.)

Morgan’s guilty plea was not coerced, and Morgan had two attorneys. The Court nevertheless concludes that the plea was involuntary because Morgan was not given notice of the nature of the offense charged. The question that should be asked is whether Morgan’s attorneys acted with reasonable competence. The attorneys in this case acted reasonably and sensibly advised Morgan to plead guilty rather than risk a first-degree murder conviction. No further review is necessary.

**Key Terms:**

**Due Process -** A constitutional guarantee that a law shall not be unreasonable, arbitrary, or capricious and that individuals will be given notice of legal proceedings conducted fairly with an opportunity for an individual to be heard before the government may impose sanctions on one’s life, liberty, or property.

**Guilty Plea -** A defendant’s official confession to the crime and waiver of the right to trial by jury.

# North Carolina v. Alford

#### United States Supreme Court 400 U.S. 25 (1970)

#### Rule of Law

**A criminal defendant can voluntarily, knowingly and understandingly consent to the imposition of a prison sentence, even if he testifies that he did not in fact commit the crime, if he intelligently concludes that a guilty plea is in his best interest and the record contains strong evidence of actual guilt.**

# \*\*NORTH CAROLINA v. ALFORD\*\*

#### United States Supreme Court 400 U.S. 25 (1970)

#### Rule of Law

**A criminal defendant can voluntarily, knowingly and understandingly consent to the imposition of a prison sentence, even if he testifies that he did not in fact commit the crime, if he intelligently concludes that a guilty plea is in his best interest and the record contains strong evidence of actual guilt.**

#### Facts

Alford (defendant) pleaded guilty to second-degree murder in order to avoid standing trial on first-degree murder, a capital offense. Alford was represented by counsel and the state had a very strong case against him. Alford testified that he was pleading guilty because of the state’s strong case but maintained that he had not committed the murder. The trial judge accepted Alford’s pleas and sentenced him to the 30-year maximum sentence. Alford sought post-conviction relief.

#### Issue

Can a guilty plea be accepted even if the defendant also testifies that he is innocent of the charged crime?

#### Holding and Reasoning (White, J.)

Yes. A guilty plea can be accepted by the court even if the defendant testifies that he is innocent of the charges. A plea must be viewed in light of the evidence against the defendant to ensure that his guilty plea is intelligently made. If the state has a strong case against him, the defendant’s guilty plea can be accepted by the court despite his testimony that he is innocent. Prior cases support this rule. *Lynch v. Overholser*, 369 U.S. 705 (1962), implied that a judge may accept a guilty plea even where there is evidence of a valid defense. Furthermore, since *Hudson v. United States*, 272 U.S. 451 (1926), courts have accepted nolo contendere pleas. In this case, the state had a strong case against Alford. He did not want to face the possibility of a death sentence if he went to trial and decided with the help of counsel that pleading guilty to second-degree murder was in his best interest. The strong evidence against Alford negates his claims of innocence and the judge therefore did not commit constitutional error in accepting his guilty plea.

**Key Terms:**

**Nolo Contendere** - A plea of no contest in which the defendant neither admits nor denies the charges against him, but the immediate effect of the plea is the same as if the defendant had pleaded guilty.

**Brady v. United States**

United States Supreme Court  
397 U.S. 742 (1970)

**Rule of Law**

**A defendant’s guilty plea is not invalid under the Fifth Amendment if it is voluntary, knowing, and intelligent and done to avoid the risk of a harsher penalty.**

**Lynch v. Overholser**

82 S.Ct. 1063

Supreme Court of the United States

**Frederick C. LYNCH, Petitioner,**

**v.**

**Winfred OVERHOLSER, Superintendent, St. Elizabeths Hospital.**

No. 159.

Argued Jan. 15, 1962.Decided May 21, 1962.

**Synopsis**

Habeas corpus proceeding to test legality of detention at mental hospital. The United States District Court for the District of Columbia Circuit ordered release and superintendent of hospital appealed. The United States Court of Appeals for the District of Columbia, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I93066b758ed511d9bc61beebb95be672&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[109 U.S.App.D.C. 404, 288 F.2d 388,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1960103257&pubNum=350&originatingDoc=I6b4901db9c2511d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) reversed and writ of certiorari was granted. The Supreme Court, Mr. Justice Harlan, held that accused, who did not claim that he had been insane when offenses were committed and who presented no evidence to support an acquittal by reason of insanity, was not properly confined in hospital for mentally ill upon finding of trial judge that he was not guilty on ground that he was insane at time of commission of offenses.

Judgment of Court of Appeals reversed and case remanded to District Court for further proceedings.

Mr. Justice Clark dissented.

# Hudson v. United States

#### United States Supreme Court 522 U.S. 93 (1997)

#### Rule of Law

**The Double Jeopardy Clause does not necessarily prohibit criminal prosecution in cases where the defendant has been subject to prior statutory sanctions for the same incident.**

#### Facts

The federal Office of the Comptroller of the Currency (OCC) concluded that John Hudson and several other bank officers (defendants) had violated federal law by using their positions to arrange certain loans to third parties. The OCC commenced action to assess penalties against the officers, resulting in an agreement in which the officers had to pay assessments and were disbarred from working with banks without OCC approval. The officers were then indicted by the United States government (plaintiff) on criminal charges for the same loans. The district court dismissed the charges on double-jeopardy grounds, and the court of appeals reversed. The United States Supreme Court granted certiorari.

#### Issue

Does the Double Jeopardy Clause necessarily prohibit criminal prosecution in cases where the defendant has been subject to prior statutory sanctions for the same incident?

#### Holding and Reasoning (Rehnquist, C.J.)

No. Penalties that are more civil than criminal in nature will not bar subsequent criminal charges for the same action. The Double Jeopardy Clause does not prohibit additional punishment; rather, the Clause protects against multiple criminal punishments in successive proceedings for the same act. The factors identified in *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), are useful in determining the nature of a punishment and include whether the sanction: (1) involves affirmative restraint, (2) has historically been considered punishment, (3) requires a finding of scienter, (4) promotes retribution and deterrence, (5) addresses acts already considered criminal, (6) has an alternative purpose assigned, and (7) appears excessive in relation to the alternative purpose assigned. These factors must be applied to the statute on its face, and only the clearest proof will cause an intended civil penalty to be treated as criminal punishment. In *United States v. Halper*, 490 U.S. 435 (1989), this Court strayed from *Kennedy* and applied double jeopardy to a sanction without first determining that the sanction was criminal in nature. In *Halper*,the defendant was convicted of Medicare fraud and sentenced to two years in jail and a $5,000 fine. The government then brought an action against the defendant under the False Claims Act, which made the defendant liable for $130,000 in fines despite defrauding the government of less than $600. This Court held that double jeopardy applied because the primary purpose of the sanction was retribution and deterrence, as shown by the overwhelmingly disproportionate monetary sanction. However, *Halper*improperly deviated from the traditional analysis by (1) focusing on the sanction rather than on the intended purpose of the statute and (2) assessing the character of the sanction instead of analyzing the statute on its face. Here, applying the traditional *Kennedy* factors to this case, the subsequent criminal prosecution was clearly not double jeopardy. The sanctions were intended to be civil; the assessments are identified as civil penalties in the statute, and the disbarment is regulated by banking agencies. There is no clear proof on the face of the statute that the sanctions are criminal in nature. While disbarment is a restraint, it does not come close to imprisonment. Neither sanction requires a finding of scienter, even though good faith and willfulness are considered in determining the level of the sanctions. Although the behavior is also considered criminal and the sanctions promote deterrence, these factors do not make the sanctions criminal in nature to the extent necessary to implicate double jeopardy. Accordingly, the judgment of the court of appeals is affirmed.

#### Concurrence (Breyer, J.)

The majority correctly uses the *Kennedy* factors, but should remove the clearest-proof language as misleading. The majority should not only view a statute on its face, but also assess the characters of the sanctions imposed.

#### Concurrence (Souter, J.)

The majority correctly uses the *Kennedy* factors, but should remove the clearest-proof element as vague.

#### Concurrence (Stevens, J.)

The majority should not have been so critical of *Halper*, which remains useful in analyzing double-jeopardy cases.

#### Concurrence (Scalia, J.)

The majority correctly refutes the *Halper* analysis.

**Key Terms:**

**Double Jeopardy -** A prohibition against a second prosecution for the same offense after an acquittal or conviction for that offense in a prior proceeding or against multiple punishments for the same offense.

**Double Jeopardy Clause -** A portion of the Fifth Amendment to the United States Constitution incorporated in the Bill of Rights that prohibits the government from trying a person more than once for the same offense.

# \*\*CLASS v. UNITED STATES\*\*

#### United States Supreme Court 138 S. Ct. 798 (2018)

#### Rule of Law

**Pleading guilty does not waive a claim that the statute of conviction is unconstitutional.**

#### Facts

The government (plaintiff) indicted Rodney Class (defendant) for possession of firearms inside a vehicle parked on the United States Capitol grounds. Class challenged the indictment on the basis that the charging statute violated the constitutional right to bear arms. Class then pled guilty under a plea agreement that waived certain rights and reserved others for appeal but did not address his right to bring an appeal on constitutional grounds. On direct appeal, the appellate court ruled that entering the plea agreement waived Class’s constitutional claim, and he appealed to the United States Supreme Court.

#### Issue

Does pleading guilty waive a claim that the statute of conviction is unconstitutional?

#### Holding and Reasoning (Breyer, J.)

No. Pleading guilty does not waive a claim that the statute of conviction is unconstitutional. That was what the Supreme Court ruled 50 years ago in *Haynes v. United States*, 390 U.S. 85 (1968). The Court reiterated that a guilty plea did not bar a constitutional challenge in two cases, *Blackledge v. Perry*, 417 U.S. 21 (1974), and *Menna v. New York*, 423 U.S. 61 (1975), resulting in what is known as the *Menna-Blackledge* doctrine. In *United States v. Broce*, 488 U.S. 563 (1989), the Court clarified that a guilty plea does not waive a constitutional challenge unless the plea effectively admits facts that foreclose the challenge. In *Broce*, pleading guilty to an indictment that charged the same crime twice waived the right to appeal on double-jeopardy grounds because the plea meant the defendants effectively admitted to committing the crime twice. Federal Rule of Criminal Procedure 11(a)(2) provides that “a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion.” However, a conditional plea reserving specific claims in writing is not the only way of preserving an appellate claim. Instead, the drafters’ notes to the rule acknowledge that the “Supreme Court has held that certain kinds of constitutional objections may be raised after a plea of guilty” and specifically reference the *Menna*-*Blackledge* doctrine. Here, Class’s plea agreement does not conflict with a claim that the statute of conviction violates the right to bear arms. Class’s plea means he admitted that he did what the indictment charged. His plea makes no admission as to whether the statute is constitutional and does not specifically waive that claim. Under those circumstances, his plea does not bar his direct appeal on constitutional grounds. The Court accordingly reverses the appellate ruling and remands to allow Class’s direct appeal to proceed.

#### Dissent (Alito, J.)

The appellate court correctly ruled that Class’s guilty plea waived his constitutional claim. Most constitutional rights are waivable. Federal Rule of Criminal Procedure 11(a)(2) makes it clear that an unconditional plea waives all nonjurisdictional claims, with the one possible exception of claims arising under the *Menna-Blackledge* doctrine. However, the Court essentially repudiated the theories behind that doctrine in *Broce* by holding that an unconditional guilty plea admits not just the facts charged in the indictment but all the factual and legal elements required to convict and sentence the defendant for that crime. In other words, entering a plea extinguishes any defenses the accused might have asserted to prevent a conviction—including challenging the charging statute. Therefore, Class’s guilty plea waived his constitutional claim.

**Key Terms:**

**Second Amendment** - Protects the right of citizens to keep and bear arms as well as form militias.

**Plea Bargain -** A negotiation between a criminal defendant via his attorney and the prosecutor in which the defendant agrees to plead guilty to a crime in exchange for a reduction of the severity of the charges.

**Waiver -** Occurs when an individual voluntarily forgoes one of his rights.

# Haynes v. United States

88 S.Ct. 722

Supreme Court of the **United** **States**

**Miles Edward HAYNES, Petitioner,**

**v.**

**UNITED STATES.**

No. 236.

Argued Oct. 11, 1967.Decided Jan. 29, **1968**.

## Synopsis

Defendant was convicted in the **United** **States** District Court for the Northern District of Texas of unlawful possession of sawed-off shotgun and he appealed. The Court of Appeals for the Fifth Circuit, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I7e515be68f7f11d98e8fb00d6c6a02dd&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=da5b14a8153846199fac2e7c2f6a5a86&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[372 F.2d 651,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1967102731&pubNum=350&originatingDoc=Id4c539769c1d11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed and certiorari was granted. The Supreme Court, Mr. Justice Harlan, held that conviction under section of National Firearms Act making it unlawful to possess any firearm which has not been registered as required by section providing for registration with Secretary of Treasury is not properly distinguishable from conviction under registration section, and registration requirement, being directed at persons inherently suspect of criminal activities, gives rise to real and appreciable hazards of incrimination and enforcement of unlawful possession provisions against defendant, despite assertion of privilege against self-incrimination, was not constitutionally permissible.

Reversed.

Mr. Chief Justice Warren dissented.

**Blackledge v. Perry**

United States Supreme Court  
417 U.S. 21 (1974)

**Rule of Law**

**The Due Process Clause of the Fourteenth Amendment is violated if an increased punishment after appeal has a real likelihood of being the result of vindictiveness.**

#### Tollett v. Henderson

93 S.Ct. 1602

Supreme Court of the United States

**Lewis S. TOLLETT, Warden, Petitioner,**

**v.**

**Willie Lee HENDERSON.**

No. 72—95.

Argued Feb. 20, 1973.Decided April 17, 1973.

## Synopsis

Proceedings on petition by state prisoner for habeas corpus relief. The United States District Court for the Middle District of Tennessee, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Id75e5a7d550611d997e0acd5cbb90d3f&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[342 F.Supp. 113,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971108058&pubNum=345&originatingDoc=Id8e2583d9c1c11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) granted writ, and the state warden appealed. The Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I65d3b29d8fdc11d98e8fb00d6c6a02dd&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[459 F.2d 237,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972109671&pubNum=350&originatingDoc=Id8e2583d9c1c11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed, and certiorari was granted. The Supreme Court, Mr. Justice Rehnquist, held that a guilty plea represents a break in the chain of events which has preceded it in the criminal process; when a criminal defendant, on advice of counsel, has solemnly admitted in open court that he is guilty of a charged offense he may not thereafter raise independent claims relating to deprivation of constitutional rights that antedated plea, such as infirmities in grand jury selection process, but may only attack the voluntary and intelligent character of the plea by showing that counsel's advice was not within the standards of governing Supreme Court decision. In addition, the Court held that in order to obtain relief by way of federal habeas corpus petitioner was required not only to establish the unconstitutional discrimination in selection of grand jurors but also that his attorney's advice to plead guilty without having made inquiry into the composition of the grand jury rendered that advice outside the range of competence demanded of attorneys in criminal cases.

Reversed and remanded for further proceedings.

Mr. Justice Marshall dissented and filed opinion in which Mr. Justice Douglas and Mr. Justice Brennan joined.

**Procedural Posture(s):** On Appeal.

**Menna v. New York**

96 S.Ct. 241

Supreme Court of the United States

**Steve MENNA**

**v.**

**State of NEW YORK.**

No. 75-5401.

Nov. 17, 1975.

**Synopsis**

Defendant was convicted in Supreme Court, Kings County, New York, on his guilty plea, under an indictment charging contempt of court in refusing to answer questions before a grand jury after having been granted immunity. The conviction was affirmed by the New York Supreme Court, Appellate Division, and by the New York Court of Appeals, [36 N.Y.2d 928, 373 N.Y.S.2d 541, 335 N.E.2d 848.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1975279346&pubNum=578&originatingDoc=I222470569bf011d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) On petition for certiorari, the Supreme Court held that defendant, by pleading guilty, did not waive his right to claim that the indictment should have been dismissed under the double jeopardy clause of the Fifth Amendment to the United States Constitution.

Remanded to New York Court of Appeals for determination of double jeopardy claim on merits.

Mr. Justice Brennan filed concurring statement favoring outright reversal.

The Chief Justice and Mr. Justice Rehnquist would grant petition for writ of certiorari and set case for oral argument.

# United States v. Broce

#### United States Supreme Court 488 U.S. 563 (1989)

#### Rule of Law

**When a defendant enters a valid guilty plea to charges, he relinquishes his right to later raise defenses against those charges even if he was not aware of the defense at the time he pled guilty.**

**Haring v. Prosise**

103 S.Ct. 2368

Supreme Court of the United States

**Gilbert A. HARING, Lieutenant, Arlington County Police Department, et al., Petitioners**

**v.**

**John Franklin PROSISE.**

No. 81–2169.

Argued April 20, 1983.Decided June 13, 1983.

**Synopsis**

Plaintiff, who pled guilty to manufacturing a controlled substance in a Virginia state court, brought damages action under Section 1983 against police officers who participated in a search of his apartment. The United States District Court for the Eastern District of Virginia granted summary judgment for defendants, and plaintiff appealed. The Court of Appeals, [667 F.2d 1133,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1982101078&pubNum=350&originatingDoc=Ice9af6fc9c9611d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))reversed and remanded and petition for writ of certiorari was filed. The Supreme Court, Justice Marshall, held that: (1) under rules of collateral estoppel applied by Virginia courts, judgment of conviction based upon plaintiff's guilty plea to charge of manufacturing a controlled substance did not bar, under federal statute requiring federal courts to give preclusive effect to state-court judgments whenever the courts of the state from which the judgments emerged would do so, subsequent Section 1983 action challenging legality of the search which had produced inculpatory evidence, and (2) plaintiff's guilty plea did not constitute a waiver of antecedent Fourth Amendment claims.

Affirmed.

**Procedural Posture(s):** On Appeal; Motion for Summary Judgment.

**Brady v. United States**

United States Supreme Court  
397 U.S. 742 (1970)

**Rule of Law**

**A defendant’s guilty plea is not invalid under the Fifth Amendment if it is voluntary, knowing, and intelligent and done to avoid the risk of a harsher penalty.**

**Tenn. R. Crim. P. Rule 11**

**Tenn. Rules for Criminal Procedure – Rule 11**

Tenn. R. Crim. P., Rule 11

**Rule 11. Pleas**

[Currentness](https://1.next.westlaw.com/Document/NCBD731F003A411DCA094A3249C637898/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_anchor_I28A41A90E12E11EAB9E2CD0ACABD5002)

**(a) Plea Alternatives.**

(1) *In General.* A defendant may plead not guilty, guilty, or nolo contendere. The court shall enter a plea of not guilty if a defendant refuses to plead or if a defendant corporation, limited liability company, or limited liability partnership fails to appear.

(2) *Nolo Contendere.* A defendant may plead nolo contendere only with the consent of the court. Before accepting a plea of nolo contendere, the court shall consider the views of the parties and the interest of the public in the effective administration of justice.

(3) *Conditional Plea.* A defendant may enter a conditional plea of guilty or nolo contendere in accordance with [Rule 37(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1008875&cite=TNRRCRPR37&originatingDoc=NCBD731F003A411DCA094A3249C637898&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

**(b) Considering and Accepting a Guilty or Nolo Contendere Plea.**

(1) *Advising and Questioning the Defendant.* Before accepting a guilty or nolo contendere plea, the court shall address the defendant personally in open court and inform the defendant of, and determine that he or she understands, the following:

(A) The nature of the charge to which the plea is offered;

(B) the maximum possible penalty and any mandatory minimum penalty;

(C) if the defendant is not represented by an attorney, the right to be represented by counsel--and if necessary have the court appoint counsel--at trial and every other stage of the proceeding;

(D) the right to plead not guilty or, having already so pleaded, to persist in that plea;

(E) the right to a jury trial;

(F) the right to confront and cross-examine adverse witnesses;

(G) the right to be protected from compelled self incrimination;

(H) if the defendant pleads guilty or nolo contendere, the defendant waives the right to a trial and there will not be a further trial of any kind except as to sentence;

(I) if the defendant pleads guilty or nolo contendere, the court may ask the defendant questions about the offence to which he or she has pleaded. If the defendant answers these questions under oath, on the record, and in the presence of counsel, the answers may later be used against the defendant in a prosecution for perjury or aggravated perjury;

(J) if the defendant pleads guilty or nolo contendere, it may have an effect upon the defendant's immigration or naturalization status, and, if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the immigration consequences of a plea; and

(K) if the defendant pleads guilty or nolo contendere to an offense for which he or she will receive an additional sentence of community supervision for life, the fact that he or she will receive the additional sentence, and, if the defendant is represented by counsel, the court shall determine that the defendant has been advised by counsel of the community supervision for life sentence and its consequences.

(2) *Insuring That Plea Is Voluntary.*- Before accepting a plea of guilty or nolo contendere, the court shall address the defendant personally in open court and determine that the plea is voluntary and is not the result of force, threats, or promises (other than promises in a plea agreement). The court shall also inquire whether the defendant's willingness to plead guilty or nolo contendere results from prior discussions between the district attorney general and the defendant or the defendant's attorney.

(3) *Determining Factual Basis for Plea.*- Before entering judgment on a guilty plea, the court shall determine that there is a factual basis for the plea.

**(c) Plea Agreement Procedure.**

(1) *In General.* The district attorney general and the defendant's attorney, or the defendant when acting pro se, may discuss and reach a plea agreement. The court shall not participate in these discussions. If the defendant pleads guilty or nolo contendere to a charged offense or a lesser or related offense, the plea agreement may specify that the district attorney general will:

(A) move for dismissal of other charges;

(B) recommend, or agree not to oppose the defendant's request for, a particular sentence, with the understanding that such recommendation or request is not binding on the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

(2) *Disclosing a Plea Agreement.*

(A) Open Court. The parties shall disclose the plea agreement in open court on the record, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(B) Timing of Disclosure. Except for good cause shown, the parties shall notify the court of a plea agreement at the arraignment or at such other time before trial as the court orders.

(3) *Judicial Consideration of a Plea Agreement.*

(A) Rule 11(c)(1)(A) or (C) Agreement. If the agreement is of the type specified in Rule 11(c) (1)(A) or (C), the court may accept or reject the agreement pursuant to Rule 11(c)(4) or (5), or may defer its decision until it has had an opportunity to consider the presentence report.

(B) Rule 11(c)(1)(B) Agreement. If the agreement is of the type specified in Rule 11(c)(1)(B), the court shall advise the defendant that the defendant has no right to withdraw the plea if the court does not accept the recommendation or request.

(4) *Accepting a Plea Agreement.* If the court accepts the plea agreement, the court shall advise the defendant that it will embody in the judgment and sentence the disposition provided in the plea agreement.

(5) *Rejecting a Plea Agreement.* If the court rejects the plea agreement, the court shall do the following on the record and in open court (or, for good cause, in camera):

(A) advise the defendant personally that the court is not bound by the plea agreement;

(B) inform the parties that the court rejects the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than provided in the plea agreement.

**(d) Inadmissibility of Pleas, Offers of Pleas, and Related Statements.** The admissibility of a plea, plea discussion, or any related statement is governed by [Tennessee Rule of Evidence 410](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1008878&cite=TNRREVR410&originatingDoc=NCBD731F003A411DCA094A3249C637898&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

**(e) Record of Proceedings and Written Plea.** There shall be a verbatim record of the proceedings at which the defendant enters a plea. If there is a plea of guilty or nolo contendere, the record shall include the inquiries and advice to the defendant required under Rule 11(b) and (c). The plea of guilty or nolo contendere shall be reduced to writing and signed by the defendant.

**Credits**

[Amended effective August 22, 1984; July 1, 1995; amended January 18, 2006, effective July 1, 2006; January 2, 2007, effective July 1, 2007; amended effective July 1, 2011; amended January 2, 2015, effective July 1, 2015.]

<**Research Note**>

<See Raybin, Tennessee Practice, volumes 9-11, for a comprehensive treatment of criminal practice and procedure.>

**Editors' Notes**

**ADVISORY COMMISSION COMMENT**

This rule is substantially the same as the federal rule. Entry by the court of a not guilty plea for one refusing to plead or standing mute is included in section (a). In addition, Rule 11 establishes a plea of nolo contendere, under limitations set out in section (a).

Although the rules do not require a plea of not guilty by reason of insanity, notice of the defendant's intention to defend on the basis of mental incompetency at the time of the offense is required under Rule 12.2. *See also* [T.C.A. §§ 40-18-117](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS40-18-117&originatingDoc=NCBD731F003A411DCA094A3249C637898&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) and [33-7-303](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS33-7-303&originatingDoc=NCBD731F003A411DCA094A3249C637898&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

The matters of specific advice to the defendant and explicit procedures for insuring on the record that pleas of guilty and nolo contendere are voluntarily and understandingly made are designed to produce finality in the proceedings. In addition to the matters specified in section (b)(1), Tennessee law requires that the defendant be further advised, “if applicable, that a different or additional punishment may result by reason of his prior convictions or other factors which may be established in the present action after the entry of his plea.” [*Mackey v. State*, 553 S.W.2d 337, 341 (Tenn. 1977)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977136384&pubNum=0000713&originatingDoc=NCBD731F003A411DCA094A3249C637898&refType=RP&fi=co_pp_sp_713_341&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_713_341). And, in addition to the matters specified in subdivision (b)(1), the *Mackey* decision requires the trial court to warn the defendant “further, that upon the sentencing hearing, evidence of any prior convictions may be presented to the judge or jury for their consideration in determining punishment.”

As does the current federal rule, section (c) recognizes and approves the practice of plea negotiation and agreement, and brings that process into the light of the open courtroom. Although subdivision (c)(1) purports to list possible alternative plea “bargains,” it is not contemplated that this list be taken as exclusive. Common to state practice (but not to federal practice) are guilty pleas entered in exchange for reduction of the charge to a lesser-included offense, recommendation by the prosecutor that any sentence be suspended and the defendant placed on probation, etc.

The provision in subdivision (c)(2)(B) specifically permits the trial judge to impose reasonable pretrial time limits on the court's consideration of plea agreements, a practice which will allow maximum efficiency in the docketing of cases proceeding to trial on pleas of not guilty.

It should be noted in connection with the record requirements of section (e) that the *Mackey* opinion, supra, requires additionally an inquiry by the court “into the defendant's understanding of his entering a plea of guilty.”

The commission feels that uniformity of procedure with the federal courts in procedural matters such as those contemplated under Rules 11 and 12 is beneficial to the public and to the legal profession.

The provisions of Rule 11(c) are similar to the Federal Rules of Criminal Procedure. Rule 11(c)(1) contains the plea bargaining options. A (c)(1)(A) and a (c)(1)(C) agreement are binding on the court only in the sense that the plea is contingent on the agreement as stated. The court may accept the plea agreement under (c)(3) or it may reject the plea agreement under circumstances set forth in (c)(4). As per prior law, acceptance or rejection of the plea may be deferred until consideration of a presentence report. This is essentially the procedure contemplated by [T.C.A. § 40-35-203(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS40-35-203&originatingDoc=NCBD731F003A411DCA094A3249C637898&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

When the court rejects the plea agreement, the defendant is given the opportunity to withdraw the plea under (c)(5). When the court rejects the plea agreement but the defendant does not withdraw a guilty plea, [T.C.A. § 40-35-203](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS40-35-203&originatingDoc=NCBD731F003A411DCA094A3249C637898&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) gives the defendant the right to a sentencing hearing and presentence report.

The above discussion is relevant for pleas contingent on a specific sentence. Rule 11(c)(3)(B) addresses those agreements which are not plea contingent. These types of agreements are (c)(1)(B) agreements which are clearly not binding on the court. The important distinction is that where the court does not follow the agreement the defendant may not withdraw the plea. The essence of Rule 11(c)(3)(B) is for the court to so advise the defendant at the time of the plea.

The type of plea agreements have greatly expanded in recent years because judges now impose non-capital sentences. Consequently, it is important for the lawyers to have a clear understanding as to those aspects of the agreement which are plea contingent and those that are not. The defendant must also have an understanding so that the plea is knowing.

A simple example should illustrate the type of contingent and noncontingent agreements contemplated. The state may agree that in exchange for a plea to burglary the state will recommend four years and that at the time of the sentencing hearing the state will recommend probation but the latter is a nonbinding recommendation. Two separate agreements have thus been made. The first, the four years, is a (c)(1)(C) agreement. The defendant's plea is wholly contingent on getting exactly four years. The sentence is not binding on the court but the alternative to rejection of the sentence agreement is a potential withdrawal of the plea. The second agreement, the recommendation of probation, is, under this example, a (c)(1)(B) agreement. The plea is contingent only on the state's recommendation of probation and not on probation actually being granted. If the court denies probation the defendant cannot withdraw the plea.

**ADVISORY COMMISSION COMMENT TO 2007 AMENDMENT**

Prior subsection (b)(1)(l) provided that a defendant may be subject to prosecution for “perjury or false statement.” False statement is no longer an offense in Tennessee, and aggravated perjury is a new offense enacted in 1989. Thus, the subsection was amended to “perjury or aggravated perjury.”

[Tenn. Code Ann. § 40-1-109](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS40-1-109&originatingDoc=NCBD731F003A411DCA094A3249C637898&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) requires a written guilty plea for misdemeanors. The amendment to subsection (e) conforms the rule to the statute but expands the concept so that all guilty or nolo contendere pleas are written. This has long been the practice in general sessions and criminal courts.

**ADVISORY COMMISSION COMMENT TO 2011 AMENDMENT**

Subsection (b)(1)(J) was added to address the United States Supreme Court's holding in *Padilla v. Kentucky*, \_\_\_ U.S. \_\_\_ (2010).

**ADVISORY COMMISSION COMMENT [2015]**

Subdivision (b)(1) was amended to add paragraph (K) to conform the rule to the requirements of case law. “Because the mandatory lifetime supervision requirement is an additional part of a defendant's sentence, the trial court is constitutionally required to inform the defendant of the supervision requirement as part of the plea colloquy.” [*Ward v. State*, 315 S.W.3d 461, 474 (Tenn. 2010)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022493344&pubNum=0004644&originatingDoc=NCBD731F003A411DCA094A3249C637898&refType=RP&fi=co_pp_sp_4644_474&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_4644_474). *See also*[*State v. Nagele,* 353 S.W.3d 112 (Tenn. 2011)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2025930318&pubNum=0004644&originatingDoc=NCBD731F003A411DCA094A3249C637898&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) (defendant allowed to withdraw guilty plea because trial court did not inform defendant of lifetime community supervision requirement and State failed to establish error was harmless beyond a reasonable doubt because defense counsel's advice to defendant about the requirement was ambiguous); [*Calvert v. State*, 342 S.W.3d 477, 491 (Tenn. 2011)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2025191481&pubNum=0004644&originatingDoc=NCBD731F003A411DCA094A3249C637898&refType=RP&fi=co_pp_sp_4644_491&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_4644_491) (defense counsel's failure to inform defendant about lifetime supervision requirement is deficient performance and defendant will be entitled to post-conviction relief if he establishes “by clear and convincing evidence a reasonable probability that, but for defense counsel's failure to inform him of the mandatory lifetime community supervision aspect of his sentence, he would have declined to plead guilty”).

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**March 25, 2021**

**Chapter 10 – The Decision Whether to Prosecute**

**Chapter 11 – Screening the Prosecutor’s Charging Decision**

**Chapter 12 – Speedy Trial and Other Speedy Dispositions**

**State v. Gray, 917 S.W.2d 668 (Tenn. 1996)**

**Statute of Limitations – TCA §§** **40-2-101 through 106**

**\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

**Chapter 10 – The Decision Whether to Prosecute**

**\*\*UNITED STATES v. ARMSTRONG\*\***

United States Supreme Court  
517 U.S. 456 (1996)

#### Rule of Law

**A federal criminal defendant making a selective-prosecution claim must demonstrate that the Government’s prosecutorial policy was motivated by a discriminatory purpose and that similarly situated individuals of different races were not prosecuted.**

#### Facts

Armstrong (defendant) and others were indicted in federal court on charges of conspiring to possess with intent to distribute crack cocaine and federal firearms offenses. In response to the indictment, Armstrong filed a motion for discovery or dismissal of the indictment on the ground that he was selected for federal prosecution because he was black. In support of his motion, Armstrong provided a “study” listing 24 defendants prosecuted for drug offenses in 1991 who were all black. The district court judge then issued a discovery order requiring the Government to submit documentation related to federal drug offenses, the races of defendants in those cases, and the Government’s criteria for deciding whether to prosecute defendants for federal cocaine offenses. In response, the Government submitted affidavits and other evidence to explain why it chose to prosecute Armstrong and the other defendants and why Armstrong’s “study” did not support the inference that the Government was singling out black defendants for federal cocaine prosecution. One of the attorneys for another defendant subsequently filed an affidavit from a drug treatment center employee who said that there were as many white drug users and dealers as there were black ones. Additionally, the attorneys submitted an affidavit from a criminal defense attorney claiming that many white defendants were prosecuted in state court for crack offenses as well as a newspaper article claiming that federal black defendants charged with crack cocaine offenses were being punished more severely than if they had been charged with powder cocaine offenses. The district court denied the Government’s motion for reconsideration of the discovery order. When the Government refused to comply with the order, the case was dismissed. The Ninth Circuit Court of Appeals affirmed the dismissal, and the Government appealed. The United States Supreme Court granted certiorari.

#### Issue

Must a federal criminal defendant making a selective-prosecution claim demonstrate that the Government’s prosecutorial policy was motivated by a discriminatory purpose and that similarly situated individuals of different races were not prosecuted?

#### Holding and Reasoning (Rehnquist, C.J.)

Yes. The requirements for a selective-prosecution claim draw on “ordinary equal protection standards.” The claimant must show that the federal prosecutorial policy had a discriminatory effect and that it was motivated by a discriminatory purpose, which may be demonstrated by showing that similarly situated individuals of a different race were not prosecuted. If discovery is ordered, the government must assemble from its files evidence which might corroborate or refute the defendant’s claim. Such a rigorous standard placed on the prosecution must similarly be applied to the defense as well. The majority of courts of appeal require that a defendant produce some evidence that similarly situated defendants of other races would have been prosecuted but were not. Here, it was not an insurmountable task for Armstrong to investigate whether similarly situated persons of other races were prosecuted by the State of California and were known to federal law enforcement officers but were not federally prosecuted. Armstrong and the other defendants failed to sufficiently produce evidence of prosecutorial discrimination. The submitted “study” failed to identify individuals who were not black and could have been prosecuted. The newspaper article was not relevant to an allegation of discrimination. The affidavits submitted by the criminal defense attorney and the drug treatment center employee were hearsay. Accordingly, the judgment of the court of appeals is reversed.

#### Dissent (Stevens, J.)

There is a need for judicial oversight over these types of drug prosecutions. The Anti-Drug Abuse Act of 1986 and other legislation established very high federal criminal penalties for crack cocaine offenses. Those penalties consistently affect black defendants more, resulting in sentences three to eight times longer than sentences for powder cocaine offenses. Additionally, there is a disparity between more lenient state sentences for cocaine offenses and the harsher sentences imposed at the federal level. The district judge possessed the discretion to call for the development of facts that would demonstrate what federal standard, if any, governed the choice of forum where similarly situated offenders are prosecuted. Armstrong and the other defendants did not need to prepare sophisticated statistical studies in order to receive discovery from the Government in this case.

#### Key Terms:

**Discovery -** Pretrial disclosure of information, documents, or tangible evidence to the opposing party in a lawsuit.

**Indictment -** A formal statement of criminal charges issued by a grand jury, or the process of determining charges to be presented for prosecution.

**Oyler v. Boles**

82 S.Ct. 501

Supreme Court of the United States

**James W. OYLER, Petitioner,**

**v.**

**Otto C. BOLES, Warden.**

**Paul H. CRABTREE, Petitioner,**

**v.**

**Otto C. BOLES, Warden.**

Nos. 56 and 57.

Argued Dec. 4, 1961.Decided Feb. 19, 1962.

## Synopsis

State prisoners' habeas corpus proceedings commenced in the Supreme Court of Appeals of West Virginia challenging validity of proceedings, under recidivist statute, against them. After relief was denied in the state proceedings, certiorari was granted in each case. The Supreme Court, Mr. Justice Clark, held, inter alia, that conscious exercise of some selectivity by state prosecuting authorities in application of West Virginia recidivist statute was not, in itself, a violation of equal protection of laws absent selection deliberately based upon unjustifiable standards such as race, religion, or other arbitrary classification.

Affirmed.

Mr. Chief Justice Warren, Mr. Justice Douglas, Mr. Justice Black and Mr. Justice Brennan dissented.

# Yick Wo v. Hopkins

#### United States Supreme Court 118 U.S. 356 (1886)

#### Rule of Law

**A facially neutral law that is applied in a discriminatory manner on the basis of race or nationality violates the Equal Protection Clause of the Fourteenth Amendment.**

#### Facts

In 1880, San Francisco passed an ordinance that required operators of laundries in buildings not made of brick or stone to apply for a permit to continue operation. At the time, 320 of the laundries in San Francisco were constructed of wood. Yick Wo and Wo Lee (defendants) were laundry operators of Chinese descent. They and over 200 other laundry operators of Chinese descent sought permits to continue their operations. All but one of their requests were denied. However, 80 of 81 similarly situated laundry operators who were not of Chinese descent were granted permits. Yick Wo and Wo Lee were fined and imprisoned after they continued to operate their laundries without permits. Yick Wo appealed to the California Supreme Court, which affirmed his conviction. Wo Lee filed a habeas corpus petition in federal court, but the court denied relief. Yick Wo and Wo Lee appealed to the United States Supreme Court.

#### Issue

Does a facially neutral law that is applied in a discriminatory manner on the basis of race or nationality violate the Equal Protection Clause of the Fourteenth Amendment?

#### Holding and Reasoning (Matthews, J.)

Yes. A facially neutral law that is applied in a discriminatory manner on the basis of race or nationality violates the Equal Protection Clause of the Fourteenth Amendment. The Fourteenth Amendment guarantees the equal protection of the laws to all people within the United States. The Equal Protection Clause applies not only to racial discrimination, but also to discrimination based on a person's nationality or alienage. Equal protection is denied when a facially neutral law is applied unequally among similarly situated people. Here, the San Francisco ordinance appears to be neutral and fair on its face. However, the ordinance has been applied unequally to similarly situated people. Notwithstanding the fact that Yick Wo and Wo Lee have complied with all requirements of the ordinance, the administrators denied their petitions and the petitions of all but one of the other laundry operators of Chinese descent, while granting permits to 80 of 81 applicants who were not of Chinese descent. These facts demonstrate that the permits were denied for no reason other than hostility against their Chinese nationality. Thus, the application of this ordinance has denied Yick Wo and Wo Lee the equal protection of the laws in violation of the Fourteenth Amendment. Consequently, their imprisonment is illegal, and they must be discharged from custody.

#### Key Terms:

**Equal Protection -** A constitutional right guaranteeing that one class of people will enjoy the same protection of the laws as another.

**Applied Challenge -** A constitutional challenge alleging that a facially neutral law has been applied unequally among similarly situated people.

# Wayte v. United States

#### United States Supreme Court 470 U.S. 598 (1985)

#### Rule of Law

**A prosecution will only be dismissed as an unconstitutional selective prosecution if the defendant can show (1) a discriminatory effect and (2) a discriminatory purpose.**

#### Facts

Wayte (defendant) was a vocal war opponent who refused to register for the Selective Service System. Wayte wrote a letter to the Selective Service System and the President reporting that he would not register for the draft. Wayte was warned that he could be prosecuted, but refused to register. Wayte was indicted. Wayte then moved to dismiss on the grounds that he was selectively prosecuted for exercising his constitutional right to freedom of speech and sought discovery of government documents. The district court ordered discovery, but the government did not provide the documents. The district court dismissed the charges. The court of appeals reversed, holding that Wayte had not proven selective prosecution and that the discovery order was erroneous. The United States Supreme Court granted certiorari.

#### Issue

Must a prosecution under passive enforcement policy of prosecuting only those who are reported be dismissed as an unconstitutional selective prosecution?

#### Holding and Reasoning (Powell, J.)

No. Prosecutors with probable cause to believe a suspect committed a crime enjoy a high degree of discretion in the management of criminal prosecutions, including determining whether and what charges to bring and whether the employ a grand jury. However, that discretion is not absolute. Specifically, prosecutors may not intentionally exercise their discretion to bring charges on constitutionally impermissible grounds, like a defendant’s race or exercise of a constitutional right. Equal protection standards govern selective enforcement cases. Thus, the claimant must show that there was actual discrimination and a discriminatory purpose. The exercise of prosecutorial discretion is not easily reviewed by courts without knowledge of the merits of the prosecution’s case or the government’s law enforcement goals. Further, this type of review might cause delays and other problems in the judicial system or make prosecutors less likely to bring charges. In this case, Wayte has not made the required showing. The government prosecuted only people who were reported or reported themselves; some of those prosecuted were war protesters and others were not. Those who were reported were not prosecuted if they later registered, regardless of whether they voiced opposition. Thus, Wayte has not shown actual discrimination. Beyond that, Wayte has not proven a discriminatory purpose. At best, Wayte has shown awareness that some protesters would be prosecuted. Since Wayte did not meet his burden, his selective prosecution claim must be denied.

#### Dissent (Marshall, J.)

The Court addresses the question of whether Wayte was selectively prosecuted, but this question is not at issue. The issue is whether Wayte was entitled to the discovery ordered by the district court. The district court concluded that Wayte had made out a claim for selective prosecution and had a right to discovery. Wayte needed only to demonstrate that the district court did not err or abuse its discretion in ordering discovery. Wayte has made that showing, and the selective prosecution claim cannot be dismissed.

#### Key Terms:

**Equal Protection -** A constitutional right guaranteeing that one class of people will enjoy the same protection of the laws as another.

**Due Process -** A constitutional guarantee that a law shall not be unreasonable, arbitrary, or capricious and that individuals will be given notice of legal proceedings conducted fairly with an opportunity for an individual to be heard before the government may impose sanctions on one’s life, liberty, or property.

**Sin v. Wittman**

25 S.Ct. 756

Supreme Court of the United States

**SIN, Plff. in Err.,**

**v.**

**GEORGE W. WITTMAN, as Chief of Police of the City and County of San Francisco, California.**

No. 245.

Submitted April 28, **1905**.Decided May 29, **1905**.

## Synopsis

IN ERROR to the Superior Court in and for the City and County of San Francisco, in the State of California, to review a judgment discharging a writ of habeas corpus to inquier into a conviction in the police court of that city for the violation of an ordinance making it unlawful to exhibit gambling implements in a barred or barricaded house or room, or to visit such a place where gambling implements are exhibited or exposed to vies. Affirmed. exposed to view. Affirmed.

# Batson v. Kentucky

#### United States Supreme Court 476 U.S. 79 (1986)

#### Rule of Law

**The Equal Protection Clause of the Fourteenth Amendment prohibits prosecutors from using peremptory challenges to remove prospective jurors based on their race.**

#### Facts

James Batson (defendant), an African American, was indicted for burglary and receipt of stolen goods. During voir dire, the prosecutor used his peremptory challenges to strike all the African Americans on the venire. As a result, the jury was made up entirely of white jurors. Batson moved to discharge the jury before it was sworn, claiming that the removal of all the African Americans violated his rights under the Equal Protection Clause of the Fourteenth Amendment. The trial judge denied the request, and Batson was convicted on both counts. The Kentucky Supreme Court affirmed Batson's conviction, and the United States Supreme Court granted certiorari.

#### Issue

Does the Equal Protection Clause of the Fourteenth Amendment prohibit prosecutors from using peremptory challenges to remove prospective jurors based on their race?

#### Holding and Reasoning (Powell, J.)

Yes. The Equal Protection Clause is violated where the prosecution excludes African American veniremen from the jury based on nothing more than a presumed bias in favor of an African American defendant. Therefore, when the defendant makes a prima facie showing of discrimination during the peremptory challenge, the prosecution may be compelled to articulate a neutral explanation for why it challenges a particular veniremen. The right to peremptory challenges is not a constitutional one, so there is no real difficulty in limiting its reach. Furthermore, the holding in *Swain v. Alabama*, 380 U.S. 202 (1965), has already established that peremptory challenges are subject to the principles of equal protection. Cases since *Swain* have established the standard for proving a prima facie case of purposeful discrimination. First, the defendant must show that he is a member of a specific racial group and that the prosecution has exercised its peremptory challenges to remove the veniremen who are of the same racial group. Then the defendant may rely on the fact that peremptory challenges are a practice that allows people to discriminate. Finally, the defendant must show that in light of all the surrounding circumstances, the prosecutor used the practice to exclude veniremen on account of their race. This inquiry need only involve evidence of the prosecutor’s peremptory challenges at the defendant’s own trial and need not establish a pattern of racial discrimination in prior cases. Once the defendant makes this prima facie showing, the burden shifts to the prosecution to justify its challenges with a neutral explanation. In this case, Batson made a timely objection to the prosecutor’s use of peremptory challenges. The judge did not ask the prosecution to explain its objection, so the case must be remanded. Accordingly, the conviction is reversed.

#### Concurrence (Marshall, J.)

The Court’s holding is correct but is only a first step towards ending racial discrimination in jury selection. To accomplish this goal, peremptory challenges, for both the defense and the prosecution, must be eliminated entirely. The rule established by the Court is not sufficient to end discrimination because it enables defendants to challenge blatant examples of discrimination, but not the more subtle kinds. Furthermore, it is difficult for a court to assess a prosecutor’s motives and decide what neutral explanations are acceptable. Finally, the prosecutor or the judge could harbor conscious or unconscious racism. This could justify a seemingly neutral explanation for excluding a potential juror, but the objectionable characteristic could be something the prosecutor never would have noticed with a white venireman.

#### Concurrence (White, J.)

The practice of using peremptory challenges to exclude African Americans from juries in cases with African American defendants remains widespread, so the Court's decision correctly allows an inquiry into prosecutors' use of peremptory challenges. However, the Court's decision should not be given retroactive effect on criminal cases in which the trial began prior to the announcement of the decision.

#### Dissent (Burger, C.J.)

Peremptory challenges have been used as part of the jury process in this country for nearly 200 years, and they are part of a common-law tradition spanning several centuries. Despite that history, the Court has decided to set aside the use of peremptory challenges on equal-protection grounds, even though Batson expressly declined to make an equal-protection argument before the Kentucky Supreme Court or this Court. The state has a substantial, and perhaps even compelling, interest in using peremptory challenges to ensure the fairness of jury trials, and the Court is wrong to limit their use.

#### Dissent (Rehnquist, J.)

The Court misapplies the Equal Protection Clause because there is nothing unequal about the state excluding African Americans from jury when the defendant is African American. This technique is applied across the board and when a defendant falls into another group or class, the state excludes potential jurors having membership in that particular group. Group affiliations have long been recognized as a legitimate basis for exercising peremptory challenges.

**Key Terms:**

**Peremptory Challenge -** During voir dire, the defense and the prosecution may each reject a certain number of potential jurors without having to give any reason.

**Venire -** The group of prospective jurors that the jury is then chosen from.

# \*\*UNITED STATES v. BATCHELDER\*\*

#### United States Supreme Court  442 U.S. 114 (1979)

#### Rule of Law

**A court must use the sentencing provisions of the statute that a defendant is convicted of violating, even where its maximum penalty is higher than that of an overlapping statute that bars the same conduct.**

#### Facts

Batchelder (defendant) was convicted of violating 18 U.S.C. 922 (h), a provision of the Omnibus Crime Control and Safe Streets Act of 1968 (the Omnibus Act). Section 922(h) prohibits a convicted felon from receiving a firearm that has been in interstate commerce. Those convicted of violating 922(h) can be sentenced to any of the penalties listed in 924(a). A second provision of the Omnibus Act, 18 U.S.C. App. 1202(a), also prohibits a convicted felon from receiving a firearm that has been in interstate commerce. Although both provisions prohibit the same conduct, 1202(a) carries lighter penalties with the maximum being 2 years in prison. The district court sentenced Batchelder to five years in prison. This was the maximum penalty allowed under the provision he was convicted of violating. The appellate court upheld Betchelder’s conviction but not the five year prison sentence he received. Since both provisions prohibited the same conduct, the court interpreted the Omnibus Act to allow only the two year maximum penalty of the 1202 provision. The court noted that ambiguity in a criminal statute should be interpreted in the defendant’s favor, that 924(a)’s penalties were repealed by the later addition of 1202(a). The Supreme Court granted certiorari.

#### Issue

Where two criminal statutes with different maximum penalties bar the same conduct, and a defendant is convicted of violating one of the statutes, is a court required to apply the sentencing provision of the statute with a lower penalty?

#### Holding and Reasoning (Marshall, J.)

No. Although these two statutes overlap by prohibiting the same conduct, each has its own independent sentencing provision and the district court used the correct penalty provision when sentencing Batchelder to a five year term. The appellate court found that three maxims of statutory interpretation required that the lighter penalties of 1202 override the harsher penalties available under the provision Batchelder was convicted of violating. First, the court relied on the principle that ambiguity in a criminal statute should be interpreted in the defendant’s favor. Batchelder was convicted of violating 18 U.S.C. 922(h) which clearly states that the penalties for violation are found in 924(a). Thus, there was no ambiguity. Second, the court reasoned that Congress may have implicitly repealed the harsher penalties of 924(a) by the later enactment of 1202(a). This reasoning is unjustified because there is no evidence of Congress’s intent to repeal and the fact that each sentencing provision applies to violations of completely separate statutes means that they exist independently. Finally the court relied on the principle that a statute should be interpreted to avoid constitutional questions. This principle of statutory interpretation does not apply where the statute is clear on its face and not open to differing interpretations. Here, the statute that Batchelder was convicted of violating clearly and unambiguously specified the provision that was to be used for sentencing. Since there is no possibility of misinterpreting the language of the statute, this maxim does not apply. The Due Process Clause requires that a criminal statute fairly specify the prohibited conduct and possible penalties. Where overlapping criminal statutes sufficiently indicate the prohibited conduct and penalties that may be imposed, they do not violate the Due Process Clause. Since there was no ambiguity in the provisions in this case, there was no Due Process violation. The court’s assertion that overlapping criminal statutes prohibiting the same conduct but authorizing different penalties give prosecutors too much discretion is incorrect. Prosecutors may be influenced by the available penalties when deciding which statute to prosecute a defendant under, but it is the same amount of discretion involved when deciding between two statutes that do not overlap. The district court properly sentenced Batchelder under 924(a), the penalty provision specified in the statute he was convicted of violating. The appellate court’s judgment vacating Batchelder’s five year prison term is reversed.

**Key Terms:**

**Repeal -** The legislature’s revocation or removal of a law.

# \*\*UNITED STATES v. GOODWIN\*\*

#### United States Supreme Court 457 U.S. 368 (1982)

#### Rule of Law

**A presumption of vindictiveness does not arise from the addition of new charges after a defendant demands a jury trial.**

#### Facts

Goodwin (defendant) was charged by the United States government (plaintiff) with several misdemeanor and petty offenses after striking a federal park officer with his vehicle and fleeing after a traffic stop. Plea negotiations took place with a Department of Justice attorney, but Goodwin demanded a jury trial in district court. An assistant U.S. attorney took over the prosecution in district court and added a felony charge for assaulting a federal officer. A jury convicted Goodwin of the felony and one misdemeanor count. Goodwin moved to have the verdict set aside due to prosecutorial vindictiveness, alleging that the felony charge had been added as retaliation for Goodwin’s jury-trial demand. The district court denied the motion, finding that the prosecutor had no retaliatory intent. The court of appeals reversed, holding that although there was no actual vindictiveness, there existed a presumption of vindictiveness in the absence of evidence that the felony could not have been brought prior to the jury-trial demand. The United States Supreme Court granted certiorari.

#### Issue

Does a presumption of vindictiveness arise from the addition of new charges after a defendant demands a jury trial?

#### Holding and Reasoning (Stevens, J.)

No. Vindictiveness cannot be presumed simply because charges are added at the pretrial stage after a defendant demands a jury trial. In *North Carolina v. Pearce*, 395 U.S. 711 (1969), this Court held that a trial judge may constitutionally impose a heavier sentence upon retrial of an overturned conviction. However, the new sentence cannot be based on retaliation, and due process requires that the defendant be free from fear of retaliation. Therefore, *Pearce* creates a presumption of vindictiveness by trial judges that can be overcome only by objective information of record justifying the harsher sentence. In *Blackledge v. Perry*, 417 U.S. 21 (1974), this Court held that prosecutors are subject to a presumption of vindictiveness similar to that of trial judges. In *Blackledge*, the defendant was found guilty of a misdemeanor and sentenced to six months in prison. The defendant appealed, and the prosecutor added a felony charge to which the defendant later plead guilty and received a sentence of five to seven years in prison. Even where no actual vindictiveness is found, due process requires that defendants be free from the potential retaliation of a prosecutor wishing to avoid the burden of retrying a convicted defendant. The presumption of vindictiveness does not extend, however, to pretrial plea negotiations during which a prosecutor carries out a threat to add charges against a defendant who refuses to plead guilty to the original charges. *See Bordenkircher v. Hayes*, 434 U.S. 357 (1978). Vindictiveness should not be measured or presumed at the pretrial stage, where charges may be added or dropped for many reasons. In this case, this Court likewise will not adopt a presumption of vindictiveness simply because charges were added after a jury-trial demand. The addition of charges is just as likely the result of a closer review of the case or the discovery of additional information as opposed to retaliation. A prosecutor has broader discretion before trial to develop a case than after trial, when presumably little new information is gained. The distinction between the burden of a prosecutor in presenting a jury trial as compared to a bench trial does not add enough significance to warrant a presumption of vindictiveness. Thus, there is no presumption of vindictiveness for Goodwin’s felony charge. Accordingly, the judgment of the court of appeals is reversed and remanded.

#### Concurrence (Blackmun, J.)

There is no distinction between pretrial and posttrial vindictiveness. In either case, the prosecutor should have to demonstrate that the charges were added based on objective information occurring after the time of the original charges.

#### Dissent (Marshall, J.)

The majority incorrectly finds that there is little distinction between a bench trial and a jury trial in this context. A jury trial involves far more prosecutorial preparation than a bench trial. Therefore, a presumption of vindictiveness should arise when a prosecutor adds charges after a jury-trial demand.

**Key Terms:**

**Right to a Jury Trial -** A constitutional right to a jury trial exists under the Sixth Amendment, in federal and state criminal trials where a defendant faces punishment of greater than six months’ imprisonment, and under the Seventh Amendment, in federal civil cases where a plaintiff seeks money damages.

**Presumption of Vindictiveness -** Protects the due-process rights of the accused by requiring proof of objective reasons for a judge to issue a harsher sentence upon retrial or a prosecutor to add new charges after the accused has exercised his or her appellate rights.

# North Carolina v. Pearce

#### United States Supreme Court 395 U.S. 711 (1969)

#### Rule of Law

**When a criminal defendant is reconvicted of an offense after being granted a new trial, it is unconstitutional to deny credit for time already served and it is unconstitutional for the court to impose a longer sentence in the absence of a finding of conduct subsequent to the original conviction that will justify imposing a longer sentence.**

**Blackledge v. Perry**

United States Supreme Court  
417 U.S. 21 (1974)

**Rule of Law**

**The Due Process Clause of the Fourteenth Amendment is violated if an increased punishment after appeal has a real likelihood of being the result of vindictiveness.**

**Texas v. McCullough**

106 S.Ct. 976

Supreme Court of the United States

**TEXAS, Petitioner**

**v.**

**Sanford James McCULLOUGH.**

No. 84–1198.

Argued Dec. 10, 1985.Decided Feb. 26, 1986.

## Synopsis

Following retrial, the defendant was convicted in a Texas state court of murder and received a greater sentence than that previously imposed by the jury in the first trial, and he appealed. [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I119e0d08e79e11d983e7e9deff98dc6f&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[The Texas Court of Appeals, 680 S.W.2d 493](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984101064&pubNum=0000713&originatingDoc=I179acb0b9c1f11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))reversed and resentenced the defendant, and the State sought review. The Texas Court of Criminal Appeals, ––– S.W.2d –––, concluded that the case should have been remanded to the trial judge for resentencing, and the State petitioned for certiorari. The Supreme Court, Chief Justice Burger, held that 50-year sentence imposed upon defendant by the judge after retrial was not the result of vindictiveness even though the jury at the first trial had imposed a sentence of only 20 years; in increasing the sentence, the judge relied on new evidence about the murder that was not presented at the first trial which indicated that the defendant rather than his accomplices slashed the victim's throat and that the defendant had been released from prison only four months before the crime had been committed.

Reversed and remanded.

Justice Brennan filed an opinion concurring in the judgment.

Justice Marshall filed a dissenting opinion in which Justice Blackmun and Justice Stevens joined.

**Bordenkircher v. Hayes**

United States Supreme Court  
434 U.S. 357 (1978)

**Rule of Law**

**The Due Process Clause of the Fourteenth Amendment to the U.S. Constitution is not violated when a prosecutor exercises discretion in whether or not to prosecute and what charge to bring before a grand jury so long as the decision is not intentionally based on race, religion, or some other unjustifiable classification.**

**Chapter 11 – Screening the Prosecutor’s Charging Decision**

# \*\*COLEMAN v. ALABAMA\*\*

#### United States Supreme Court 399 U.S. 1 (1970)

#### Rule of Law

**A defendant has the right to counsel during any pre-trial confrontation where there is the potential for substantial prejudice to his right to a fair trial as affected by his right to meaningfully cross-examine a witness and have effective assistance of counsel at the trial.**

#### Facts

Coleman (defendant) was arrested and convicted of assault with intent to murder. At the preliminary hearing, Coleman was not appointed counsel. Testimony given at the hearing was not admissible at trial where the defendant did not have a chance to cross-examine through counsel. Therefore, the court of appeals held that the denial of counsel at the preliminary hearing did not prejudice Coleman’s rights.

#### Issue

Does the potential for substantial prejudice to a defendant’s rights exist where he is denied access to an attorney during a preliminary hearing?

#### Holding and Reasoning (Brennan, J.)

Yes. A preliminary hearing is a critical stage of the prosecution, and the defendant maintains the right to have an attorney present, because the potential to seriously prejudice the defendant’s rights exists. While testimony elicited at the hearing cannot be admitted at trial where the defendant did not meaningfully cross-examine the witness, the potential to harm the defendant by pursuing an improper prosecution exists. With counsel present, fatal weaknesses of the prosecution’s case may be exposed. On cross-examination, counsel could elicit statements that could be used to impeach a witness at trial or preserve testimony favorable to the defendant. The preliminary hearing would give counsel an understanding of the prosecution’s case so he may effectively argue against it at trial. Finally, the preliminary hearing would give defense counsel a chance to put forth some of its own arguments, like the need for a psychiatric exam or bail. Accordingly, the conviction is vacated. The case is remanded to determine whether the denial of counsel in this case was harmless error.

#### Concurrence (Black, J.)

The Sixth Amendment requires that a defendant have access to counsel in all criminal prosecutions. The preliminary hearing is a definite part of the criminal prosecution because if the magistrate finds probable cause the defendant will be incarcerated or admitted to bail.

#### Dissent (Stewart, J.)

The Court’s opinion seems to hold that a defendant maintains the right to counsel at a preliminary hearing to ensure a fair preliminary hearing, not a fair trial.

**Key Terms:**

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

**Critical Stages of Prosecution** - Any interaction between an accused person and the government in which the government makes a deliberate effort to elicit incriminating information from the accused person. Critical stages of prosecution include (1) any pretrial proceeding in which the accused person's substantial rights may be affected by the outcome (*e.g.*, preliminary hearings), (2) the guilt phase of the trial, and (3) the sentencing phase of the trial. The Sixth Amendment to the United States Constitution guarantees an accused person the right to the effective assistance of counsel at all critical stages of the prosecution.

# Powell v. Alabama (Scottsboro Boys Trial)

#### United States Supreme Court 287 U.S. 45 (1932)

#### Rule of Law

**Due process requires that criminal defendants have the right to counsel both at trial and in the time leading up to trial when consultation and preparation take place.**

**Tumey v. Ohio**

47 S.Ct. 437

Supreme Court of the United States.

**TUMEY**

**v.**

**STATE OF OHIO.**

No. 527.

Argued Nov. 29, 30, 1926.Decided March 7, 1927.

## Synopsis

In Error to the Supreme Court of Ohio.

Ed Tumey was convicted before the mayor of the village of North College Hill, Ohio, of unlawfully possessing intoxicating liquor. Judgment of court of common pleas [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Iaaf979cccf2b11d983e7e9deff98dc6f&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[(25 Ohio Nisi Prius (N. S.) 580),](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1925002466&pubNum=2632&originatingDoc=Icdec8a8d9cc211d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) reversing judgment of conviction, was reversed by the Court of Appeals (23 Ohio Law Reporter, 634), and a petition in error as of right to the state Supreme Court was dismissed, for the reason that no debatable constitutional question was involved, and defendant brings error. Judgment reversed, and cause remanded.

**Weaver v. Massachusetts**

#### United States Supreme Court 137 S. Ct. 1899 (2017)

#### Rule of Law

**Ineffective assistance of counsel raised on collateral review is a structural error requiring a new trial only if the defendant shows prejudice or fundamental unfairness.**

# United States v. Wade

#### United States Supreme Court 388 U.S. 218 (1967)

#### Rule of Law

**A post-indictment witness identification of a criminal suspect, conducted without notice to and in the absence of the suspect's counsel, violates the Sixth Amendment right to the assistance of counsel.**

**Hamilton v. Alabama**

82 S.Ct. 157

Supreme Court of the United States

**Charles Clarence HAMILTON, Petitioner,**

**v.**

**STATE OF ALABAMA.**

No. 32.

Argued Oct. 17, **1961**.Decided Nov. 13, **1961**.

## Synopsis

Proceeding on **Alabama** defendant's application for leave to file petition in **Alabama** Circuit Court for writ of error coram nobis. The [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I9f82cea20c0511d9bc18e8274af85244&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=5c5d33e247454dbd8bd8dcb746957f3c&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[**Alabama** Supreme Court, 271 **Ala**. 88, 122 So.2d 602,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1960128550&pubNum=735&originatingDoc=I18d0a6019bea11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) denied the petition, and certiorari was granted. The Supreme Court, Mr. Justice Douglas, held that arraignment is so critical a stage of **Alabama** criminal procedure that denial of counsel at arraignment required reversal of conviction, even though no prejudice was shown.

Reversed.

# Miranda v. Arizona

#### United States Supreme Court 384 U.S. 436 (1966)

#### Rule of Law

**Without certain hallmark warnings regarding the right to remain silent and the right to counsel, statements made during custodial interrogation are inadmissible at trial.**

# Pointer v. Texas

#### United States Supreme Court 380 U.S. 400 (1965)

#### Rule of Law

**A defendant's Sixth Amendment guarantee of the right to confront witnesses applies to the states.**

#### Facts

Pointer (defendant) and Dillard were arrested for the robbery of Kenneth Phillips. At a preliminary hearing, the prosecutor examined the state’s witnesses, but neither Pointer nor Dillard had counsel. Phillips testified, identifying Pointer as the perpetrator who committed the robbery. Pointer did not cross-examine Phillips. Pointer was indicted for the robbery charge. Phillips later moved to another state with no intention of returning. Because Phillips was no longer available to give in-person testimony, the state offered the transcript of Phillips’s preliminary-hearing testimony as evidence at Pointer’s robbery trial. Pointer’s trial counsel objected, but the trial judge overruled the objection on the grounds that Pointer could have cross-examined Phillips at the preliminary hearing. Pointer was convicted, and he appealed, contending that the use of the preliminary-hearing transcript at trial violated his rights under the Sixth and Fourteenth Amendments. The conviction was affirmed.

#### Issue

Does a defendant's Sixth Amendment guarantee of the right to confront witnesses apply to the states?

#### Holding and Reasoning (Black, J.)

Yes. A defendant's Sixth Amendment of the right to confront witnesses applies to the states. The Fourteenth Amendment obligates the states to guarantee defendants the right to be confronted with the witnesses against them, including the right to cross-examine those witnesses. The Sixth Amendment provides that defendants in all criminal prosecutions have the right to be confronted with the witnesses against them and to have the assistance of counsel. The right to confront witnesses undoubtedly includes the right to cross-examine the state’s witnesses in a criminal case. Cross-examination serves the important truth-seeking purpose of exposing any flaws or falsehoods in the state’s case. The fact that this right was incorporated into the Bill of Rights confirms that confrontation is a fundamental right absolutely necessary for a just trial. Furthermore, the importance of cross-examination has been repeatedly stressed as a mode of protection for criminal defendants. The standard for determining whether this crucial right has been violated is the same, regardless of whether a case proceeds in a state or federal court. Here, Pointer’s Sixth Amendment right to confront and cross-examine witnesses was plainly denied. Pointer did not have an adequate opportunity to cross-examine Phillips through counsel during the preliminary hearing. Thus, the introduction of the preliminary-hearing transcript at trial would have violated Pointer’s Sixth Amendment rights in either a federal proceeding or a state proceeding. The use of Phillips’s transcript testimony in the state court denied a fundamental constitutional right to Pointer. Accordingly, Pointer’s conviction is reversed, and the case is remanded.

#### Key Terms:

#### Incorporation - A doctrine through which certain substantive protections of the Constitution are applicable to states.

#### Cross Examination - Questioning of a witness by the opposing side on the issues raised by the party offering a witness’ testimony during direct examination.

# Chapman v. California

#### United States Supreme Court 386 U.S. 18 (1967)

#### Rule of Law

**In order for a federal constitutional error to be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.**

# \*\*VASQUEZ v. HILLERY\*\*

#### United States Supreme Court 474 U.S. 254 (1986)

#### Rule of Law

**The mandatory remedy for racial discrimination in grand jury selection is reversal of any subsequent criminal conviction.**

#### Facts

Hillery (defendant) was an African-American indicted on murder charges by a grand jury. Hillery asserted that African-Americans had been intentionally excluded from the grand jury and moved to quash the indictment. The trial court denied his motion and Hillery was subsequently convicted. Hillary spent 16 years appealing his conviction in the state courts. When Hillery exhausted his state court appeals, he petitioned the federal district court for a writ of habeas corpus. The district court granted the writ. Vasquez (plaintiff), the warden of San Quentin Prison, petitioned the Supreme Court for review of the district court’s decision.

#### Issue

Is reversal of any subsequent criminal conviction the mandatory remedy for racial discrimination in grand jury selection?

#### Holding and Reasoning (Marshall, J.)

Yes. Reversal of any subsequent criminal conviction is the mandatory remedy for racial discrimination in grand jury selection. The intentional exclusion of members of a defendant’s racial group from a grand jury violates equal protection requirements. Since 1880, this Court has consistently held that a criminal conviction must be vacated whenever racial discrimination has tainted grand jury selection. Vasquez asks the Court to dispense with this venerable doctrine. Vasquez asserts that racial discrimination is no longer an issue with grand jury selection in Kings County, California. Vasquez argues that the discriminatory grand jury selection in Hillery’s case amounted to harmless error. In addition, Vasquez asserts that any unfairness in the grand jury process was negated by Hillery’s receipt of a fair jury trial, at which Hillery was found guilty. Finally, Vasquez argues that forcing the state to conduct a new trial many years after the original conviction is an unfair penalty when the constitutional violation had no effect on the fairness of the original trial. The longstanding remedy of reversal is the only effective remedy for the serious constitutional violation worked by discriminatory grand jury selection. A grand jury has broad discretion to determine the charges for which a defendant will be tried. As such, discrimination in grand jury selection directly affects whether or not a defendant will face trial and the charges to which the defendant must answer. In the face of unconstitutional discrimination in the charging process, we cannot afford a presumption of fairness, nor can we assess the harm of error. The fact that a defendant is subsequently convicted of charges issued by a tainted grand jury does not lead to the conclusion that the grand jury was not impermissibly biased in its charging decision. Vasquez presents no evidence to convince the Court that the societal concerns underlying our doctrine of mandatory reversal are any less relevant today than they were in 1880. The district court ruling is affirmed.

#### Dissent (Powell, J.)

This Court generally ignores constitutional violations that result in harmless error. The burden falls to the defendant to demonstrate prejudice resulting from a constitutional trespass. The only exception to the rule has been in cases of grand jury discrimination. The rationale proposed for the exception has been that grand jury discrimination casts doubt on the integrity of the judicial process. The same can be said of any constitutional violation. Not every constitutional violation deprives the defendant of a fair trial. The record demonstrates that the composition of the grand jury did not deprive Hillery of a fair trial. The majority stands on precedent mandating reversal, but reversal is not a constitutional requirement. The Court should be addressing the question of the appropriate remedy for the error under the particular facts of Hillery’s case. The fact that Hillery was subsequently convicted on the charges issued by the grand jury demonstrates the validity of the grand jury’s indictment decision. There is no evidence that the grand jury’s charging decision was based on Hillery’s race or that grand juries in Kings County ever treated white defendants differently under a similar weight of evidence. Hillery did not even raise his discrimination claim until 16 years after his conviction. The cost to the state of reversing the conviction exceeds the deterrent effect of the majority rule. There is no dispute that racial discrimination in grand jury selections has been eliminated in Kings County. There is no dispute that a grand jury representative of the population demographics of Kings County at the time of Hillery’s indictment would have contained only one African-American member. The majority decision offers little deterrent benefit. By contrast, the state must now face the daunting task of attempting to reconstruct a case originally tried 23 years ago.

**Key Terms:**

**Grand Jury -** A group of individuals convened for the purpose of reviewing evidence in criminal proceedings and deciding whether to issue an indictment.

**Indictment -** A formal statement of criminal charges issued by a grand jury, or the process of determining charges to be presented for prosecution.

# Strauder v. West Virginia

#### United States Supreme Court 100 U.S. 303 (1880)

#### Rule of Law

**The Fourteenth Amendment prohibits states from enacting laws that deny any of its citizens equal protection under the law.**

#### Facts

West Virginia (plaintiff) enacted a statute limiting jury service to white males over the age of 21 who are state citizens. An all-white jury convicted Strauder (defendant), a black man, of murder. Strauder argues that his conviction by a jury selected under the West Virginia statute violated the Fourteenth Amendment.

#### Issue

Is a state statute that limits jury service to white persons constitutional under the Fourteenth Amendment?

#### Holding and Reasoning (Strong, J.)

No. A state statute limiting jury service to white persons only is unconstitutional under the Fourteenth Amendment. The Fourteenth Amendment was adopted to protect a race of people, recently freed from slavery, from adverse action by the states, and to prevent the states from denying them their civil rights. It further authorized Congress to enforce these provisions by appropriate legislation. The Fourteenth Amendment is a declaration that all persons, regardless of race or color, must be held equal under the laws of the states. No state may discriminate by law against a person because of his race. West Virginia’s statute clearly represents a prohibited discrimination, singling out an entire race of people and denying them the right to participate as jurors, thus branding them as inferior, furthering racial prejudice, and impeding their access to equal justice under the law. This court does not hold that states are prohibited under the Fourteenth Amendment from designating other qualifications for jurors, such as limiting jury selection to males, citizens, landowners, or persons of a certain age or with a certain level of education. The purpose of the Fourteenth Amendment is to prohibit discrimination based on race or color.

#### Dissent (Field, J.)

I dissent for the same reasons I did in *Ex Parte Virginia*, 100 U.S. 339 (1879). [Editor's Note: In Ex Parte Virginia, a Virginia judge had been indicted under a federal law making it a criminal offense to exclude otherwise qualified jurors from the pool on the basis of race. The Court denied the judge'e petition for a writ of habeas corpus on the ground that both the law and the indictment were constitutional under the Thirteenth and Fourteenth Amendments. Justice Field's dissent argued that the indictment failed to name any qualified citizens who had been excluded from jury service and was therefore unconstitutionally vague, even if the law was constitutional. Nevertheless, Justice Field asserted that the law was not constitutional, because the Thirteenth and Fourteenth Amendments did not give the federal government the authority to usurp the power of states to control inherently local matters, which was specifically reserved to the states in the Tenth Amendment and embodied throughout the rest of the Constitution.]

#### Key Terms:

**Equal Protection -** A constitutional right guaranteeing that one class of people will enjoy the same protection of the laws as another.

**Rose v. Mitchell**

99 S.Ct. 2993

Supreme Court of the United States

**Jim ROSE, Warden, Petitioner,**

**v.**

**James E. MITCHELL and James Nichols, Jr.**

No. 77–1701.

Argued Jan. 16, 1979.Decided July 2, 1979.

## Synopsis

State prisoners filed pro se petitions for writs of habeas corpus alleging racial discrimination in selection of grand jury foreman. The United States District Court for the Western District of Tennessee dismissed the petitions, and petitioners appealed. The United States Court of Appeals for the Sixth Circuit, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I4f045c32914f11d98e8fb00d6c6a02dd&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[570 F.2d 129,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1978102521&pubNum=350&originatingDoc=Ic1df77609c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) reversed and remanded with directions, and certiorari was granted. The Supreme Court, Mr. Justice Blackmun, held that: (1) racial discrimination in selection of grand jury is a valid ground for setting aside criminal conviction even where defendant has been found guilty beyond a reasonable doubt by a properly constituted petit jury at a trial on the merits that was free from other constitutional error; (2) such claims are cognizable on federal habeas corpus, but (3) plaintiffs in the instant case failed to make out a prima facie case of discrimination in selection of grand jury foreman.

Judgment of Court of Appeals reversed and case remanded.

Mr. Justice Rehnquist filed a statement concurring in part.

Mr. Justice Stewart and Mr. Justice Powell filed separate opinions concurring in the judgment, in which Mr. Justice Rehnquist joined.

Mr. Justice White filed an opinion dissenting in part in which Mr. Justice Stevens joined.

Mr. Justice Stevens filed an opinion dissenting in part.

**Procedural Posture(s):** On Appeal.

**United States v. Ciambrone**

601 F.2d 616

United States Court of Appeals,

Second Circuit.

**UNITED STATES of America, Appellee,**

**v.**

**Richard CIAMBRONE, Defendant-Appellant.**

No. 354, Docket 78-1235.

Argued Nov. 8, 1978.Decided May 15, 1979.

**Synopsis**

Defendant was convicted in the United States District Court for the Eastern District of New York, Thomas C. Platt, Jr., J., of making false declarations under oath when he testified as a witness in a trial of a criminal case, and he appealed. The Court of Appeals, Mansfield, Circuit Judge, held that: (1) any possible error in prosecutor having misled grand jury which indicted defendant by failing to reveal in response to grand jurors' questions that defendant had been coerced by threats against his life into giving alleged perjurious testimony did not warrant dismissal of indictment; (2) reversal of conviction was not required because of Government's failure to record entire grand jury proceedings since grand jury transcript appeared to be full record of proceedings; (3) refusal to order disclosure to defendant of name of informer who advised Government of threats on defendant's life prior to criminal case in which he testified was not an abuse of discretion; (4) instructions to jury did not improperly shift burden of proof to defendant, and (5) trial judge did not err in failing to state his reasons for imposing maximum five-year sentence.

Affirmed.

Friendly, Circuit Judge, dissented and filed opinion.

**Tumey v. Ohio**

47 S.Ct. 437

Supreme Court of the United States.

**TUMEY**

**v.**

**STATE OF OHIO.**

No. 527.

Argued Nov. 29, 30, 1926.Decided March 7, 1927.

## Synopsis

In Error to the Supreme Court of Ohio.

Ed Tumey was convicted before the mayor of the village of North College Hill, Ohio, of unlawfully possessing intoxicating liquor. Judgment of court of common pleas [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Iaaf979cccf2b11d983e7e9deff98dc6f&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[(25 Ohio Nisi Prius (N. S.) 580),](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1925002466&pubNum=2632&originatingDoc=Icdec8a8d9cc211d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) reversing judgment of conviction, was reversed by the Court of Appeals (23 Ohio Law Reporter, 634), and a petition in error as of right to the state Supreme Court was dismissed, for the reason that no debatable constitutional question was involved, and defendant brings error. Judgment reversed, and cause remanded.

# United States v. Batchelder

#### United States Supreme Court  442 U.S. 114 (1979)

#### Rule of Law

**A court must use the sentencing provisions of the statute that a defendant is convicted of violating, even where its maximum penalty is higher than that of an overlapping statute that bars the same conduct.**

**Burnet v. Coronado Oil & Gas Co.**

52 S.Ct. 443

Supreme Court of the United States

**BURNET, Commissioner of Internal Revenue,**

**v.**

**CORONADO OIL & GAS CO.**

No. 341.

Argued March 16, 1932.Decided April 11, 1932.

## Synopsis

Mr. Justice STONE, Mr. Justice BRANDEIS, Mr. Justice ROBERTS, and Mr. Justice CARDOZO, dissenting.

On Writ of Certiorari to the Court of Appeals of the District of Columbia.

Petition by the Coronado Oil & Gas Company, opposed by David Burnet, Commissioner of Internal Revenue, to review a decision of the Board of Tax Appeals upholding the Commissioner's assessment of income and excess profits taxes. The Court of Appeals of the District of Columbia reversed the decision of the Board of Tax Appeals and remanded the case ([50 F.(2d) 998, 60 App. D. C. 233),](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1931129747&pubNum=350&originatingDoc=Icde8e1079cc211d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) and the Commissioner brings certiorari.

Judgment of Court of Appeals affirmed.

# Chapman v. California

#### United States Supreme Court 386 U.S. 18 (1967)

#### Rule of Law

**In order for a federal constitutional error to be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt.**

# Harrington v. California

89 S.Ct. 1726

Supreme Court of the United States

**Glen Martin HARRINGTON, Petitioner,**

**v.**

**State of CALIFORNIA.**

No. 750.

Argued April 23, 1969.Decided June 2, 1969.

**Synopsis**

The Superior Court of Los Angeles County entered a judgment convicting defendant of murder and he appealed. The [California Court of Appeal, 256 Cal.App.2d 209, 64 Cal.Rptr. 159,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1967111757&pubNum=227&originatingDoc=I237719269c1e11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed and the California Supreme Court denied a petition for hearing and certiorari was granted. The Supreme Court, Mr. Justice Douglas, held that where one of the three codefendants, whose confessions were admitted in evidence with limiting instructions, took stand and testified that defendant was at scene, a fact admitted by defendant who cross-examined such testifying codefendant, admission of confessions of the nontestifying codefendants in violation of defendant's constitutional right of confrontation was harmless error because of special circumstances in prosecution in which evidence of defendant's guilt was overwhelming.

Affirmed.

Mr. Justice Brennan, The Chief Justice and Mr. Justice [Marshall](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0336250901&originatingDoc=I237719269c1e11d9bdd1cfdd544ca3a4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I237719269c1e11d9bdd1cfdd544ca3a4) dissented.

# Coleman v. Alabama

#### United States Supreme Court 399 U.S. 1 (1970)

#### Rule of Law

**A defendant has the right to counsel during any pre-trial confrontation where there is the potential for substantial prejudice to his right to a fair trial as affected by his right to meaningfully cross-examine a witness and have effective assistance of counsel at the trial.**

**Milton v. Wainwright**

92 S.Ct. 2174

Supreme Court of the United States

**George William MILTON, Petitioner,**

**v.**

**Louie L. WAINWRIGHT, Director, Florida Divisions of Corrections.**

No. 70—5012.

Argued Jan. 12, 1972.Decided June 22, 1972.

## Synopsis

Habeas corpus proceeding by state prisoner. The United States District Court for the Southern District of Florida, [306 F.Supp. 929,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1969116011&pubNum=345&originatingDoc=I0a401b209bf011d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) denied relief, and prisoner appealed. The Court of Appeals, [428 F.2d 463,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1970104080&pubNum=350&originatingDoc=I0a401b209bf011d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed, and certiorari was granted. The Supreme Court, Mr. Chief Justice Burger, held that error, if any, in admission of post-indictment, pretrial confession obtained by a police officer who posed as fellow prisoner confined in cell with petitioner was harmless beyond a reasonable doubt, where jury, in addition to hearing challenged testimony, was presented with overwhelming evidence of petitioner's guilt, including no less than three full confessions made by petitioner prior to his indictment.

Affirmed.

Mr. Justice Stewart fild a dissenting opinion in which Mr. Justice Douglas, Mr. Justice Brennan, and Mr. Justice Marshall concurred.

**Procedural Posture(s):** On Appeal.

# Gerstein v. Pugh

#### United States Supreme Court 420 U.S. 103 (1975)

#### Rule of Law

**A defendant charged with a crime by information may not be detained for an extended period of time without a judicial determination of probable cause.**

# Gideon v. Wainwright

#### United States Supreme Court 372 U.S. 335 (1963)

#### Rule of Law

**The Fourteenth Amendment incorporates the Sixth Amendment right to counsel to the states.**

#### Hobby v. United States

104 S.Ct. 3093

Supreme Court of the **United** **States**

**Wilbur HOBBY, Petitioner**

**v.**

**UNITED STATES.**

No. 82-2140.

Argued April 25, **1984**.Decided July 2, **1984**.

**Synopsis**

The **United** **States** District Court for the Eastern District of North Carolina denied petitioner's motion to dismiss indictment. The Court of Appeals for the Fourth Circuit, [702 F.2d 466,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1983112494&pubNum=350&originatingDoc=I2220ede79bf011d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed, and petitioner sought writ of certiorari. The Supreme Court, Chief Justice Burger, held that assuming that discrimination entered into selection of grand jury foremen, such discrimination did not warrant reversal of conviction of petitioner, a white male, and dismissal of indictment against him.

Affirmed.

Justice Marshall filed dissenting opinion in which Justice Brennan and Justice Stevens joined.

Justice Stevens filed dissenting opinion.

**Procedural Posture(s):** Motion to Dismiss.

# Oregon v. Elstad

#### United States Supreme Court 470 U.S. 298 (1985)

#### Rule of Law

**A suspect can make a statement that is admissible in court after being read his *Miranda* warnings, even when he previously made an unwarned statement, because the initial failure to read a suspect his *Miranda* warnings does not taint later voluntary statements.**

# Miranda v. Arizona

#### United States Supreme Court 384 U.S. 436 (1966)

#### Rule of Law

**Without certain hallmark warnings regarding the right to remain silent and the right to counsel, statements made during custodial interrogation are inadmissible at trial.**

# United States v. Leon

#### United States Supreme Court 468 U.S. 897 (1984)

#### Rule of Law

**Evidence obtained in reasonable, good-faith reliance on a facially valid search warrant is not subject to the Fourth Amendment's exclusionary rule, even if the warrant is later deemed defective.**

# \*\*COSTELLO v. UNITED STATES\*\*

#### United States Supreme Court 350 U.S. 359 (1956)

#### Rule of Law

**Under the Fifth Amendment, a grand jury indictment will not be dismissed because it is based solely on hearsay evidence.**

#### Facts

Frank Costello (defendant) was indicted for failure to pay income taxes. Costello filed motions to review the grand jury minutes and dismiss the indictment on the grounds that the grand jury could not have heard any valid evidence against him. The motion was denied. At trial, Costello’s attorney asked witnesses whether they had testified at the grand jury. Costello again moved to dismiss the indictment on the grounds that the grand jury only heard hearsay evidence. The motion was denied, and Costello was found guilty. The court of appeals affirmed the conviction. The United States Supreme Court granted certiorari.

#### Issue

Under the Fifth Amendment, must an indictment be dismissed if the grand jury issued the indictment based solely on hearsay evidence?

#### Holding and Reasoning (Black, J.)

No. A grand jury indictment will not be dismissed because it is based solely on hearsay evidence. The Fifth Amendment mandates that prosecutions must be initiated by a presentment or an indictment by a grand jury. The Fifth Amendment in no way limits the types of evidence that grand juries may hear. The grand jury was an English invention adopted by the Founders of our Constitution. In England, grand jurors were lay people asked to fairly determine whether prosecution should be instituted. Grand jurors had very few rules or guidelines and were permitted to use whatever information or knowledge they considered helpful. The grand jury in this country is similarly structured and designed to promote fairness and justice. Under *Holt v. United States*, 218 U.S. 245 (1910), the Court refused to quash an indictment based on incompetent evidence. Allowing such considerations would essentially result in an additional trial to assess the validity of the evidence heard by the grand jury before the real trial could begin. Not only is this not necessary under the Fifth Amendment, it would needlessly delay the judicial process. If a facially valid indictment is issued by a lawfully convened grand jury, the defendant may be properly tried. The Court declines to create a rule allowing the challenge of otherwise valid indictments on the grounds of inadequate evidence. Such a rule would be unnecessary and burdensome. The decision of the lower court is affirmed.

#### Key Terms:

**Grand Jury -** A group of individuals convened for the purpose of reviewing evidence in criminal proceedings and deciding whether to issue an indictment.

**Grand Jury Clause -** Fifth Amendment clause requiring that the government secure an indictment from a grand jury before prosecuting an individual for a serious crime.

#### United States v. Reed

2 Blatchf. 435

Case No. 16,134, 2 Blatchf. 435;[1](https://1.next.westlaw.com/Document/I7cb3c84e53c511d9b17ee4cdc604a702/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef0000017828db817874a32871%3Fppcid%3D92d030ed4534420f978e91b07eff9d46%26Nav%3DCASE%26fragmentIdentifier%3DI7cb3c84e53c511d9b17ee4cdc604a702%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=c767b76dfbbb237e490b4337026467af&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=92d030ed4534420f978e91b07eff9d46&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00111800137001) 15 Law Rep. 428

Circuit Court, N.D. New York.

**UNITED STATES**

**v.**

**REED.**

Oct., **1852**.

## Synopsis

This was a motion to quash an indictment found in the district court at Buffalo, in November, 1851, and transmitted to this court. The indictment was founded upon the 7th section of the act of congress of September 18th, 1850 (9 Stat. 464), commonly called the ‘Fugitive Slave Act,’ and the alleged offence consisted in rescuing from the custody of the **United** **States** marshal, at Syracuse, Jerry, a person lawfully in his custody under that act, as a fugitive from service or labor. The indictment contained two classes of counts—one averring that the person rescued was held to service or labor in the state of Missouri, and was a fugitive from such service, and, as such in the lawful custody of the marshal when the rescue took place—and the other averring that the person rescued was an alleged fugitive from service or labor, and was, at the time of the rescue, in the custody of the marshal, under a warrant duly issued by a **United** **States** commissioner under said act, he having jurisdiction of the case, and proceedings being in progress before him under said warrant, to determine whether the person rescued was such fugitive or not. The motion was founded upon affidavits, and affidavits were read in opposition. The defendant [Enoch **Reed**] had not pleaded, but was now brought into court for the first time, and arraigned, nor had he been arrested, or held to answer in any way, before the indictment was found.

**Holt v. United States**

31 S.Ct. 2

Supreme Court of the **United** **States**.

**JAMES H. HOLT, Plff. in Err.,**

**v.**

**UNITED STATES.**

No. 231.

Argued October 13, 14, **1910**.Decided October 31, **1910**.

**Synopsis**

IN ERROR to the Circuit Court of the **United** **States** for the Western District of Washington to review a conviction for murder, alleged to have been committed in a place within the exclusive Federal jurisdiction. Affirmed.

See same case below on motion for new trial, [168 Fed. 141](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1909101819&pubNum=348&originatingDoc=If22c70089cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

The facts are stated in the opinion.

# United States v. Calandra

#### United States Supreme Court 414 U.S. 338 (1974)

#### Rule of Law

**A witness subpoenaed to testify before a grand jury may not invoke the exclusionary rule as grounds for refusal to answer questions relating to illegally obtained evidence.**

#### Facts

Calandra (defendant) was subpoenaed to testify before a grand jury about evidence seized pursuant to a federal search warrant. Calandra asserted that the evidence was obtained illegally and moved to suppress its admission to the grand jury. Calandra also moved for an order relieving him from having to answer questions based upon the illegally obtained evidence. The district court granted Calandra’s motion and barred the grand jury from asking questions pertaining to the seized evidence. The court of appeals affirmed. The United States (plaintiff) petitioned the Supreme Court for review.

#### Issue

May a witness subpoenaed to testify before a grand jury invoke the exclusionary rule as grounds for refusal to answer questions relating to illegally obtained evidence?

#### Holding and Reasoning (Powell, J.)

No. A witness subpoenaed to testify before a grand jury may not invoke the exclusionary rule as grounds for refusal to answer questions relating to illegally obtained evidence. The purpose of a grand jury is to make a determination as to the existence of probable cause to believe that a defendant has committed a crime. This function serves to protect individuals from baseless criminal prosecutions. The grand jury operates without judicial supervision and has broad authority to compel the production of testimony and evidence. A grand jury is an investigative process and not an adversarial proceeding. A grand jury may consider evidence that would be inadmissible for lack of probative value, but it may not compel a violation of an individual’s constitutional rights. For example, a grand jury cannot compel the production of self-incriminating testimony. The court of appeals held that the Fourth Amendment prohibited the grand jury from compelling Calandra’s testimony regarding illegally obtained evidence. The purpose of the exclusionary rule is not to provide a remedy for the subject of an unlawful search, but to deter unlawful police practices. The rule does not seek to advance a personal right but to generally deter Fourth Amendment search and seizure violations. The rule does not apply in every situation, but only in those where its deterrent purposes will be effectively achieved. Permitting the exclusionary rule to operate in grand jury proceedings would frustrate the investigative functions of a grand jury and impose delays that might defeat effective law enforcement. Extending the exclusionary rule to grand jury proceedings would not enhance its deterrent effect. There should be no concern that failure to extend the rule will serve as an enticement for police to conduct illegal searches with the goal of obtaining a grand jury indictment. Even though illegally obtained evidence would be admissible before the grand jury, it would not be admissible in a subsequent criminal trial. Questions derived from illegally obtained evidence are not the direct product of a Fourth Amendment violation. The allowance of questions derived from illegally obtained evidence does not amount to a new violation of an individual constitutional right. The allowance or disallowance of such derivative evidence implicates the availability of a remedy for a prior constitutional violation. That remedy is not available in the context of grand jury proceedings. The exclusion of illegally obtained evidence would frustrate the purpose of the grand jury without offering an equivalent advancement of the rule’s deterrent purpose. The same logic must extend to the fruits of illegal evidence, including questions derived from that evidence. The judgment of the court of appeals is reversed.

#### Dissent (Brennan, J.)

When this Court announced the deterrent principle underlying the exclusionary rule, it did so in the context of a ruling that made the exclusionary rule applicable to the states. The deterrent principle was announced as justification for the decision not to make the application of the exclusionary rule retroactive, which would have called into question the validity of criminal convictions across the nation. The exclusionary rule is an integral and fundamental element of the Fourth and Fourteenth Amendments. Calandra seeks to assert a remedy for the violation of his individual Fourth Amendment rights and is told that his only recourse is to seek damages. This ruling empowers the state to violate Fourth Amendment rights as long as it is willing to pay for the violation.

#### Key Terms:

**Fourteenth Amendment –** Provides that all persons born or naturalized in the United States are U.S. citizens. Also provides that no state shall: (1) abridge the privileges or immunities of a U.S. citizen; (2) deprive any person of life, liberty, or property, without due process of law; or (3) deny equal protection of the laws to anyone within its jurisdiction.

**Fourth Amendment** - An amendment to the United States Constitution that protects against unreasonable searches and seizures and mandates that warrants be based upon probable cause and that they define the scope of the search or seizure with particularity.

**Exclusionary Rule** - A rule that excludes or suppresses evidence in a criminal proceeding where that evidence was obtained in violation of an individual’s constitutional rights.

# United States v. Williams

#### United States Supreme Court 504 U.S. 36 (1992)

#### Rule of Law

**Courts have a supervisory power that allows them to control their own procedures but not those of the grand jury.**

#### Facts

Williams (defendant) was indicted by a federal grand jury for insurance fraud. Williams petitioned the district court to dismiss the indictment. He claimed that the government did not present substantial exculpatory evidence to the grand jury which negated an essential element of the charged offense. The district court agreed with Williams. The district court held that the exculpatory evidence created reasonable doubt about Williams’ guilt and the grand jury’s decision to indict was therefore suspect. The appeals court affirmed.

#### Issue

Can a court dismiss a valid indictment if the government failed to disclose to the grand jury substantial exculpatory evidence?

#### Holding and Reasoning (Scalia, J.)

No. While courts maintain a supervisory power that allows them to regulate their own procedures, federal courts have only limited control over grand jury procedures and cannot dismiss a valid indictment where the government fails to include exculpatory evidence. Furthermore, it is the role of a grand jury to assess whether there is sufficient evidence to bring criminal charges. If the grand jury had to compel the prosecution to present exculpatory evidence, the grand jury would no longer be an accusatory body but rather an adjudicatory body. The grand jury is a separate institution from the courts and the courts do not preside over its functioning. The rules governing a grand jury are not as stringent as those governing the courts. A grand jury can launch an investigation simply to ensure no laws are being broken and it needs no court authorization to do so. It is true that the grand jury cannot compel the appearance of witnesses and the production of evidence, and must appeal to the courts when such compulsion is necessary. However, precedence shows that the grand jury is free to pursue an investigation and function independent of the courts unless what it seeks to do violates the Constitution. Accordingly, the judgment is reversed and the case is remanded.

#### Dissent (Stevens, J.)

It is the duty of the courts to supervise prosecutors and prevent prosecutorial misconduct. The potential for a prosecutor to abuse his power during a grand jury proceeding is tremendous since the defendant never has the opportunity to present his case. Furthermore, the consequences of a mistaken indictment are serious. Therefore, the judiciary must monitor the prosecution to prevent unfairness and ensure the administration of justice. This position is consistent with prior jurisprudence and the history of grand jury proceedings. Grand juries are not independent of the judiciary. While Congress and the courts have chosen not to impose procedural rules on grand juries, they maintain the power to do so. The prosecution has no duty to present all the evidence that favors the defendant but it must disclose evidence that directly negates the guilt of the defendant.

#### Key Terms:

**Grand Jury -** A group of individuals convened for the purpose of reviewing evidence in criminal proceedings and deciding whether to issue an indictment.

#### Kaley v. United States

134 S.Ct. 1090

Supreme Court of the **United** **States**

**Kerri L. KALEY,**[**et vir**](https://1.next.westlaw.com/Search/Results.html?query=advanced%3a+OAID(5041445827)&saveJuris=False&contentType=BUSINESS-INVESTIGATOR&startIndex=1&contextData=(sc.Default)&categoryPageUrl=Home%2fCompanyInvestigator&originationContext=document&transitionType=DocumentItem)**, Petitioners**

**v.**

**UNITED STATES.**

No. 12–464.

Argued Oct. 16, **2013**.Decided Feb. 25, 2014.

## Synopsis

**Background:** Defendants who had been charged with conspiracy to transport stolen property, transportation of stolen property, obstruction of justice and money laundering moved to vacate protective order that prevented them from transferring assets described in forfeiture count of indictment, as allegedly interfering with their ability to retain criminal defense counsel of their choice. The **United** **States** District Court for the Southern District of Florida, [Kenneth A. Marra](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0175431401&originatingDoc=I29249e439e1e11e3a659df62eba144e8&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I29249e439e1e11e3a659df62eba144e8), J., denied the motion, and defendants appealed. The Court of Appeals for the Eleventh Circuit, [Marcus](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0128259301&originatingDoc=I29249e439e1e11e3a659df62eba144e8&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I29249e439e1e11e3a659df62eba144e8), Circuit Judge, [579 F.3d 1246,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2019620318&pubNum=506&originatingDoc=I29249e439e1e11e3a659df62eba144e8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) reversed and remanded, and denied rehearing en banc. On remand, the District Court, denied defendants' motion to vacate pre-trial protective order restraining their assets, and defendants filed interlocutory appeal. The Court of Appeals, [677 F.3d 1316,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2027568631&pubNum=506&originatingDoc=I29249e439e1e11e3a659df62eba144e8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed. Certiorari was granted.

[**Holding:**](https://1.next.westlaw.com/Document/I29249e439e1e11e3a659df62eba144e8/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef0000017828e4e6f074a32c5f%3Fppcid%3D772db9c0065e4a9491c004d276c86c9b%26Nav%3DCASE%26fragmentIdentifier%3DI29249e439e1e11e3a659df62eba144e8%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=64f2668f7b0a35fbccba7711819b6e58&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=772db9c0065e4a9491c004d276c86c9b&originationContext=Smart%20Answer&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F52032778698) The **United** **States** Supreme Court, Justice [Kagan](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=I29249e439e1e11e3a659df62eba144e8&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I29249e439e1e11e3a659df62eba144e8), held that defendants were not entitled to challenge grand jury's probable cause determination at pre-trial post-restraint hearing; abrogating [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ief2207f707db11dda9c2f716e0c816ba&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=c681aaadfe6a42acb63413866575bf1a&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[***United******States***v. E–Gold, Ltd., 521 F.3d 411,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2015772204&pubNum=506&originatingDoc=I29249e439e1e11e3a659df62eba144e8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))[](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ibbbe744a79db11d98c82a53fc8ac8757&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=c681aaadfe6a42acb63413866575bf1a&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[***United******States***v. Dejanu, 37 Fed.Appx. 870,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002366911&pubNum=6538&originatingDoc=I29249e439e1e11e3a659df62eba144e8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))[](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I8139bee9970b11d9a707f4371c9c34f0&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=c681aaadfe6a42acb63413866575bf1a&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[***United******States***v. Michelle's Lounge, 39 F.3d 684,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1994213590&pubNum=506&originatingDoc=I29249e439e1e11e3a659df62eba144e8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))and [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I58154f5a967211d9bdd1cfdd544ca3a4&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=c681aaadfe6a42acb63413866575bf1a&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[***United******States***v. Monsanto, 924 F.2d 1186](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991024469&pubNum=0000350&originatingDoc=I29249e439e1e11e3a659df62eba144e8&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

Affirmed and remanded.

Chief Justice [Roberts](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0258116001&originatingDoc=I29249e439e1e11e3a659df62eba144e8&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I29249e439e1e11e3a659df62eba144e8) filed a dissenting opinion in which Justices [Breyer](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I29249e439e1e11e3a659df62eba144e8&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I29249e439e1e11e3a659df62eba144e8) and [Sotomayor](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I29249e439e1e11e3a659df62eba144e8&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I29249e439e1e11e3a659df62eba144e8) joined.

**Chapter 12 – Speedy Trial and Other Speedy Dispositions**

# \*\*BARKER v. WINGO\*\*

#### United States Supreme Court 407 U.S. 514 (1972)

#### Rule of Law

**Whether a defendant’s right to a speedy trial has been violated requires applying a balancing test in which the conduct of the prosecution and the conduct of the defendant are weighed and the court considers (1) the length of the delay, (2) the government’s reason for the delay, (3) whether and how the defendant asserted his right to a speedy trial, and (4) whether the defendant was prejudiced by the delay.**

#### Facts

Two suspects were arrested for killing an older couple. The state had a stronger case against Manning so it planned to try Manning first so that he would then testify at Barker’s (defendant) trial. The state encountered many problems with Manning’s trial. After six trials and four years, Manning was finally convicted of both murders. During this time, the state continued to request continuances in Barker’s trial. In all, it made 16 such requests. Upon the state’s twelfth request, Barker filed a motion to dismiss the indictment but his motion was denied and the continuance was granted. Barker then objected to the state’s fifteenth request for a continuance. By this time, Manning’s trials were over but the request was denied and the continuance granted because the state’s chief investigating officer was sick. The witness was still unable to testify when the new trial date came around so an additional continuance was granted. Barker again requested that the indictment be dismissed, specifying that his right to a speedy trial had been violated. His motion was denied. Finally the trial commenced and Barker was convicted. The state court of appeals affirmed the conviction. Barker petitioned the Sixth Circuit Court of Appeals for habeas corpus but the court ruled that he had waived his right to a speedy trial for the entire period before he objected to the state’s fifteenth request for a continuance. The United States Supreme Court granted certiorari.

#### Issue

Is a defendant denied his right to a speedy trial when it appears that he does not in fact want a speedy trial?

#### Holding and Reasoning (Powell, J.)

No. To determine whether or not a defendant has been denied his right to a speedy trial, courts must look at both the actions of the prosecution and the defendant. The courts cannot establish a timeframe defining what “speedy” means because such rule making remains the power of the legislatures. Furthermore, courts cannot hold that the right to a speedy trial can only be violated in cases where the defendant asserts that right. No precedence supports the position that there is an assumed waiver of constitutional rights. The right to a speedy trial differs from other constitutional rights because it often protects the rights of society and not the rights of the defendant, because deprivation of the right often benefits the defendant, and because the right is inherently vague. For these reasons, a balancing approach is preferable to a bright-line rule. While none are necessary or sufficient to finding a deprivation of the right to a speedy trial, courts must consider four factors in their balancing analysis: (1) the length of the delay; (2) the government’s reason for the delay; (3) whether and how the defendant asserted his right to a speedy trial; and (4) whether the defendant was prejudiced by the delay. In this case, Barker’s right to a speedy trial was not violated. It is true that there was an incredible delay in Barker’s case with over five years elapsing between his arrest and his trial, and most of this time was attributable to the state’s inability to create a case against Barker. However, Barker was not prejudiced by the delay. He spent most of the time between his arrest and his trial out on bail, and he was not injured by witnesses who forgot key pieces of information. In addition, Barker did not want a speedy trial. He took a chance that if Manning was acquitted he would never be tried and thus he did not want his trial to commence until Manning’s ended. Barker had counsel throughout the many continuance requests and it was not until he realized that Manning was not going to be acquitted that he began to assert his right to a speedy trial. Therefore, in the final balancing analysis, Barker was not deprived of his due process right.

#### Concurrence (White, J.)

Barker’s right to a speedy trial would have been violated if he had not acquiesced with the multiple requests for continuances. Delays between arrest and trial interfere with a defendant’s liberty, whether he is out on bail or not. The purpose of the Sixth Amendment right to a speedy trial is to protect against such interference.

**Key Terms:**

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

# Vermont v. Brillon

#### United States Supreme Court 556 U.S. 81 (2009)

#### Rule of Law

**Delays caused by assigned defense counsel are properly attributed to the defendant.**

#### Facts

On July 27, 2001, Michael Brillon (defendant) was arrested and later charged with felony domestic assault. The court assigned Richard Ammons, a public defender, as Brillon’s attorney. Ammons filed several motions for continuances that were ultimately denied. Brillon fired Ammons on February 22, 2002, and the trial court granted Ammons’ motion to withdraw. That same day, the trial judge appointed a second attorney, who withdrew immediately due to a conflict. On March 1, 2002, the court assigned Gerard Altieri as Brillon’s third attorney. Brillon moved to dismiss Altieri based on his lack of communication. Altieri also sought to withdraw as counsel on grounds that Brillon had threatened his life. The trial court granted Brillon’s motion but warned him that the grant of the motion would only extend his time in jail while waiting for trial. The trial court appointed Paul Donaldson as Brillon’s fourth attorney on the same day. Donaldson moved for additional time due to his caseload. Brillon sought to remove Donaldson for his lack of responsiveness. On November 26, 2002, Donaldson was released from the case because his contract with the Defender General’s office expired. Brillon’s fifth counsel, David Sleigh, was assigned on January 15, 2003. Sleigh requested several extensions due to his caseload. On April 10, 2003, Sleigh withdrew as counsel due to changes in his contract with the Defender General. Brillon was without counsel for the ensuing four months. Kathleen Moore was appointed as Brillon’s sixth counsel on August 1, 2003. The trial court granted both parties several extensions. On February 23, 2004, Moore sought dismissal of the case for lack of a speedy trial. The trial court denied the motion. After trial on June 14, 2004, Brillon was convicted and sentenced to 12 to 20 years in prison. Brillon sought a post-trial dismissal for lack of a speedy trial. The trial court denied the motion, finding that the delay was mostly Brillon’s fault and that Brillon failed to demonstrate prejudice resulting from the delay. The Vermont Supreme Court vacated Brillon’s conviction, finding that his right to a speedy trial had been denied.

#### Issue

Are delays caused by assigned defense counsel properly attributed to the defendant?

#### Holding and Reasoning (Ginsburg, J.)

Yes. The Sixth Amendment requires that an accused be afforded a speedy trial. Factors to consider in determining whether this right has been violated include the length of the delay, the reason for the delay, whether the defendant asserted the right, and whether the defendant suffered prejudice as a result of the delay. Where the reason for delay is the fault of the attorney, the delay is generally attributed to the defendant, since the attorney is the defendant’s agent. This is the case even where the attorney is a public defender assigned by the court, unless it can be shown there was a systemic breakdown in the public defender system. Although a public defender is part of the state criminal justice system, the public defender acts only in the interest of the defendant. Here, the Vermont Supreme Court charged against Brillon the delays caused by his firing of Ammons and his threat against Altieri’s life, but charged the State with delays caused by assigned counsel in moving the case forward. However, since delays caused by a public defender are generally attributable to the defendant and there was no finding that there was a systemic breakdown in the public defender system, this Court holds that the Vermont Supreme Court erred and its decision is reversed.

**Key Terms:**

**Speedy Trial Clause -** Guarantee contained in the Sixth Amendment that a person accused of a crime shall not be subject to undue delays between the initiation of prosecution and trial.

# \*\*DOGGETT v. UNITED STATES\*\*

#### United States Supreme Court 505 U.S. 647 (1992)

#### Rule of Law

**An eight and one-half years delay between indictment and arrest due to the government’s negligence violates the Sixth Amendment right to a speedy trial.**

#### Facts

Doggett (defendant) was indicted on drug conspiracy charges. Doggett did not know about the indictment and left the country for two years. Upon return, Doggett passed through customs, married, worked, and lived for six years without incident before the outstanding warrant was found. Doggett was arrested.

#### Issue

Does an eight and one-half years delay between indictment and arrest violate the Sixth Amendment right to a speedy trial?

#### Holding and Reasoning (Souter, J.)

Yes. An eight and one-half years delay between indictment and arrest caused by governmental negligence violates the right to a speedy trial guaranteed by the Sixth Amendment. In assessing whether a delay is permissible, courts consider (1) the length of the delay, (2) which side is more at fault, (3) if the accused invoked his right to a speedy trial, and (4) whether the delay caused prejudice to the defendant. The length of the delay is both a threshold question and a component of the claim. An eight and one-half years delay creates a presumption of prejudice, and the threshold is met. The government is at fault because it failed to exercise due diligence in finding and prosecuting Doggett, while Doggett was unaware of the indictment. The primary issue in this case is whether the defendant has made the requisite showing of prejudice. Doggett was not detained or even aware of the indictment; thus, the only type of prejudice possible is the loss or degradation of evidence. In *Barker v. Wingo*, 407 U.S. 514 (1972), this Court noted that loss of evidence often cannot be proven. As a result, prejudice may be presumed. On a continuum between governmental diligence and bad faith, the negligence in this case falls somewhere in the middle. Nevertheless, because of the length of time lapsed due to the government’s negligence, Doggett’s Sixth Amendment right to a speedy trial was violated. The indictment is dismissed.

#### Dissent (Thomas, J.)

The facts of this case are highly unusual, but Doggett was not subjected to the disadvantages the right to a speedy trial serves to curtail. The right is not a statute of limitations requiring trial “speedily after the offense.” The test set forth in *Barker* is inapplicable here because Doggett did not know he was under indictment. The indictment is dismissed based on the inadequacy of law enforcement’s efforts to find Doggett instead of actual prejudice to the defense. This ruling asks courts to sit in judgment of investigatory practices, and this is not supported by the Constitution.

**Key Terms:**

**Speedy Trial Clause -** Guarantee contained in the Sixth Amendment that a person accused of a crime shall not be subject to undue delays between the initiation of prosecution and trial.

**Barker v. Wingo**

#### United States Supreme Court 407 U.S. 514 (1972)

#### Rule of Law

**Whether a defendant’s right to a speedy trial has been violated requires applying a balancing test in which the conduct of the prosecution and the conduct of the defendant are weighed and the court considers (1) the length of the delay, (2) the government’s reason for the delay, (3) whether and how the defendant asserted his right to a speedy trial, and (4) whether the defendant was prejudiced by the delay.**

**United States v. MacDonald**

102 S.Ct. 1497

Supreme Court of the **United** **States**

**UNITED STATES, Petitioner**

**v.**

**Jeffrey R. MacDONALD.**

No. 80-1582.

Argued Dec. 7, 1981.Decided March 31, **1982**.

**Synopsis**

Defendant was convicted before the **United** **States** District Court for the Eastern District of North Carolina, at Raleigh, of murdering his wife and children, and he appealed. The Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I6a86bdbe922911d9bc61beebb95be672&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=346a1c79fd344e2394ecc93bf143d3a7&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[632 F.2d 258,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980132876&pubNum=350&originatingDoc=Ic1d342709c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))reversed on speedy trial grounds, and denied a petition for rehearing, [635 F.2d 1115.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980151200&pubNum=350&originatingDoc=Ic1d342709c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) Upon granting certiorari, the Supreme Court, Chief Justice Burger, held that time between dismissal of military charges and a subsequent indictment on civilian criminal charges should not be considered in determining whether the delay in bringing respondent to trial violated his right to a speedy trial under the Sixth Amendment.

Reversed and remanded.

Justice Stevens filed an opinion concurring in the judgment.

Justice Marshall filed a dissenting opinion in which Justice Brennan and Justice Blackmun joined.

**United States v. Loud Hawk**

106 S.Ct. 648

Supreme Court of the **United** **States**

**UNITED STATES, Petitioner,**

**v.**

**Kenneth Moses LOUD HAWK et al.**

No. 84–1361.

Argued Nov. 12, 1985.Decided Jan. 21, 1986.Rehearing Denied March 3, 1986.See [475 **U.S**. 1061, 106 S.Ct. 1289](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&pubNum=708&cite=106SCT1289&originatingDoc=Ic1e4597b9c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

**Synopsis**

Following reversal of suppression order and dismissal of indictment in the Ninth Circuit, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I545c5de191c311d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=5d9c3e94320048e29f43a073118082ab&Rank=2&RuleBookModeDisplay=False&contextData=(sc.Search))[628 F.2d 1139,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979130106&pubNum=350&originatingDoc=Ic1e4597b9c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) the **United** **States** District Court for the District of Oregon granted as to **one** defendant motion to dismiss superseding indictment. The Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I15df1b9992fb11d9bdd1cfdd544ca3a4&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=5d9c3e94320048e29f43a073118082ab&Rank=2&RuleBookModeDisplay=False&contextData=(sc.Search))[682 F.2d 841,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1982134234&pubNum=350&originatingDoc=Ic1e4597b9c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) reversed, but dismissed other defendants' appeals for lack of jurisdiction. On remand, the District Court granted defendants' motion to dismiss on speedy trial grounds, and the Government appealed. The Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I9a6d5673945811d9a707f4371c9c34f0&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=5d9c3e94320048e29f43a073118082ab&Rank=2&RuleBookModeDisplay=False&contextData=(sc.Search))[741 F.2d 1184,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984141064&pubNum=350&originatingDoc=Ic1e4597b9c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed, and certiorari was granted. The Supreme Court, Justice Powell, held that: (**1**) time during which indictment was dismissed and defendants were free of all restrictions on their liberty was excludable from length of delay considered under speedy trial clause; (2) delay attributable to interlocutory appeals did not count for defendants' speedy trial claim; and (3) delays in question were not sufficiently long to justify dismissal of case because of alleged violation of speedy trial clause.

Reversed.

Justice Marshall filed dissenting opinion, in which Justices Brennan, Blackmun and Stevens, joined.

**Procedural Posture(s):** On Appeal; Motion to Dismiss.

# United States v. Marion

#### United States Supreme Court 404 U.S. 307 (1971)

#### Rule of Law

**The Sixth Amendment right to a speedy trial is not activated until arrest or indictment, and a pre-indictment delay is only cause for dismissal if it violates the statute of limitations or due process.**

#### Facts

Marion and others (defendants) were indicted for crimes that occurred more than three years before. The United States Attorney’s office said the delay was due to understaffing and more important cases taking precedence. The defendants claimed that the lengthy delay before indictment was unduly prejudicial and sought dismissal under the Sixth Amendment.

#### Issue

Does a three-year delay after a crime has occurred before an indictment is brought violate the Sixth Amendment right to a speedy trial?

#### Holding and Reasoning (White, J.)

No. The right to a speedy trial does not apply to pre-indictment delays. The Sixth Amendment guarantees a criminal defendant a speedy trial. By its plain language, the amendment only applies to a defendant once a criminal prosecution has been initiated. The amendment confers no rights on a person who has not been accused of a crime and imposes no duty on the government to conduct an investigation or bring a prosecution in a set timeframe. The language of the Amendment suggests that the framers did not intend to extend the protections to individuals not yet subject to criminal prosecution, and precedent does not support such an expansive construction. Before arrest, an individual does not bear the loss of freedom or other disadvantages associated with criminal prosecution. Pre-indictment delays may impair the defendant’s ability to secure evidence and construct a defense, but that detriment does not justify redefining the right. Statutes of limitations bar prosecution after a set period of time and balance the government’s interests against the potential prejudice to criminal defendants. Thus, it is not necessary to invoke the Sixth Amendment since statutes of limitations already protect the defendant’s interests. While intentionally delaying indictment to disadvantage a defendant so that a fair trial is not possible could lead to dismissal on due process grounds, the circumstances requiring dismissal will require future adjudication. In this case, prosecution was not barred by the statute of limitations. Further, there has been no showing of prosecutorial intent to prejudice the defendants or any genuine prejudice, and therefore dismissal is not warranted on due process grounds.

#### Concurrence (Douglas, J.)

As a historical matter, lapse of time after the commission of a crime was a factor in British courts’ decision to issue an information. Further, criminal prosecutions were instituted by private citizens, and a person was often formally accused before the state issued an indictment. The right to a speedy trial furthers the government’s interest in the effective prosecution and deterrence of crime as well as an individual’s ability to put on a defense. Pre-indictment delays can be just as detrimental to an individual, who has no opportunity to clear his name, as post-indictment delays. In fact, an unindicted individual with no notice of an impending trial may be at greater risk of forgetting or losing evidence. In this case, a substantial amount of time passed between the crime and the indictment. The delay in this case would violate the Sixth Amendment right to a speedy trial for a less complex crime. The right was not violated here since prosecuting this type of case is complicated and time-consuming, but a three-year delay is at the outer limit of what is allowable.

**Key Terms:**

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

**Information -** A criminal charge filed with the court, containing the crimes alleged and factual allegations supporting the charges, that commences a criminal case without a grand jury indictment.

**Speedy Trial Clause -** Guarantee contained in the Sixth Amendment that a person accused of a crime shall not be subject to undue delays between the initiation of prosecution and trial.

# \*\*UNITED STATES v. LOVASCO\*\*

#### United States Supreme Court 431 U.S. 783 (1977)

#### Rule of Law

**An investigative delay does not violate the Due Process Clause, even if it resulted in prejudice to the defendant.**

#### Facts

Lovasco (defendant) was suspected of possessing stolen guns and selling guns without a license between July 25 and August 31, 1973. One month later, the Postal Inspector issued a report stating that there was strong evidence against Lovasco, but that investigators had not been able to establish how Lovasco got the guns. On March 6, 1975, Lovasco was indicted for the crime. Lovasco moved to dismiss on the grounds that the undue delay had impaired his ability to defend himself. Lovasco said two material witnesses died before the indictment was issued. The district court dismissed the indictment, and the court of appeals affirmed.

#### Issue

Does an 18-month delay between commission of the crime and indictment violate the Due Process Clause?

#### Holding and Reasoning (Marshall, J.)

No. Investigative delays do not violate the Due Process Clause. The Court in *United States v. Marion*, 404 U.S. 307 (1971), made clear that the Sixth Amendment right to a speedy trial is inapplicable to delays that occur before an individual has been indicted or at least arrested. Generally, statutes of limitations are the primary mechanism for addressing the permissibility of pre-arrest delays, but it is possible that some delays could violate due process. A defendant alleging a due process violation must show that the delay caused actual prejudice and that the reason for the delay was impermissible. Forcing the prosecution to bring charges as soon as there is enough evidence for a guilty verdict is unreasonable. Such a rule would strip the government of its ability to build cases against multiple defendants in complicated criminal enterprises and require redundant trials for each defendant. Further, prosecutors might rush to bring charges in cases where prosecution is not justified or advisable. Pre-arrest delays used to continue investigation and consider the propriety of bringing charges at all may benefit the defendant. These investigative delays do not violate the Due Process Clause, even if prejudicial. The lower courts in this case found that delaying the indictment so that additional defendants could be found was impermissible and dismissed the indictment, but Lovasco has not made the necessary showing for a due process violation. The ruling of the lower courts is reversed.

#### Dissent (Stevens, J.)

The Court’s ruling is unfounded. The district court found and the appellate court affirmed that the prosecution substantially delayed indictment and prejudiced Lovasco for no reason. The principles of swift justice rooted in the common law and manifested in our Constitution require dismissal of the indictment. The ruling of the court of appeals should be affirmed.

#### Key Terms:

**Due Process -** A constitutional guarantee that a law shall not be unreasonable, arbitrary, or capricious and that individuals will be given notice of legal proceedings conducted fairly with an opportunity for an individual to be heard before the government may impose sanctions on one’s life, liberty, or property.

# United States v. Marion

#### United States Supreme Court 404 U.S. 307 (1971)

#### Rule of Law

**The Sixth Amendment right to a speedy trial is not activated until arrest or indictment, and a pre-indictment delay is only cause for dismissal if it violates the statute of limitations or due process.**

# Betterman v. Montana

#### United States Supreme Court 136 S. Ct. 1609 (2016)

#### Rule of Law

**The Sixth Amendment’s Speedy Trial Clause does not apply to sentencing proceedings.**

#### Facts

Brandon Betterman (defendant) was charged with domestic assault. He failed to appear in court, and the State of Montana (plaintiff) charged him with bail jumping. Betterman pleaded guilty to the bail-jumping charge. Betterman then waited in jail for 14 months for sentencing. The delay was mostly based on institutional delay, such as the preparation of the presentence report and the scheduling of the sentencing. Eventually, Betterman was sentenced to seven years in prison. Betterman appealed.

#### Issue

Does the Sixth Amendment’s Speedy Trial Clause apply to sentencing proceedings?

#### Holding and Reasoning (Ginsburg, J.)

No. The Sixth Amendment’s Speedy Trial Clause does not apply to sentencing proceedings. There are three phases to a criminal proceeding. The first phase is when the state investigates and determines whether to charge a suspect. The second phase occurs between charging, and trial or plea. The third phase is between the conviction and sentencing. In the first phase, statutes of limitations and the Due Process Clause protect an individual against delay. During the second phase, an individual is presumed innocent, and the Sixth Amendment’s Speedy Trial Clause protects the individual against delay. This clause reflects the concern that a presumptively innocent person should not languish under an unresolved charge. Therefore, the clause guarantees an individual accused of a crime the right to a speedy trial. The remedy for a violation of this clause is the dismissal of charges. Here, Betterman argues that the Speedy Trial Clause also applies to the third phase. However, the clause uses the term “accused” instead of “convicted,” and the term “trial” instead of “sentencing.” Additionally, Congress enacted a statute implementing the Speedy Trial Clause, which sets a firm limit on the amount of time between being charged with a crime and going to trial. States have adopted similar statutes. None of these statutes addresses the time period between conviction and sentencing. The primary concern of the Speedy Trial Clause, which is the protection of those presumed innocent, is also not implicated during this third phase. Instead, individuals must raise any issues regarding delay during the sentencing phase through applicable statutes, rules, and the Due Process Clause. Therefore, the Speedy Trial Clause does not apply to the sentencing phase of a criminal proceeding, and Betterman cannot obtain relief under that clause. Accordingly, the trial court’s judgment is affirmed.

**Key Terms:**

**Speedy Trial Clause -** Guarantee contained in the Sixth Amendment that a person accused of a crime shall not be subject to undue delays between the initiation of prosecution and trial.

**State v. Gray, 917 S.W.2d 668 (Tenn. 1996)**

**State v. Gray (Westlaw)**

917 S.W.2d 668

Supreme Court of **Tennessee**,

at Nashville.

**STATE of Tennessee, Appellee,**

**v.**

**Harold Winter GRAY, Appellant.**

Feb. 26, **1996**.

**Synopsis**

Defendant was indicted for carnal knowledge of female under age of twelve. The Wilson County Court, [James O. Bond](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0209589701&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ib6ec7c0ce7c711d98ac8f235252e36df), J., dismissed indictment, and **state** appealed. The Court of Criminal Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I64718f0feb3811d9bf60c1d57ebc853e&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=33d8d6baece847fbaba52a7ef6119ff8&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[1994 WL 405335,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1994163197&pubNum=999&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))reversed, and defendant applied for further review. The Supreme Court, [Birch](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0259809301&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ib6ec7c0ce7c711d98ac8f235252e36df), J., held **that prosecution of defendant for incident that occurred 42 years prior to indictment violated due process.**

Judgment of Court of Criminal Appeals reversed; judgment of trial court reinstated.

Appeal from County Court, Wilson County; Hon. [James O. Bond](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0209589701&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ib6ec7c0ce7c711d98ac8f235252e36df), Judge.

## **Attorneys and Law Firms**

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**OPINION**

[BIRCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0259809301&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ib6ec7c0ce7c711d98ac8f235252e36df), Justice.

On September 15, 1992, a Wilson County grand jury indicted Harold Winter **Gray**, the defendant, upon a single charge of carnal knowledge of a female under the age of twelve.[1](https://1.next.westlaw.com/Document/Ib6ec7c0ce7c711d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef0000017829010db274a336ad%3Fppcid%3D0eb9705777764333b71c695b1fe17d6f%26Nav%3DCASE%26fragmentIdentifier%3DIb6ec7c0ce7c711d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=825a2e5e300a5a100a4135f27eda08a4&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=0eb9705777764333b71c695b1fe17d6f&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00111996058459) The indictment alleged that the offense occurred in the early months of 1950.

In a pretrial motion to dismiss the indictment, **Gray** contended that prosecution was barred by the statute of limitations and that the indictment violated his due process and speedy trial rights under the constitutions of the United **States** and the **State** of **Tennessee**. He based these contentions on the prejudice to his rights occasioned by the forty-two-year period between the act alleged and the indictment. The trial court agreed with **Gray's**contentions and dismissed the indictment.

The Court of Criminal Appeals considered the **State's** appeal pursuant to [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=NF078AD8003A511DCA094A3249C637898&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=33d8d6baece847fbaba52a7ef6119ff8&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[Rule 3, Tenn.R.App.P](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1008880&cite=TNRRAPR3&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). After a searching analysis, the court rendered an opinion in which it articulated three significant conclusions: (1) the general savings statute saved the prosecution  **\*670** of the cause from the operation of the statute of limitations;[2](https://1.next.westlaw.com/Document/Ib6ec7c0ce7c711d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef0000017829010db274a336ad%3Fppcid%3D0eb9705777764333b71c695b1fe17d6f%26Nav%3DCASE%26fragmentIdentifier%3DIb6ec7c0ce7c711d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=825a2e5e300a5a100a4135f27eda08a4&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=0eb9705777764333b71c695b1fe17d6f&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00221996058459) (2) the **State** bore no responsibility for the delay in prosecuting the case; and (3) the **State** did not violate **Gray's** due process rights. Pursuant to this analysis, the Court of Criminal Appeals reversed the trial court's judgment, reinstated the indictment, and remanded the cause for further proceedings.

We accepted **Gray's** application for review under [Rule 11, Tenn.R.App.P](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1008880&cite=TNRRAPR11&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))., in order to determine whether “pre-accusatorial delay” in this case violated **Gray's** constitutional rights. We use “pre-accusatorial” to refer to the period of time between the commission of an offense and its disclosure to law enforcement authorities. Other jurisdictions refer to this period as “pre-indictment.” However, under the facts of this case, we believe “pre-accusatorial” is more appropriate because “pre-indictment” suggests that the **State** has knowledge of the offense, which is not the case here.

After a thorough examination of the record and a careful consideration of the issue presented, we have concluded that the prosecution should not continue. Accordingly, for the reasons outlined below, we reverse the judgment of the Court of Criminal Appeals and reinstate the trial court's order dismissing the indictment.

**I**

At the outset, we agree with the Court of Criminal Appeals that the prosecution of **Gray** is not barred by the statute of limitations. However, because we find the constitutional issue dispositive, we need not further address the statute of limitations issue.

**II**

Mary Joanne **Gray** Perdue, who was approximately fifty-three years old at the time of the hearing, testified that in early 1950, **Gray**, her uncle, penetrated her vaginally. In 1950, **Gray** was approximately nineteen, and Perdue was eight. She testified that **Gray** told her at the time that he would be killed if she told anyone. Thereafter, rumor and innuendo about **Gray's** sexual conduct with Perdue and other nieces coursed through the small community where they lived. Nothing definitive was said or done, however, until early 1992. On that occasion, Perdue had a conversation with her cousin in which the women expressed to each other their concern for **Gray's** granddaughter. The apparent root of their concern was the fear that **Gray** might treat the granddaughter or other young female family members as he had treated them.

Following the conversation with her cousin, Perdue discussed the matter with other family members and an attorney. It was after these discussions that Perdue decided to lodge a formal complaint against **Gray**; she accomplished this by contacting the District Attorney General. The matter was referred to Agent Donna Pence, **Tennessee** Bureau of Investigation. Perdue cooperated with the investigators and the District Attorney General; the indictment followed shortly thereafter. When asked, at the hearing on **Gray's** motion to dismiss, why she had waited so long before coming forward with this information, Perdue responded, “For years I thought that I had done something that possibly caused him to do this to me. But over the years I realized that there's nothing that a young child can do to cause an adult to do this to them.”

On appeal, **Gray** insists that the trial court properly dismissed the indictment against him as violative of his due process rights because (1) the victim waited forty-two years before filing charges against him, and (2) there was no justification for the delay. He urges that the pre-accusatorial delay caused him substantial prejudice because he “is placed with the awesome task of trying to recall people and events [forty-two] years ago.”

**\*671** [1](https://1.next.westlaw.com/Document/Ib6ec7c0ce7c711d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef0000017829010db274a336ad%3Fppcid%3D0eb9705777764333b71c695b1fe17d6f%26Nav%3DCASE%26fragmentIdentifier%3DIb6ec7c0ce7c711d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=825a2e5e300a5a100a4135f27eda08a4&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=0eb9705777764333b71c695b1fe17d6f&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F11996058459)In **Tennessee**, the law is well-settled that “[d]elay between the commission of an offense and the commencement of adversarial proceedings does not violate an accused's constitutional right to a speedy trial.”

[](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ifffcb012e7d911d98ac8f235252e36df&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=33d8d6baece847fbaba52a7ef6119ff8&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[***State***v. Dykes, 803 **S.W**.**2d** 250, 255 (Tenn.Crim.App.1990)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991026840&pubNum=0000713&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=RP&fi=co_pp_sp_713_255&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_255) (citing [United***States***v. Marion, 404 U.S. 307, 92 S.Ct. 455, 30 L.Ed.2d 468 (1971)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971136565&pubNum=0000708&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); [***State***v. Baker, 614 **S.W**.**2d** 352 (**Tenn**.1981)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981118320&pubNum=0000713&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); [***State***v. Walton, 673 **S.W**.**2d** 166, 170 (Tenn.Crim.App.1984)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984135749&pubNum=0000713&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=RP&fi=co_pp_sp_713_170&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_170); [Boswell v.***State***, 528 **S.W**.**2d** 825, 826–27 (Tenn.Crim.App.1975)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1975135347&pubNum=0000713&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=RP&fi=co_pp_sp_713_826&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_826)). However, as the Dykes court further recognized, the “ ‘delay may occur in such a manner that the defendant's Fifth Amendment right to due process—in contrast to the Sixth Amendment right to speedy trial—is violated.’ ” [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ifffcb012e7d911d98ac8f235252e36df&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=33d8d6baece847fbaba52a7ef6119ff8&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[Id.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991026840&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) (quoting [Baker, 614 **S.W**.**2d**at 354);](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981118320&pubNum=713&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=RP&fi=co_pp_sp_713_354&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_354) see also[United***States***v. Lovasco, 431 U.S. 783, 97 S.Ct. 2044, 52 L.Ed.2d 752 (1977)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118799&pubNum=0000708&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). Additionally, as the Court of Criminal Appeals once noted, “[w]hile there is no constitutional right to be arrested, courts have recognized that an unreasonable delay between the commission of the offense and the arrest may violate the defendant's constitutional rights if the delay results in prejudice to him or was part of a deliberate, purposeful and oppressive design for delay.” [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Id6faf839ec7911d983e7e9deff98dc6f&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=33d8d6baece847fbaba52a7ef6119ff8&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[Halquist v.***State***, 489 **S.W**.**2d** 88, 93 (Tenn.Crim.App.1972)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972133336&pubNum=0000713&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=RP&fi=co_pp_sp_713_93&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_93), rev'd on other grounds,[](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I74f5c8d1e7b211d99439b076ef9ec4de&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=33d8d6baece847fbaba52a7ef6119ff8&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[***State***v. Jones, 598 **S.W**.**2d** 209 (**Tenn**.1980)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980115739&pubNum=0000713&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) (citation omitted). Thus, according to the Dykes court,

[b]efore an accused is entitled to relief based upon the delay between the offense and the initiation of adversarial proceedings, the accused must prove that (a) there was a delay, (b) the accused sustained actual prejudice as a direct and proximate result of the delay, and (c) the **State** caused the delay in order to gain tactical advantage over or to harass the accused.

[](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ifffcb012e7d911d98ac8f235252e36df&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=33d8d6baece847fbaba52a7ef6119ff8&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[803 **S.W**.**2d** at 256.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991026840&pubNum=713&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=RP&fi=co_pp_sp_713_256&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_256)

**Gray** and the **State** address the Dykes test in their briefs. On one hand, **Gray** contends that he has satisfied the requirements of Dykes. In his view, the Court of Criminal Appeals applied the third prong of Dykes too narrowly. He urges that the **State** stands in the shoes of the victim; therefore, he attributes to the **State** the victim's delay in filing charges. Assuming, arguendo, that Dykes is the standard, we find this argument unpersuasive and agree with the Court of Criminal Appeals that there is no evidence in the record that the **State** caused the delay. The **State** cannot be held responsible for conduct of which it had no knowledge, to which it had not acquiesced, and over which it had no control.

On the other hand, the **State** insists that the trial court erred in finding that the delay in bringing the prosecution violated **Gray's** Fifth Amendment due process rights because the trial judge ignored the Dykes requirements. The Court of Criminal Appeals agreed, finding the third prong of Dykes dispositive. We conclude otherwise. In Dykes, the Court of Criminal Appeals addressed the issue whether the delay between the alleged commission of an offense and the initiation of criminal proceedings violated the defendant's speedy trial or due process rights where the **State**had knowledge of the offense. The case before us is different. First, in Dykes the interim between the alleged offense and the indictment was approximately one year. In contrast, the interim in the case under review was forty-two years. Second, in Dykes, the **State** had knowledge of the offense from the time of commission. In the instant case there was no such knowledge. Thus, we find the Dykes three-pronged test to be inapposite here.

In the case before the Court, Perdue has accused **Gray** of sexually penetrating her when she was eight years old in early 1950. She testified that for more than forty years—until March 26, 1992—she kept her silence about the incident. There is no evidence in the record that **Gray** tried to conceal his alleged conduct or that he threatened the victim in any way. Perdue testified that she had been “bothered” by her memory of the incident throughout her childhood and adult life. Finally, the record shows that she continued to interact with the defendant through the years. Under these facts, the trial court correctly held that forty-two years “is much too long to wait before prosecuting an alleged offense where the prosecutor [victim] **\*672** is of legal age for the great majority of this time....”[3](https://1.next.westlaw.com/Document/Ib6ec7c0ce7c711d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef0000017829010db274a336ad%3Fppcid%3D0eb9705777764333b71c695b1fe17d6f%26Nav%3DCASE%26fragmentIdentifier%3DIb6ec7c0ce7c711d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=825a2e5e300a5a100a4135f27eda08a4&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=0eb9705777764333b71c695b1fe17d6f&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00331996058459)

In holding that Dykes does not apply to the circumstances here, we are left with the task of determining the appropriate standard by which to measure pre-accusatorial delay—the period of time between the commission of the offense and its disclosure to law enforcement authorities. This precise issue has neither been discussed nor decided in **Tennessee**. Hence, we look to other jurisdictions for guidance.

The California Supreme Court's opinion in [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I53d135d1fab311d9bf60c1d57ebc853e&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=33d8d6baece847fbaba52a7ef6119ff8&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[People v. Morris, 46 Cal.3d 1, 249 Cal.Rptr. 119, 756 P.2d 843 (1988)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988094467&pubNum=0000661&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), provides some guidance, although it deals with the related issue of pre-indictment delay. Morris was sentenced to death for a September 1978 murder. [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I53d135d1fab311d9bf60c1d57ebc853e&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=33d8d6baece847fbaba52a7ef6119ff8&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[249 Cal.Rptr. at 125, 756 P.2d at 849.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988094467&pubNum=661&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=RP&fi=co_pp_sp_661_849&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_661_849) By February 1979, the police had ample evidence linking Morris to the crime; however, charges were not filed against him until May 1982. Id. In Morris, the court declared, “An unreasonable delay between the time an offense is committed and an accusatory pleading is filed may violate a defendant's right to a fair trial and due process of law under ... the California Constitution and the Fifth and Fourteenth Amendments to the United **States** Constitution.” [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I53d135d1fab311d9bf60c1d57ebc853e&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=33d8d6baece847fbaba52a7ef6119ff8&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[249 Cal.Rptr. at 142, 756 P.2d at 866.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988094467&pubNum=661&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=RP&fi=co_pp_sp_661_866&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_661_866) The California court further **stated** that a pre-complaint delay must be evaluated by weighing any prejudice the delay caused the defendant against justification for the delay. Id. The court continued,

“In the balancing process, the defendant has the initial burden of showing some prejudice before the prosecution is required to offer any reason for the delay. The showing of prejudice requires some evidence and cannot be presumed.” Prejudice may be shown by loss of material witnesses due to lapse of time or loss of evidence because of fading memory attributable to the delay.

[](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I53d135d1fab311d9bf60c1d57ebc853e&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=33d8d6baece847fbaba52a7ef6119ff8&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[249 Cal.Rptr. at 142, 756 P.2d at 866](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988094467&pubNum=0000661&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=RP&fi=co_pp_sp_661_866&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_661_866) (citations omitted).

The Court of Appeals of New York also provides some guidance on the issue. In [People v. Singer, 44 N.Y.2d 241, 405 N.Y.S.2d 17, 376 N.E.2d 179 (1978)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1978106320&pubNum=0000578&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), the defendant was convicted of felony-murder. The crime occurred on October 22, 1970; however, the defendant was not arrested and charged until May 1974. In its discussion, the court commented on the distinction the United **States** Supreme Court makes when evaluating pre-arrest or pre-accusatorial delay and post-arrest or post-indictment delay. The New York court noted,

Characterization of the delay as “preindictment” or “postindictment” is often determinative. Delay in bringing the defendant to trial after indictment or arrest is measured against the Sixth Amendment speedy trial requirement which takes into account a number of factors, including actual or potential prejudice to the defendant's case through the loss of witnesses and the dulling of memory. Preindictment delay, on the other hand, is governed by the due process clause which generally requires a showing of actual prejudice before dismissal would be warranted.

[405 N.Y.S.2d at 24, 376 N.E.2d at 185](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1978106320&pubNum=0000578&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=RP&fi=co_pp_sp_578_185&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_578_185) (citations omitted). The court further **stated** that this “distinction is based essentially on the theory that the speedy trial guarantee was designed primarily ‘to prevent undue and oppressive incarceration prior to trial, [and] to minimize anxiety and concern accompanying public accusation.’ ” Id. (quoting [Marion, 404 U.S. at 320, 92 S.Ct. at 463).](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971136565&pubNum=708&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=RP&fi=co_pp_sp_708_463&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_463) Moreover, observed the court, “[t]he distinction assumes that these considerations do not become relevant until the defendant has been arrested or formally accused.” Id.

Further, while the Supreme Court “has recognized ... that any delay in bringing the defendant to trial may impair his right to a fair trial, ... it has assumed that the Statute of Limitations is the primary safeguard against potential prejudice when there has been a delay in arresting or formally charging the defendant.” Id. (citing **\*673** [Marion, 404 U.S. at 321–23, 92 S.Ct. at 463–65).](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971136565&pubNum=708&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=RP&fi=co_pp_sp_708_463&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_463) In Marion, the Court observed that the statute of “limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past.” [404 U.S. at 323, 92 S.Ct. at 465.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971136565&pubNum=708&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=RP&fi=co_pp_sp_708_465&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_465)

Other courts point to statutes of limitations as the first barrier of protection against unwarranted unconstitutional prejudice. See, e.g.,[***State***v. Prince, 581 So.2d 874, 877 (Ala.Crim.App.1991)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991051027&pubNum=0000735&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=RP&fi=co_pp_sp_735_877&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_735_877) (“statute of limitations is the principal device ... to protect against prejudice arising from a lapse of time between the commission of a crime and an indictment or arrest”); [***State***v. Chavez, 111 Wash.2d 548, 761 P.2d 607, 613 (1988)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988113884&pubNum=0000661&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=RP&fi=co_pp_sp_661_613&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_661_613) ( “statutes of limitations are the ‘primary guarantee against bringing overly stale criminal charges' ”) (quoting [***State***v. Haga, 8 Wash.App. 481, 507 P.2d 159 (1973)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1973122469&pubNum=0000661&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))). However, in the case under review, the statute of limitations affords **Gray** no protection whatsoever against prejudice possibly inherent in the delay. The reason is that the offense here charged has no period of limitation. Thus, we are reluctant to assess the delay here under the limited due process standard established by the Supreme Court in Marion and Lovasco.

Having reviewed the existing law on the issue, we observe that the [*Marion*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971136565&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))–*[](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ifffcb012e7d911d98ac8f235252e36df&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=33d8d6baece847fbaba52a7ef6119ff8&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))*[*Dykes*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991026840&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) approach to pre-accusatorial delay is, in application, extremely one-sided. It places a daunting, almost insurmountable, burden on the accused by requiring a demonstration not only that the delay has caused prejudice but also that the **State** orchestrated the delay in order to obtain a tactical advantage. Thus, under the facts before us, application of so stringent a standard would force a result we would consider unconstitutional, unwarranted, and unfair. To accomplish justice while preserving **Gray's** right to a fair trial requires, in our view, a less stringent standard.

[2](https://1.next.westlaw.com/Document/Ib6ec7c0ce7c711d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef0000017829010db274a336ad%3Fppcid%3D0eb9705777764333b71c695b1fe17d6f%26Nav%3DCASE%26fragmentIdentifier%3DIb6ec7c0ce7c711d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=825a2e5e300a5a100a4135f27eda08a4&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=0eb9705777764333b71c695b1fe17d6f&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F21996058459)Today we articulate a standard by which to evaluate pre-accusatorial delay and hold that an untimely prosecution may be subject to dismissal upon Fifth and Fourteenth Amendment due process grounds and under [Article I, §§ 8](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000305&cite=TNCNART1S8&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and [9, of the **Tennessee** Constitution](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000305&cite=TNCNART1S9&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) even though in the interim the defendant was neither formally accused, restrained, nor incarcerated for the offense. In determining whether pre-accusatorial delay violates due process, the trial court must consider the length of the delay, the reason for the delay, and the degree of prejudice, if any, to the accused.[4](https://1.next.westlaw.com/Document/Ib6ec7c0ce7c711d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef0000017829010db274a336ad%3Fppcid%3D0eb9705777764333b71c695b1fe17d6f%26Nav%3DCASE%26fragmentIdentifier%3DIb6ec7c0ce7c711d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=825a2e5e300a5a100a4135f27eda08a4&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=0eb9705777764333b71c695b1fe17d6f&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00441996058459) See[Lovasco, 431 U.S. at 790, 97 S.Ct. at 2048–49](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118799&pubNum=0000708&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=RP&fi=co_pp_sp_708_2048&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_2048) (“proof of prejudice is generally a necessary but not sufficient element of a due process claim, ... the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused”).

[3](https://1.next.westlaw.com/Document/Ib6ec7c0ce7c711d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef0000017829010db274a336ad%3Fppcid%3D0eb9705777764333b71c695b1fe17d6f%26Nav%3DCASE%26fragmentIdentifier%3DIb6ec7c0ce7c711d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=825a2e5e300a5a100a4135f27eda08a4&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=0eb9705777764333b71c695b1fe17d6f&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F31996058459)We now apply the standard we have articulated to the facts and circumstances here present to determine whether the prosecution of **Gray** shall proceed. We hold that it shall not. We find that the length of the delay was profoundly excessive, and no reasonable justification for such delay has been demonstrated. **Gray** has made a prima facie showing of prejudice. As the trial court correctly found, the record reveals at least three instances of prejudice: (1) the lapse of time has diminished the victim's memory; (2) witnesses thought to be material are now unavailable; and (3) the victim cannot specifically date the incident, thereby requiring **Gray** to account for his whereabouts and his conduct during a six-month period forty-two years past.

As the Supreme Court declared in Morrissey v. Brewer, “due process is flexible and calls for such procedural protections as the particular situation demands.” [408 U.S. 471, 481, 92 S.Ct. 2593, 2600, 33 L.Ed.2d 484 (1972)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127185&pubNum=0000708&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=RP&fi=co_pp_sp_708_2600&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_2600); accord[***State***v. Pearson, 858 **S.W**.**2d** 879, 885 (**Tenn**.1993)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1993135917&pubNum=0000713&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=RP&fi=co_pp_sp_713_885&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_713_885).

 Finally, under the  **\*674** facts of this case, prosecution of **Gray** would violate the concepts of fundamental fairness and substantial justice embodied in the due process clause of the Fifth and Fourteenth Amendments of the United **States** Constitution, as well as [Article I, § 8, of the **Tennessee**Constitution](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000305&cite=TNCNART1S8&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

Accordingly, the judgment of the Court of Criminal Appeals is **reversed**; the trial court's order dismissing the indictment is **reinstated**.

[ANDERSON](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0157496001&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ib6ec7c0ce7c711d98ac8f235252e36df), C.J., and [DROWOTA](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0259789701&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ib6ec7c0ce7c711d98ac8f235252e36df), [REID](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0259686601&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ib6ec7c0ce7c711d98ac8f235252e36df), [WHITE](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0163409201&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ib6ec7c0ce7c711d98ac8f235252e36df), JJ., concur.

## All Citations

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## **Footnotes**

[1](https://1.next.westlaw.com/Document/Ib6ec7c0ce7c711d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef0000017829010db274a336ad%3Fppcid%3D0eb9705777764333b71c695b1fe17d6f%26Nav%3DCASE%26fragmentIdentifier%3DIb6ec7c0ce7c711d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=825a2e5e300a5a100a4135f27eda08a4&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=0eb9705777764333b71c695b1fe17d6f&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_fnRef_B00111996058459_ID0ENKAE)

The statute under which **Gray** was indicted provided that “[a]ny person who shall carnally know and abuse a female under the age of twelve years shall, on conviction, be punished as in the case of rape.” Code of **Tenn**. § 10784 (1932). Rape was punishable by electrocution or life imprisonment. Id. § 10781. The carnal knowledge statute was amended in 1974, and the punishment for conviction was reduced to ten years to life. Tenn.Code Ann. § 39–3705 (Supp.1974). In 1978, the statute was repealed by Tenn.Code Ann. §§ 39–3701 to 39–3708 (Supp.1978). Under today's law, **Gray** would be charged with “rape of a child,” [Tenn.Code Ann. § 39–13–522](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-522&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) (Supp.1995), and the statute of limitations is either four years or the date the child reaches the age of majority, whichever occurs later. [Tenn.Code Ann. § 40–2–101(d)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS40-2-101&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=SP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_5ba1000067d06) (1990).

[2](https://1.next.westlaw.com/Document/Ib6ec7c0ce7c711d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef0000017829010db274a336ad%3Fppcid%3D0eb9705777764333b71c695b1fe17d6f%26Nav%3DCASE%26fragmentIdentifier%3DIb6ec7c0ce7c711d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=825a2e5e300a5a100a4135f27eda08a4&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=0eb9705777764333b71c695b1fe17d6f&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_fnRef_B00221996058459_ID0ECSAE)

Under the savings statute, “any offense, as defined by [a repealed statute], committed while such statute ... was in full force and effect shall be prosecuted under such ... statute in effect at the time of the commission of the offense.” Tenn.Code Ann. § 39–114 (Supp.1975). Currently, this statute is codified at [Tenn.Code Ann. § 39–11–112](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-11-112&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) (1991), which provides that “in the event the subsequent act provides for a lesser penalty, any punishment imposed shall be in accordance with the subsequent act.”

[3](https://1.next.westlaw.com/Document/Ib6ec7c0ce7c711d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef0000017829010db274a336ad%3Fppcid%3D0eb9705777764333b71c695b1fe17d6f%26Nav%3DCASE%26fragmentIdentifier%3DIb6ec7c0ce7c711d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=825a2e5e300a5a100a4135f27eda08a4&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=0eb9705777764333b71c695b1fe17d6f&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_fnRef_B00331996058459_ID0EKXAG)

This reasoning is consistent with the apparent intent of the legislature because it has since amended the statute of limitations in child sex abuse cases so that prosecution must be initiated within four years or no later than the date the child reaches majority, whichever occurs later. [Tenn.Code Ann. § 40–2–101(d)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS40-2-101&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=SP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_5ba1000067d06) (1990).

[4](https://1.next.westlaw.com/Document/Ib6ec7c0ce7c711d98ac8f235252e36df/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef0000017829010db274a336ad%3Fppcid%3D0eb9705777764333b71c695b1fe17d6f%26Nav%3DCASE%26fragmentIdentifier%3DIb6ec7c0ce7c711d98ac8f235252e36df%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=825a2e5e300a5a100a4135f27eda08a4&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=0eb9705777764333b71c695b1fe17d6f&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_fnRef_B00441996058459_ID0EOSBG)

We note that other **states** have framed their own tests for determining when pre-accusatorial delay violates due process rights. For example, the **State** of Washington applies the following three-prong test: “ ‘(1) The defendant must show he was prejudiced by the delay; (2) the court must consider the reasons for the delay; and (3) if the **State** is able to justify the delay, the court must undertake a further balancing of the **State's** interest and the prejudice to the accused.’ ” [***State***v. Chavez, 111 Wash.2d 548, 761 P.2d 607, 613 (1988)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988113884&pubNum=0000661&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=RP&fi=co_pp_sp_661_613&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_661_613)(quoting [***State***v. Alvin, 109 Wash.2d 602, 746 P.2d 807 (1987)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1987153377&pubNum=0000661&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))).

**West Headnotes:**

**Indictments and Charging Instruments**

Delay between commission of offense and commencement of adversarial proceedings does not violate defendant's constitutional right to speedy trial. [U.S.C.A. Const.Amend. 6](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOAMENDVI&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

**Constitutional Law**

Untimely prosecution may be subject to dismissal upon due process grounds even though in the interim defendant was neither formally accused, restrained, nor incarcerated for offense; in determining whether preaccusatorial delay violates due process, trial court must consider length of delay, reason for delay, and degree of prejudice, if any, to accused. [U.S.C.A. Const.Amends. 5](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOAMENDV&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), [14](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOAMENDXIV&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); [**Tenn**. Const. Art. 1, §§ 8](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000305&cite=TNCNART1S8&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), [9](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000305&cite=TNCNART1S9&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

**Constitutional Law**

**Indictments and Charging Instruments**

Prosecution of defendant for carnal knowledge of female under twelve years of age for incident that allegedly occurred 42 years prior to indictment would violate due process; there was no evidence that defendant tried to conceal his alleged conduct or threatened victim in any way, victim continue to interact with defendant through the years, lapse of time had diminished victim's memory, witnesses thought to be material were unavailable, and victim could not specifically date incident, thereby requiring defendant to account for his whereabouts and his conduct during six-month period 42 years past. [U.S.C.A. Const.Amends. 5](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOAMENDV&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), [14](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOAMENDXIV&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); [**Tenn**. Const. Art. 1, § 8](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000305&cite=TNCNART1S8&originatingDoc=Ib6ec7c0ce7c711d98ac8f235252e36df&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

**State v. Gray (Lexis)**

**[CaselawQuestioned](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)State v. Gray, 917 S.W.2d 668**

Copy CitationRequest Law School Case Brief

Supreme Court of Tennessee, At Nashville

February 26, 1996, FILED

NO. 01-S-01-9411-CR-00138

**Reporter**  
**[917 S.W.2d 668 \*](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)** | [1996 Tenn. LEXIS 120 \*\*](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)  
  
STATE OF TENNESSEE, Appellee VS. HAROLD WINTER GRAY, Appellant  
  
**Prior History:**

[[\*\*1]](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) WILSON COUNTY. HON. [JAMES O. BOND](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893), JUDGE.

**Disposition:**

JUDGMENT OF THE COURT OF CRIMINAL APPEALS REVERSED; JUDGMENT OF THE TRIAL COURT REINSTATED.

**Core Terms**

**indictment, pre-accusatorial, rights, statute of limitations, arrest, trial court, speedy, pre-indictment, forty-two, charges**

**Case Summary**

**Procedural Posture**

Defendant sought review of an order from the Court of Criminal Appeals (Tennessee), which reversed the trial court's order, which dismissed the State's indictment charging defendant with the offense of carnal knowledge of a female under the age of 12.

**Overview**

Over 40 years after the incident occurred, defendant's niece claimed that he sexually assaulted her when she was 8 years old. Based on the accusations, defendant was charged with the offense of carnal knowledge of a female under the age of 12, but the trial court granted his motion to dismiss. The appellate court reversed the trial court, but the court disagreed with the appellate court and reinstated the trial court's order of dismissal. The court held that defendant's prosecution violated his due process rights. The court further held that the appellate court incorrectly decided the case based on its conclusion that the State was not the cause of the delay in charging defendant with the crime. The court then held that because defendant was charged under a savings clause, no statute of limitations applied to protect him from the stale prosecution. The court also held that the constitutional issue was dispositive of the case and that the unreasonable delay and the resultant prejudice to defendant required the dismissal of the indictment. Finally, the court held that prosecution of defendant would violate the concepts of fundamental fairness and substantial justice.

**Outcome**

The court reversed the appellate court's order and reinstated the trial court's order, which dismissed the indictment against defendant.

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[***HN1[](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)***](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) **Abuse of Children, Elements**  
Any person who shall carnally know and abuse a female under the age of 12 years shall, on conviction, be punished as in the case of rape. Tenn. Code Ann. § 10784 (1932). Rape is punishable by electrocution or life imprisonment. [[](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)More like this Headnote](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)

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[***HN2[](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)***](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) **Statute of Limitations, Tolling**  
Under the savings statute, any offense, as defined by a repealed statute, committed while such statute was in full force and effect shall be prosecuted under such statute in effect at the time of the commission of the offense. Tenn. Code Ann. § 39-114 (Supp. 1975). This statute is codified at [Tenn. Code Ann. § 39-11-112](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) (1991), which provides that in the event the subsequent act provides for a lesser penalty, any punishment imposed shall be in accordance with the subsequent act. [[](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)More like this Headnote](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)

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* Criminal Law & Procedure > [Preliminary Proceedings](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) > [Speedy Trial](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) > [Constitutional Right](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)

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[***HN3[](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)***](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) **Criminal Process, Speedy Trial**  
In Tennessee, the law is well-settled that delay between the commission of an offense and the commencement of adversarial proceedings does not violate an accused's constitutional right to a speedy trial. However, the delay may occur in such a manner that the defendant's Fifth Amendment right to due process, in contrast to the Sixth Amendment right to speedy trial, is violated. Additionally, while there is no constitutional right to be arrested, an unreasonable delay between the commission of the offense and the arrest may violate the defendant's constitutional rights if the delay results in prejudice to him or was part of a deliberate, purposeful and oppressive design for delay. [[](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)More like this Headnote](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)

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* Constitutional Law > ... > [Fundamental Rights](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) > [Topic Summary ReportProcedural Due Process](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) > [General Overview](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)
* Criminal Law & Procedure > ... > [Dismissal](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) > [Grounds for Dismissal](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) > [Delay in Filing](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)

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An unreasonable delay between the time an offense is committed and an accusatory pleading is filed may violate a defendant's right to a fair trial and due process of law. A pre-complaint delay must be evaluated by weighing any prejudice the delay caused the defendant against justification for the delay. In the balancing process, the defendant has the initial burden of showing some prejudice before the prosecution is required to offer any reason for the delay. The showing of prejudice requires some evidence and cannot be presumed. Prejudice may be shown by loss of material witnesses due to lapse of time or loss of evidence because of fading memory attributable to the delay. Characterization of the delay as "preindictment" or "post indictment" is often determinative. Delay in bringing the defendant to trial after indictment or arrest is measured against the Sixth Amendment speedy trial requirement which takes into account a number of factors, including actual or potential prejudice to the defendant's case through the loss of witnesses and the dulling of memory. Preindictment delay, on the other hand, is governed by the due process clause which generally requires a showing of actual prejudice before dismissal would be warranted. [[](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)More like this Headnote](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)

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* Criminal Law & Procedure > [Preliminary Proceedings](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) > [Speedy Trial](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) > [General Overview](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)
* Governments > [Legislation](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) > [Statute of Limitations](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) > [General Overview](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)

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The speedy trial guarantee is designed primarily to prevent undue and oppressive incarceration prior to trial and to minimize anxiety and concern accompanying public accusation. These considerations do not become relevant until the defendant has been arrested or formally accused. While any delay in bringing the defendant to trial may impair his right to a fair trial, the statute of limitations is the primary safeguard against potential prejudice when there has been a delay in arresting or formally charging the defendant. The statute of limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past. Statutes of limitations is the principal device to protect against prejudice arising from a lapse of time between the commission of a crime and an indictment or arrest. Statutes of limitations are the primary guarantee against bringing overly stale criminal charges. [[](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)More like this Headnote](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)

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[***HN6[](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)***](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) **Fundamental Rights, Procedural Due Process**  
An untimely prosecution may be subject to dismissal upon Fifth and Fourteenth Amendment due process grounds and under [Tenn. Const. art. I, §§ 8](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893), [9](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) even though in the interim the defendant was neither formally accused, restrained, nor incarcerated for the offense. In determining whether pre-accusatorial delay violates due process, the trial court must consider the length of the delay, the reason for the delay, and the degree of prejudice, if any, to the accused. Proof of prejudice is generally a necessary but not sufficient element of a due process claim, the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused. [[](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)More like this Headnote](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)

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**Counsel:** For Appellant: B.F. "Jack" Lowery, Lebanon, TN.  
  
For Appellee: [Charles W. Burson](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893), Attorney General & Reporter, [Eugene J. Honea](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893), Assistant Attorney General, Nashville, TN, Tom P. Thompson, Jr., District Attorney General, John D. Wootten, Jr., Assistant District Attorney General, Hartsville, TN.    
  
**Judges:** [ADOLPHO A. BIRCH, JR.](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893), Justice, CONCUR: [Anderson](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893), C.J., [Drowota](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893), [Reid](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893), [White](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893), JJ.    
  
**Opinion by:** [ADOLPHO A. BIRCH, JR.](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) 

**Opinion**

[[\*669]](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)OPINION

BIRCH, J.

On September 15, 1992, a Wilson County grand jury indicted Harold Winter Gray, the defendant, upon a single charge of carnal knowledge of a female under the age of twelve. [**1[Link to the text of the note](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)**](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) The indictment alleged that the offense occurred in the early months of 1950.

[[\*\*2]](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) In a pretrial motion to dismiss the indictment, Gray contended that prosecution was barred by the statute of limitations and that the indictment violated his due process and speedy trial rights under the constitutions of the United States and the State of Tennessee. He based these contentions on the prejudice to his rights occasioned by the forty-two-year period between the act alleged and the indictment. The trial court agreed with Gray's contentions and dismissed the indictment.

The Court of Criminal Appeals considered the State's appeal pursuant to Rule 3, Tenn. R. App. P. After a searching analysis, the court rendered an opinion in which it articulated three significant conclusions: (1) the general savings statute saved the prosecution [[\*670]](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) of the cause from the operation of the statute of limitations; [**2[Link to the text of the note](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)**](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) (2) the State bore no responsibility for the delay in prosecuting the case; and (3) the State did not violate Gray's due process rights. Pursuant to this analysis, the Court of Criminal Appeals reversed the trial court's judgment, reinstated the indictment, and remanded the cause for further proceedings.

[[\*\*3]](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) We accepted Gray's application for review under Rule 11, Tenn. R. App. P., in order to determine whether "pre-accusatorial delay" in this case violated Gray's constitutional rights. We use "pre-accusatorial" to refer to the period of time between the commission of an offense and its disclosure to law enforcement authorities. Other jurisdictions refer to this period as "pre-indictment." However, under the facts of this case, we believe "pre-accusatorial" is more appropriate because "pre-indictment" suggests that the State has knowledge of the offense, which is not the case here.

After a thorough examination of the record and a careful consideration of the issue presented, we have concluded that the prosecution should not continue. Accordingly, for the reasons outlined below, we reverse the judgment of the Court of Criminal Appeals and reinstate the trial court's order dismissing the indictment.

**I**

At the outset, we agree with the Court of Criminal Appeals that the prosecution of Gray is not barred by the statute of limitations. However, because we find the constitutional issue dispositive, we need not further address the statute of limitations issue.

**II**

Mary Joanne Gray Perdue, [[\*\*4]](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) who was approximately fifty-three years old at the time of the hearing, testified that in early 1950, Gray, her uncle, penetrated her vaginally. In 1950, Gray was approximately nineteen, and Perdue was eight. She testified that Gray told her at the time that he would be killed if she told anyone. Thereafter, rumor and innuendo about Gray's sexual conduct with Perdue and other nieces coursed through the small community where they lived. Nothing definitive was said or done, however, until early 1992. On that occasion, Perdue had a conversation with her cousin in which the women expressed to each other their concern for Gray's granddaughter. The apparent root of their concern was the fear that Gray might treat the granddaughter or other young female family members as he had treated them.

Following the conversation with her cousin, Perdue discussed the matter with other family members and an attorney. It was after these discussions that Perdue decided to lodge a formal complaint against Gray; she accomplished this by contacting the District Attorney General. The matter was referred to Agent Donna Pence, Tennessee Bureau of Investigation. Perdue cooperated with the investigators and the[[\*\*5]](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)District Attorney General; the indictment followed shortly thereafter. When asked, at the hearing on Gray's motion to dismiss, why she had waited so long before coming forward with this information, Perdue responded, "For years I thought that I had done something that possibly caused him to do this to me. But over the years I realized that there's nothing that a young child can do to cause an adult to do this to them."

On appeal, Gray insists that the trial court properly dismissed the indictment against him as violative of his due process rights because (1) the victim waited forty-two years before filing charges against him, and (2) there was no justification for the delay. He urges that the pre-accusatorial delay caused him substantial prejudice because he "is placed with the awesome task of trying to recall people and events [forty-two] years ago."

[[\*671]](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) [***HN3[](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)***](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) In Tennessee, the law is well-settled that "delay between the commission of an offense and the commencement of adversarial proceedings does not violate an accused's constitutional right to a speedy trial." [State v. Dykes, 803 S.W.2d 250, 255 (Tenn. Crim. App. 1990)](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) (citing [United States v. Marion,404 U.S. 307, 30 L. Ed. 2d  [\*\*6]](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) 468, 92 S. Ct. 455 (1971); [State v. Baker, 614 S.W.2d 352 (Tenn. 1981)](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893); [State v. Walton, 673 S.W.2d 166, 170 (Tenn. Crim. App. 1984)](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893); [Boswell v. State, 528 S.W.2d 825, 826-27 (Tenn. Crim. App. 1975))](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893). However, as the Dykes court further recognized, the "'delay may occur in such a manner that the defendant's Fifth Amendment right to due process--in contrast to the Sixth Amendment right to speedy trial--is violated.'" Id. (quoting [Baker, 614 S.W.2d at 354](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)); see also [United States v. Lovasco, 431 U.S. 783, 52 L. Ed. 2d 752, 97 S. Ct. 2044 (1977)](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893). Additionally, as the Court of Criminal Appeals once noted, "while there is no constitutional right to be arrested, courts have recognized that an unreasonable delay between the commission of the offense and the arrest may violate the defendant's constitutional rights if the delay results in prejudice to him or was part of a deliberate, purposeful and oppressive design for delay." [Halquist v. State, 489 S.W.2d 88, 93 (Tenn. Crim. App. 1972)](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893), *rev'd on other grounds,* [State v. Jones, 598 S.W.2d 209 (Tenn. 1980)](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) (citation omitted). Thus, according to the Dykescourt,

before an accused is entitled[[\*\*7]](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) to relief based upon the delay between the offense and the initiation of adversarial proceedings, the accused must prove that (a) there was a delay, (b) the accused sustained actual prejudice as a direct and proximate result of the delay, and (c) the State caused the delay in order to gain tactical advantage over or to harass the accused.

[803 S.W.2d at 256](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893).

Gray and the State address the Dykes test in their briefs. On one hand, Gray contends that he has satisfied the requirements of Dykes. In his view, the Court of Criminal Appeals applied the third prong of Dykes too narrowly. He urges that the State stands in the shoes of the victim; therefore, he attributes to the State the victim's delay in filing charges. Assuming, *arguendo,* that Dykes is the standard, we find this argument unpersuasive and agree with the Court of Criminal Appeals that there is no evidence in the record that the State caused the delay. The State cannot be held responsible for conduct of which it had no knowledge, to which it had not acquiesced, and over which it had no control.

On the other hand, the State insists that the trial court erred in finding that the delay in bringing the[[\*\*8]](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)prosecution violated Gray's Fifth Amendment due process rights because the trial judge ignored the Dykes requirements. The Court of Criminal Appeals agreed, finding the third prong of Dykes dispositive. We conclude otherwise. In Dykes, the Court of Criminal Appeals addressed the issue whether the delay between the alleged commission of an offense and the initiation of criminal proceedings violated the defendant's speedy trial or due process rights where the State had knowledge of the offense. The case before us is different. First, in Dykes the interim between the alleged offense and the indictment was approximately one year. In contrast, the interim in the case under review was forty-two years. Second, in Dykes, the State had knowledge of the offense from the time of commission. In the instant case there was no such knowledge. Thus, we find the Dykes three-pronged test to be inapposite here.

In the case before the Court, Perdue has accused Gray of sexually penetrating her when she was eight years old in early 1950. She testified that for more than forty years--until March 26, 1992--she kept her silence about the incident. There is no evidence in the record[[\*\*9]](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) that Gray tried to conceal his alleged conduct or that he threatened the victim in any way. Perdue testified that she had been "bothered" by her memory of the incident throughout her childhood and adult life. Finally, the record shows that she continued to interact with the defendant through the years. Under these facts, the trial court correctly held that forty-two years "is much too long to wait before prosecuting an alleged offense where the prosecutor [victim] [[\*672]](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) is of legal age for the great majority of this time . . . ." [**3[Link to the text of the note](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)**](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)

In holding that Dykes does not apply to the circumstances here, we are left with the task of determining the appropriate standard by which to measure pre-accusatorial[[\*\*10]](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) delay--the period of time between the commission of the offense and its disclosure to law enforcement authorities. This precise issue has neither been discussed nor decided in Tennessee. Hence, we look to other jurisdictions for guidance.

The California Supreme Court's opinion in [People v. Morris, 46 Cal. 3d 1, 756 P.2d 843, 249 Cal. Rptr. 119 (Cal. 1988)](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893), provides some guidance, although it deals with the related issue of pre-indictment delay. Morris was sentenced to death for a September 1978 murder.  [756 P.2d at 849](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893). By February 1979, the police had ample evidence linking Morris to the crime; however, charges were not filed against him until May 1982. Id. In Morris, the court declared, [***HN4[](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)***](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) "An unreasonable delay between the time an offense is committed and an accusatory pleading is filed may violate a defendant's right to a fair trial and due process of law under . . . the California Constitution and the [Fifth](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) and [Fourteenth Amendments to the United States Constitution](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)." [756 P.2d at 866](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893). The California court further stated that a pre-complaint delay must be evaluated by weighing any prejudice the delay caused the defendant against justification for the delay. Id. The[[\*\*11]](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) court continued,

"In the balancing process, the defendant has the *initial* burden of showing some prejudice before the prosecution is required to offer any reason for the delay. The showing of prejudice requires some evidence and cannot be presumed." Prejudice may be shown by loss of material witnesses due to lapse of time or loss of evidence because of fading memory attributable to the delay.

[756 P.2d at 866](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) (citations omitted).

The Court of Appeals of New York also provides some guidance on the issue. In [People v. Singer, 44 N.Y.2d 241, 376 N.E.2d 179, 405 N.Y.S.2d 17 (N.Y. 1978)](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893), the defendant was convicted of felony-murder. The crime occurred on October 22, 1970; however, the defendant was not arrested and charged until May 1974. In its discussion, the court commented on the distinction the United States Supreme Court makes when evaluating pre-arrest or pre-accusatorial delay and post-arrest or post-indictment delay. The New York court noted,

Characterization of the delay as "preindictment" or "post indictment" is often determinative. Delay in bringing the defendant to trial after indictment or arrest is measured against the Sixth Amendment speedy[[\*\*12]](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) trial requirement which takes into account a number of factors, including actual or potential prejudice to the defendant's case through the loss of witnesses and the dulling of memory. Preindictment delay, on the other hand, is governed by the due process clause which generally requires a showing of actual prejudice before dismissal would be warranted.

[376 N.E.2d at 185](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) (citations omitted). The court further stated that this "distinction is based essentially on the theory that [***HN5[](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)***](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) the speedy trial guarantee was designed primarily 'to prevent undue and oppressive incarceration prior to trial, [and] to minimize anxiety and concern accompanying public accusation.'" Id. (quoting [Marion, 404 U.S. at 320](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)). Moreover, observed the court, "the distinction assumes that these considerations do not become relevant until the defendant has been arrested or formally accused." Id.

Further, while the Supreme Court "has recognized . . . that any delay in bringing the defendant to trial may impair his right to a fair trial, . . . it has assumed that the Statute of Limitations is the primary safeguard against potential prejudice when there has been a delay in arresting or formally charging[[\*\*13]](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) the defendant." Id. (citing [Marion, 404  [\*673]](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) U.S. at 321-23). In Marion, the Court observed that the statute of "limitation is designed to protect individuals from having to defend themselves against charges when the basic facts may have become obscured by the passage of time and to minimize the danger of official punishment because of acts in the far-distant past." [404 U.S. at 323](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893).

Other courts point to statutes of limitations as the first barrier of protection against unwarranted unconstitutional prejudice. *See, e.g.,* [State v. Prince, 581 So. 2d 874, 877 (Ala. Crim. App. 1991)](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) ("statute of limitations is the principal device . . . to protect against prejudice arising from a lapse of time between the commission of a crime and an indictment or arrest"); [State v. Chavez, 111 Wash. 2d 548, 761 P.2d 607, 613 (Wash. 1988)](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) ("statutes of limitations are the 'primary guarantee against bringing overly stale criminal charges'") (quoting State v. Haga[, 8 Wash. App. 481, 507 P.2d 159 (Wash. Ct. App. 1973))](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893). However, in the case under review, the statute of limitations affords Gray no protection whatsoever against prejudice possibly inherent in the delay. The reason is that the offense[[\*\*14]](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) here charged has no period of limitation. Thus, we are reluctant to assess the delay here under the limited due process standard established by the Supreme Court in Marion and Lovasco.

Having reviewed the existing law on the issue, we observe that the Marion-Dykes approach to pre-accusatorial delay is, in application, extremely one-sided. It places a daunting, almost insurmountable, burden on the accused by requiring a demonstration not only that the delay has caused prejudice but also that the State orchestrated the delay in order to obtain a tactical advantage. Thus, under the facts before us, application of so stringent a standard would force a result we would consider unconstitutional, unwarranted, and unfair. To accomplish justice while preserving Gray's right to a fair trial requires, in our view, a less stringent standard.

Today we articulate a standard by which to evaluate pre-accusatorial delay and hold that [***HN6[](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)***](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) an untimely prosecution may be subject to dismissal upon Fifth and Fourteenth Amendment due process grounds and under Article I, §§ 8 and 9, of the Tennessee Constitution even though in the interim the defendant was neither formally accused, restrained, nor[[\*\*15]](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) incarcerated for the offense. In determining whether pre-accusatorial delay violates due process, the trial court must consider the length of the delay, the reason for the delay, and the degree of prejudice, if any, to the accused. [**4[Link to the text of the note](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)**](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) See [Lovasco, 431 U.S. at 790](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) ("proof of prejudice is generally a necessary but not sufficient element of a due process claim, . . . the due process inquiry must consider the reasons for the delay as well as the prejudice to the accused").

[[\*\*16]](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) We now apply the standard we have articulated to the facts and circumstances here present to determine whether the prosecution of Gray shall proceed. We hold that it shall not. We find that the length of the delay was profoundly excessive, and no reasonable justification for such delay has been demonstrated. Gray has made a *prima facie* showing of prejudice. As the trial court correctly found, the record reveals at least three instances of prejudice: (1) the lapse of time has diminished the victim's memory; (2) witnesses thought to be material are now unavailable; and (3) the victim cannot specifically date the incident, thereby requiring Gray to account for his whereabouts and his conduct during a six-month period forty-two years past.

As the Supreme Court declared in Morrissey v. Brewer, "due process is flexible and calls for such procedural protections as the particular situation demands." [408 U.S. 471, 481, 33 L. Ed. 2d 484, 92 S. Ct. 2593 (1972)](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893); accord [State v. Pearson, 858 S.W.2d 879, 885 (Tenn. 1993)](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893). Finally, under the [[\*674]](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) facts of this case, prosecution of Gray would violate the concepts of fundamental fairness and substantial justice embodied in the [due process [\*\*17]](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) clause of the Fifth and [Fourteenth Amendments of the United States Constitution](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893), as well as [Article I, § 8, of the Tennessee Constitution](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893).

Accordingly, the judgment of the Court of Criminal Appeals is reversed; the trial court's order dismissing the indictment is reinstated.

[ADOLPHO A. BIRCH, JR.](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893), Justice

CONCUR:

[Anderson](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893), C.J.

[Drowota](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893), [Reid](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893), [White](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893), JJ.

**Footnotes**

* [**1[Link to the location of the note in the document](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)**](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)

The statute under which Gray was indicted provided that [***HN1[](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)***](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) "any person who shall carnally know and abuse a female under the age of twelve years shall, on conviction, be punished as in the case of rape." Code of Tenn. § 10784 (1932). Rape was punishable by electrocution or life imprisonment. Id. § 10781. The carnal knowledge statute was amended in 1974, and the punishment for conviction was reduced to ten years to life. Tenn. Code Ann. § 39-3705 (Supp. 1974). In 1978, the statute was repealed by Tenn. Code Ann. §§ 39-3701 to 39-3708 (Supp. 1978). Under today's law, Gray would be charged with "rape of a child," [Tenn. Code Ann. § 39-13-522](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)(Supp. 1995), and the statute of limitations is either four years or the date the child reaches the age of majority, whichever occurs later. [Tenn. Code Ann. § 40-2-101(d)](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)(1990).

* [**2[Link to the location of the note in the document](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)**](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)

[***HN2[](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)***](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) Under the savings statute, "any offense, as defined by [a repealed statute], committed while such statute . . . was in full force and effect shall be prosecuted under such . . . statute in effect at the time of the commission of the offense." Tenn. Code Ann. § 39-114 (Supp. 1975). Currently, this statute is codified at [Tenn. Code Ann. § 39-11-112](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) (1991), which provides that "in the event the subsequent act provides for a lesser penalty, any punishment imposed shall be in accordance with the subsequent act."

* [**3[Link to the location of the note in the document](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)**](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)

This reasoning is consistent with the apparent intent of the legislature because it has since amended the statute of limitations in child sex abuse cases so that prosecution must be initiated within four years or no later than the date the child reaches majority, whichever occurs later. [Tenn. Code Ann. § 40-2-101(d)](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) (1990).

* [**4[Link to the location of the note in the document](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)**](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893)

We note that other states have framed their own tests for determining when pre-accusatorial delay violates due process rights. For example, the State of Washington applies the following three-prong test: "'(1) The defendant must show he was prejudiced by the delay; (2) the court must consider the reasons for the delay; and (3) if the State is able to justify the delay, the court must undertake a further balancing of the State's interest and the prejudice to the accused.'" [State v. Chavez, 111 Wash. 2d 548, 761 P.2d 607, 613 (Wash. 1988)](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893) (quoting [State v. Alvin, 109 Wash. 2d 602, 746 P.2d 807 (Wash. 1987))](https://plus.lexis.com/search/?pdmfid=1530671&crid=d315879d-b356-45ab-8399-c809510812f7&pdsearchterms=State+v.+Gray%2C+917+S.W.2d+668+(Tenn.+1996)&pdtypeofsearch=searchboxclick&pdsearchtype=SearchBox&pdstartin=&pdpsf=&pdqttype=and&pdquerytemplateid=&ecomp=34htk&earg=pdsf&prid=eda70a80-4909-485e-9c2e-bd2aba5ae893).

**Statute of Limitations – TCA §** **40-2-101 through 106**

**TCA §** **40-2-101 through 106**

**Effective: July 1, 2019**

T. C. A. § 40-2-101

**§ 40-2-101. Felonies**

[Currentness](https://1.next.westlaw.com/Document/N918B6010961911E9BECFBE167A0DFBF9/View/FullText.html?transitionType=UniqueDocItem&contextData=(sc.Search)&userEnteredCitation=TCA+40-2-101#co_anchor_I9D0389507D5C11EB8EA486D757C257EF)

(a) A person may be prosecuted, tried and punished for an offense punishable with death or by imprisonment in the penitentiary during life, at any time after the offense is committed.

(b) Prosecution for a felony offense shall begin within:

(1) Fifteen (15) years for a Class A felony;

(2) Eight (8) years for a Class B felony;

(3) Four (4) years for a Class C or Class D felony; and

(4) Two (2) years for a Class E felony.

(c) Notwithstanding subsections (a) and (b), offenses arising under the revenue laws of the state shall be commenced within the three (3) years following the commission of the offense, except that the period of limitation of prosecution shall be six (6) years in the following instances:

(1) Offenses involving the defrauding or attempting to defraud the state of Tennessee or any agency of the state, whether by conspiracy or not, and in any manner;

(2) The offense of willfully attempting in any manner to evade or defeat any tax or the payment of a tax;

(3) The offense of willfully aiding or abetting, or procuring, counseling or advising, the preparation or presentation under, or in connection with, any matter arising under the revenue laws of the state, or a false or fraudulent return, affidavit, claim or document, whether or not the falsity or fraud is with the knowledge or consent of the person authorized or required to present the return, affidavit, claim or document; and

(4) The offense of willfully failing to pay any tax, or make any return at the time or times required by law or regulation.

(d) Notwithstanding the provisions of subdivision (b)(3) to the contrary, prosecution for the offense of arson as prohibited by [§ 39-14-301](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-14-301&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) shall commence within eight (8) years from the date the offense occurs.

(e) Prosecutions for any offense committed against a child prior to July 1, 1997, that constitutes a criminal offense under [§ 39-2-601](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-2-601&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) [repealed], § 39-2-603 [repealed], § 39-2-604 [repealed], § 39-2-606 [repealed], § 39-2-607 [repealed], § 39-2-608 [repealed], § 39-2-612 [repealed], § 39-4-306 [repealed], [§ 39-4-307](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-4-307&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation))[repealed], § 39-6-1137 [repealed], or § 39-6-1138 [repealed], or under [§§ 39-13-502](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-502&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) -- [39-13-505](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-505&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), [§ 39-15-302](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-15-302&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) or [§ 39-17-902](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-17-902&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) shall commence no later than the date the child attains the age of majority or within four (4) years after the commission of the offense, whichever occurs later; provided, that pursuant to subsection (a), an offense punishable by life imprisonment may be prosecuted at any time after the offense has been committed.

(f) For offenses committed prior to November 1, 1989, the limitation of prosecution in effect at that time shall govern.

(g)(1) Prosecutions for any offense committed against a child on or after July 1, 1997, that constitutes a criminal offense under [§ 39-17-902](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-17-902&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) shall commence no later than the date the child reaches twenty-one (21) years of age; provided, that if subsection (a) or (b) provides a longer period of time within which prosecution may be brought than this subsection (g), the applicable provision of subsection (a) or (b) shall prevail.

(2) Prosecutions for any offense committed against a child on or after July 1, 1997, but prior to June 20, 2006, that constitutes a criminal offense under [§§ 39-13-502](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-502&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) -- [39-13-505](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-505&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), [§ 39-13-522](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-522&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) or [§ 39-15-302](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-15-302&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) shall commence no later than the date the child reaches twenty-one (21) years of age; provided, that if subsection (a) or (b) provides a longer period of time within which prosecution may be brought than this subsection (g), the applicable provision of subsection (a) or (b) shall prevail.

(h)(1) A person may be prosecuted, tried and punished for any offense committed against a child on or after June 20, 2006, that constitutes a criminal offense under [§ 39-13-504](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-504&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), [§ 39-13-505](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-505&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), [§ 39-13-527](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-527&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) or [§ 39-15-302](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-15-302&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), no later than twenty-five (25) years from the date the child becomes eighteen (18) years of age.

(2) A person may be prosecuted, tried and punished for any offense committed against a child on or after June 20, 2006, that constitutes a criminal offense under [§ 39-13-502](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-502&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), [§ 39-13-503](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-503&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) or [§ 39-13-522](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-522&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) no later than twenty-five (25) years from the date the child becomes eighteen (18) years of age.

(i)(1) A person may be prosecuted, tried and punished for any offense committed against a child on or after July 1, 2007, that constitutes a criminal offense under [§ 39-13-532](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-532&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), no later than twenty-five (25) years from the date the child becomes eighteen (18) years of age.

(2) A person may be prosecuted, tried and punished for any offense committed against a child on or after July 1, 2007, that constitutes a criminal offense under [§ 39-13-531](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-531&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), no later than twenty-five (25) years from the date the child becomes eighteen (18) years of age.

(j) A person may be prosecuted, tried and punished for any offense committed against a child on or after July 1, 2012, that constitutes a criminal offense under [§ 39-17-902](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-17-902&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), [§ 39-17-1003](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-17-1003&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), [§ 39-17-1004](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-17-1004&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), or [§ 39-17-1005](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-17-1005&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), no later than twenty-five (25) years from the date the child becomes eighteen (18) years of age.

(k)(1) A person may be prosecuted, tried and punished for any offense committed against a child on or after July 1, 2013, that constitutes a criminal offense under [§ 39-13-309](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-309&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) or [§ 39-13-529](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-529&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), no later than fifteen (15) years from the date the child becomes eighteen (18) years of age.

(2) A person may be prosecuted, tried, and punished for any offense committed against a child on or after July 1, 2013, that constitutes a criminal offense under [§ 39-13-514](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-514&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) no later than ten (10) years from the date the child becomes eighteen (18) years of age.

(3)(A) A person may be prosecuted, tried, and punished for any offense committed against a child on or after July 1, 2013, but prior to July 1, 2015, that constitutes a criminal offense under [§ 39-13-515](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-515&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) no later than ten (10) years from the date the child becomes eighteen (18) years of age.

(B) A person may be prosecuted, tried, and punished for any offense committed against a child on or after July 1, 2015, that constitutes a criminal offense under [§ 39-13-515](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-515&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)) no later than twenty-five (25) years from the date the child becomes eighteen (18) years of age.

(*l*)(1) Notwithstanding subsections (b), (g), (h), and (i) to the contrary, a person may be prosecuted, tried, and punished at any time after the commission of an offense if:

(A) The offense was one (1) of the following:

(i) Aggravated rape, as prohibited by [§ 39-13-502](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-502&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)); or

(ii) Rape, as prohibited by [§ 39-13-503](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-503&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation));

(B) The victim was an adult at the time of the offense;

(C) The victim notifies law enforcement or the office of the district attorney general of the offense within three (3) years of the offense; and

(D) The offense is committed:

(i) On or after July 1, 2014; or

(ii) Prior to July 1, 2014, unless prosecution for the offense is barred because the applicable time limitation set out in this section for prosecution of the offense expired prior to July 1, 2014.

(2) If subdivision (l)(1) does not apply to the specified offenses, prosecution shall be commenced within the times otherwise provided by this section.

(m) A person may be prosecuted, tried, and punished for any offense committed against a child on or after July 1, 2016, that constitutes the offense of aggravated statutory rape under [§ 39-13-506(c)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-506&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=SP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_4b24000003ba5), no later than fifteen (15) years from the date the child becomes eighteen (18) years of age.

(n) Notwithstanding subsection (b), prosecutions for any offense committed on or after July 1, 2016, that constitutes the offense of aggravated child abuse, or aggravated child neglect or endangerment, under [§ 39-15-402](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-15-402&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), shall commence by the later of:

(1) Ten (10) years after the child reaches eighteen (18) years of age; or

(2) The time within which prosecution must be commenced pursuant to subsection (b).

(*o*) A person may be prosecuted, tried and punished for any offense committed against a child on or after July 1, 2019, that constitutes the offense of female genital mutilation, under [§ 39-13-110](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-110&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), no later than twenty-five (25) years from the date the child becomes eighteen (18) years of age.

(p) Notwithstanding subsection (b), a person may be prosecuted, tried, and punished for second degree murder, as prohibited by [§ 39-13-210](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-210&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), that is committed on or after July 1, 2019, at any time after the offense is committed.

(q)(1) Notwithstanding subsections (b), (g), (h), (i), (j), (k), or (m), prosecution for the following offenses, when committed against a minor under eighteen (18) years of age shall commence as provided by this subsection (q):

(A) Trafficking for a commercial sex act, as prohibited by [§ 39-13-309](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-309&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation));

(B) Aggravated rape, as prohibited by [§ 39-13-502](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-502&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation));

(C) Rape, as prohibited by [§ 39-13-503](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-503&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation));

(D) Aggravated sexual battery, as prohibited by [§ 39-13-504](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-504&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation));

(E) Sexual battery, as prohibited by [§ 39-13-505](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-505&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation));

(F) Mitigated statutory rape, as prohibited by [§ 39-13-506](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-506&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation));

(G) Statutory rape, as prohibited by [§ 39-13-506](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-506&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation));

(H) Aggravated statutory rape, as prohibited by [§ 39-13-506(c)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-506&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=SP&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)#co_pp_4b24000003ba5);

(I) Indecent exposure, as prohibited by [§ 39-13-511](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-511&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), when the offense is classified as a felony offense;

(J) Patronizing prostitution, as prohibited by [§ 39-13-514](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-514&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation));

(K) Promotion of prostitution, as prohibited by [§ 39-13-515](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-515&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation));

(L) Continuous sexual abuse of a child, as prohibited by [§ 39-13-518](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-518&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation));

(M) Rape of a child, as prohibited by [§ 39-13-522](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-522&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation));

(N) Sexual battery by an authority figure, as prohibited by [§ 39-13-527](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-527&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation));

(O) Solicitation of a minor, as prohibited by [§ 39-13-528](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-528&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), when the offense is classified as a felony offense;

(P) Soliciting sexual exploitation of a minor--exploitation of a minor by electronic means, as prohibited by [§ 39-13-529](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-529&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation));

(Q) Aggravated rape of a child, as prohibited by [§ 39-13-531](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-531&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation));

(R) Statutory rape by an authority figure, as prohibited by [§ 39-13-532](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-532&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation));

(S) Unlawful photographing, as prohibited by [§ 39-13-605](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-605&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), when the offense is classified as a felony offense;

(T) Observation without consent, as prohibited by [§ 39-13-607](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-13-607&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)), when the offense is classified as a felony offense;

(U) Incest, as prohibited by [§ 39-15-302](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-15-302&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation));

(V) Sexual exploitation of a minor, as prohibited by [§ 39-17-1003](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-17-1003&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation));

(W) Aggravated sexual exploitation of a minor, as prohibited by [§ 39-17-1004](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-17-1004&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)); or

(X) Especially aggravated sexual exploitation of a minor, as prohibited by [§ 39-17-1005](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-17-1005&originatingDoc=N918B6010961911E9BECFBE167A0DFBF9&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.UserEnteredCitation)).

(2) A person may be prosecuted, tried, and punished for an offense listed in subdivision (q)(1) at any time after the commission of an offense if:

(A) The victim was under thirteen (13) years of age at the time of the offense; or

(B)(i) The victim was at least thirteen (13) years of age but no more than seventeen (17) years of age at the time of the offense; and

(ii) The victim reported the offense to another person prior to the victim attaining twenty-three (23) years of age.

(3)(A) Except as provided in subdivision (q)(3)(B), a person may be prosecuted, tried, and punished for an offense listed in subdivision (q)(1) at any time after the commission of an offense if:

(i) The victim was at least thirteen (13) years of age but no more than seventeen (17) years of age at the time of the offense; and

(ii) The victim did not meet the reporting requirements of subdivision (q)(2)(B)(ii).

(B) In order to commence prosecution for an offense listed in subdivision (q)(1) under the circumstances described in subdivision (q)(3)(A), at a date that is more than twenty-five (25) years from the date the victim becomes eighteen (18) years of age, the prosecution is required to offer admissible and credible evidence corroborating the allegations or similar acts by the defendant.

(4) This subsection (q) applies to offenses:

(A) Committed on or after July 1, 2019; or

(B) Committed prior to July 1, 2019, unless prosecution for the offense is barred because the applicable time limitation set out in this section for prosecution of the offense expired prior to July 1, 2019.

T. C. A. § 40-2-102

**§ 40-2-102. Misdemeanors**

[Currentness](https://1.next.westlaw.com/Document/N3E84EC30CCE411DB8F04FB3E68C8F4C5/View/FullText.html?originationContext=previousnextsection&contextData=(sc.UserEnteredCitation)&transitionType=StatuteNavigator&needToInjectTerms=False#co_anchor_I390230007D5C11EB8EA486D757C257EF)

(a) Except as provided in [§ 62-18-120(g)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS62-18-120&originatingDoc=N3E84EC30CCE411DB8F04FB3E68C8F4C5&refType=SP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Document)#co_pp_16f4000091d86) and [subsection (b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS62-18-120&originatingDoc=N3E84EC30CCE411DB8F04FB3E68C8F4C5&refType=SP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Document)#co_pp_a83b000018c76) of this section, all prosecutions for misdemeanors shall be commenced within the twelve (12) months after the offense has been committed, except gaming, which shall be commenced within six (6) months.

(b) Prosecutions under [§ 39-16-301](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000039&cite=TNSTS39-16-301&originatingDoc=N3E84EC30CCE411DB8F04FB3E68C8F4C5&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Document)) for criminal impersonation accomplished through the use of a fraudulently obtained driver license shall be commenced within one (1) year of the date the driver license expires or within three (3) years of the date the nonexpired driver license was last used to falsely impersonate the person in whose name the driver license was issued, whichever is longer.

T. C. A. § 40-2-103

**§ 40-2-103. Concealment of crime or absence from state**

[Currentness](https://1.next.westlaw.com/Document/N3ECC0750CCE411DB8F04FB3E68C8F4C5/View/FullText.html?originationContext=previousnextsection&contextData=(sc.Document)&transitionType=StatuteNavigator&needToInjectTerms=False#co_anchor_IC6089E30403511EB9152AE98B613A3F5)

No period during which the party charged conceals the fact of the crime, or during which the party charged was not usually and publicly resident within the state, is included in the period of limitation.

**Effective: July 1, 2013**

T. C. A. § 40-2-104

**§ 40-2-104. Prosecution; commencement**

[Currentness](https://1.next.westlaw.com/Document/NF11F4D90F9BA11E2BDCFBC051F1040FF/View/FullText.html?originationContext=previousnextsection&contextData=(sc.Document)&transitionType=StatuteNavigator&needToInjectTerms=False#co_anchor_IE69E4F507D5C11EB8EA486D757C257EF)

A prosecution is commenced, within the meaning of this chapter, by finding an indictment or presentment, the issuing of a warrant, the issuing of a juvenile petition alleging a delinquent act, binding over the offender, by the filing of an information as provided for in chapter 3 of this title, or by making an appearance in person or through counsel in general sessions or any municipal court for the purpose of continuing the matter or any other appearance in either court for any purpose involving the offense. A prosecution is also commenced, within the meaning of this chapter, by finding an indictment or presentment or the issuing of a warrant identifying the offender by a deoxyribonucleic acid (DNA) profile.

T. C. A. § 40-2-105

**§ 40-2-105. Prosecution; irregularities; suspension**

[Currentness](https://1.next.westlaw.com/Document/N3F94FCA0CCE411DB8F04FB3E68C8F4C5/View/FullText.html?originationContext=previousnextsection&contextData=(sc.Document)&transitionType=StatuteNavigator&needToInjectTerms=False#co_anchor_I3CF56960403611EB9152AE98B613A3F5)

When the judgment is arrested, or the indictment or presentment quashed for any defect in the indictment or presentment, or for the reason that it was not found by a grand jury regularly organized, or because it charged no offense, or for any other cause, or when the prosecution is dismissed because of a variance between the allegations of the indictment or presentment and the evidence, and a new indictment or presentment is ordered to be preferred, the time elapsing between the preferring of the first charge, indictment or presentment and the next subsequent term of court must be deducted from the time limited for the prosecution of the offense last charged.

T. C. A. § 40-2-106

**§ 40-2-106. Reversal; suspension**

[Currentness](https://1.next.westlaw.com/Document/N3FB68E60CCE411DB8F04FB3E68C8F4C5/View/FullText.html?originationContext=previousnextsection&contextData=(sc.Document)&transitionType=StatuteNavigator&needToInjectTerms=False#co_anchor_I79DD04F01F9811EB8358F9CDD67CFA07)

When an indictment or presentment is quashed, or the proceedings on the indictment or presentment are set aside, or reversed on writ of error, the time during the pendency of the indictment or presentment so quashed, set aside or reversed shall not be reckoned within the time limited by this chapter, so as to bar any new indictment or presentment for the same offense.

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**April 1, 2021**

**Chapter 15 – Trial by Jury**

**Tenn. R. Crim. Proc. Rules 23 - 31**

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**Chapter 15 – Trial by Jury**

**\*\*BLANTON v. CITY of NORTH LAS VEGAS\*\***

United States Supreme Court  
489 U.S. 538 (1989)

**Rule of Law**

**In general, jury trial rights do not apply for petty offenses with a maximum penalty of six months of imprisonment or less.**

**Facts**

Melvin Blanton and Mark Fraley (defendants) both faced charges for driving under the influence (DUI). The trial court denied both their requests for jury trials, and both appealed. The appellate court granted Blanton’s request for a jury trial but denied Fraley’s a month later. The Nevada Supreme Court consolidated the cases and concluded that the Sixth Amendment did not guarantee a right to a jury trial for DUI offenses because the maximum penalty did not exceed six months and the maximum fine was $1,000. The United States Supreme Court granted review.

**Issue**

In general, do jury trial rights apply for petty offenses with a maximum penalty of six months of imprisonment or less?

**Holding and Reasoning (Marshall, J.)**

No. In general, jury trial rights do not apply for petty offenses with a maximum penalty of six months of imprisonment or less. It is well-settled that the Sixth Amendment does not guarantee a jury trial for petty crimes or offenses. Originally, courts determined whether a particular offense was petty by focusing on the nature of the offense and whether it was triable by jury under the common law. However, in cases like *Baldwin v. New York*, 399 U.S. 66 (1970), the Supreme Court turned toward using more objective criteria like the maximum penalty for the crime as more closely reflecting the legislature’s judgment of its seriousness. The legislature is better situated than the judiciary to decide how severely to treat a particular crime. Although courts may consider additional penalties determining the seriousness of an offense, the maximum period of incarceration provides the primary factor because it entails a more severe loss of liberty than fines or probation. The *Baldwin*Court held that a defendant has the right to a jury trial for any offense carrying a prison sentence of more than six months. Defendants facing charges with maximum sentences of six months or less are entitled to jury trials only if the additional penalties imposed for the offense are severe enough to reflect that the legislature considered it serious. In addition, the most recent federal statute setting maximum monetary fines for petty offenses set the upper limit at $5,000. Here, the maximum sentence for a first-time DUI offense does not exceed six months. That creates a presumption that the Nevada legislature considers DUI a petty offense for purposes of jury trial rights. The $1,000 fine also falls well below the $5,000 limit set by federal law. Additional statutory penalties include a 90-day license suspension and performing 48 hours of community service dressed in clothing identifying the defendant as a DUI offender. Those penalties taken together are still not as severe as six months in jail, and thus do not clearly show that the state legislature considers DUI serious. Therefore, the Sixth Amendment does not guarantee a jury trial for DUI in Nevada. The Court accordingly affirms the judgment of the Nevada Supreme Court.

**Key Terms:**

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

**Right to a Jury Trial -** A constitutional right to a jury trial exists under the Sixth Amendment, in federal and state criminal trials where a defendant faces punishment of greater than six months’ imprisonment, and under the Seventh Amendment, in federal civil cases where a plaintiff seeks money damages.

**Driving Under the Influence (DUI) -** An offense generally defined as operating a motor vehicle on a public road while under the influence of alcohol, drugs, or some other intoxicant. In some jurisdictions this offense is called Driving While Impaired or Driving While Intoxicated, both of which are abbreviated as DWI.

# Duncan v. Louisiana

#### United States Supreme Court 391 U.S. 145 (1968)

#### Rule of Law

**The Sixth Amendment right to a jury trial applies to state court proceedings through the Fourteenth Amendment.**

#### Facts

Gary Duncan (defendant) was convicted of simple battery by a judge in a Louisiana state court. Under Louisiana law, simple battery is a misdemeanor punishable by a maximum sentence of two years imprisonment and a $300 fine. Duncan sought trial by jury, but the Louisiana constitution granted jury trials only in cases in which capital punishment or imprisonment at hard labor could be imposed. Duncan's request was denied, and he was convicted and sentenced to sixty days in prison and a fine of $150. Duncan appealed and brought suit against the State of Louisiana, alleging an infringement of his constitutional right to a jury trial.

#### Issue

Whether the Sixth Amendment right to a jury trial applies to state court proceedings through the Fourteenth Amendment.

#### Holding and Reasoning (White, J.)

Yes. The Fourteenth Amendment guarantees a right to a jury trial in all state criminal cases that would be eligible for trial by jury under the Sixth Amendment if tried in federal court. Many of the first eight Amendments to the Constitution had already been applied to the states by the Fourteenth Amendment. By precedent, the test for holding an amendment applicable to the states through the Fourteenth Amendment is whether the right protected is among those “fundamental principles of liberty and justice that lie at the base of all our civil and political institutions." The right to trial by jury is necessary for criminal defendants to prevent oppression by the government and to provide safeguards against corrupt or overzealous prosecutors or "compliant, biased, or eccentric" judges. The nation, as a whole, has demonstrated a deep deference for the right to a jury trial. Thus, this right meets the standard of a “fundamental principle of liberty and justice" and should be protected by the Due Process Clause and respected by the states. The decision of the lower court is reversed.

#### Concurrence (Fortas, J.)

It is not the Court’s role to dictate the specific form of a jury trial to the states. The right to a jury trial is absolutely necessary for serious offenses, but states should be free to develop their own rules regarding the procedure of those jury trials without interference by federal or historical standards.

#### Concurrence (Black, J.)

The Fourteenth Amendment, as a whole, makes the Bill of Rights applicable to the states. Thus, although the majority bases its reasoning for extending the Sixth Amendment to the states on the Due Process Clause, the Privileges and Immunities Clause can also be used to grant jury trials in state-court proceedings. Additionally, although complete incorporation of the Bill of Rights and all Amendments to the states should be done at one time, the current process of selective incorporation is adequate. This process guards against Supreme Court justices making improper decisions about the scope of the Bill of Rights’ protections. Further, this method has already worked to make many of those Amendments applicable to the states.

#### Dissent (Harlan, J.)

States were historically responsible for governing all criminal proceedings within their borders according to procedures adapted to best suit their needs and populations. The Due Process Clause of the Constitution requires these proceedings to be “fundamentally fair” in all respects. However, the requirement of fundamental fairness does not mean that procedures need to be uniform among state and federal courts. Some procedural rules used in federal courts may be outdated or impractical for certain state-court settings, and the Court should only require uniformity of procedure if it is necessary for promoting basic fairness. The right to trial by jury should not be included in this category of rights, and the judgment of the district court should be affirmed.

**Key Terms:**

**Bill of Rights** - The first ten amendments to the U.S. Constitution.

**Right to a Jury Trial -** A constitutional right to a jury trial exists under the Sixth Amendment, in federal and state criminal trials where a defendant faces punishment of greater than six months’ imprisonment, and under the Seventh Amendment, in federal civil cases where a plaintiff seeks money damages.

**Simple Battery -** A battery includes any “offensive touching” without the requirement of pain or physical injury.

# Baldwin v. New York

#### United States Supreme Court 399 U.S. 66 (1970)

#### Rule of Law

**The Sixth Amendment guarantees a defendant the right to a trial by jury for all “serious” offenses that require imprisonment for more than six months.**

#### Facts

Baldwin (defendant) was arrested for “jostling,” a misdemeanor, in violation of New York Penal Law § 165.25 which provided “[a] person is guilty of jostling when, in a public place, he intentionally and unnecessarily: (1) places his hand in the proximity of a person’s pocket or handbag; or (2) jostles or crowds another person at a time when a third person’s hand is in the proximity of such person’s pocket or handbag.” Baldwin was brought to trial in New York City Criminal Court, which conducted all trials without a jury pursuant to § 40 of the New York City Criminal Court Act (the Act). Baldwin moved the court for a jury trial and was denied. Thereafter, Baldwin was convicted and sentenced to one year in prison. Baldwin appealed, arguing that § 40 of the Act was unconstitutional because it denied him an opportunity for a jury trial. The U.S. Supreme Court granted certiorari to review.

#### Issue

Does the Sixth Amendment guarantee a defendant the right to a trial by jury for all “serious” offenses that require imprisonment for more than six months?

#### Holding and Reasoning (White, J.)

Yes. In *Duncan v. Louisiana*, 391 U.S. 145 (1968), the Court held that the Sixth Amendment, as applied to the States through the Fourteenth Amendment, requires that defendants accused of serious crimes be afforded the right to trial by jury. However, “petty offenses” may be tried without a jury. In determining whether an offense is “petty” the Court looks to objective criteria reflecting the seriousness with which society regards the offense. The best determinant of how serious society regards the offense is by looking at the length of imprisonment a violation of the offense demands. A possible six-month sentence is short enough to classify as “petty,” while a two-year maximum is sufficiently “serious” to require the opportunity for jury trial. Where the accused cannot possibly face more than six months imprisonment, any possible disadvantages placed upon the defendant may be outweighed by the benefits which can result from speedy and inexpensive nonjury adjudication. However, similar justification does not hold where the possible penalty exceeds six months’ imprisonment. Here, Baldwin’s one-year sentence is sufficiently “serious” to warrant the opportunity for a jury trial. The judgment of conviction is reversed.

**Key Terms:**

**Right to a Jury Trial -** A constitutional right to a jury trial exists under the Sixth Amendment, in federal and state criminal trials where a defendant faces punishment of greater than six months’ imprisonment, and under the Seventh Amendment, in federal civil cases where a plaintiff seeks money damages.

# Lewis v. United States

#### United States Supreme Court 518 U.S. 322 (1996)

#### Rule of Law

**The Sixth Amendment does not entitle a criminal defendant to a jury trial on petty offenses, even when conviction on multiple petty offenses could result in a sentence greater than six months in prison.**

#### Facts

Lewis (defendant) was charged with two counts of obstructing the mail. Each count carried a maximum prison sentence of six months. Lewis requested a jury trial. The United States (plaintiff) moved for a bench trial. A federal magistrate judge denied a jury trial with the explanation that she would not sentence Lewis to more than six months in any event. Lewis petitioned the United States Supreme Court for review on grounds that he was entitled to a jury trial under the Sixth Amendment.

#### Issue

Does the Sixth Amendment entitle a criminal defendant to a jury trial on petty offenses when conviction on multiple petty offenses could result in a sentence greater than six months in prison?

#### Holding and Reasoning (O’Connor, J.)

No. The Sixth Amendment does not entitle a criminal defendant to a jury trial on petty offenses, even when conviction on multiple petty offenses could result in a sentence greater than six months in prison. The Sixth Amendment right to trial by jury attaches only to serious offenses. Petty crimes are not subject to the right of trial by jury. The determination of whether a crime constitutes a serious offense was formerly based on the nature of the offense and whether a jury trial was traditionally afforded under common law. In more recent times, the advent of statutory crimes without a common law foundation altered the analysis of the seriousness of an offense. We now look to the legislature’s determination of appropriate penalties to assess whether an offense is a serious offense to merit a jury trial. In this case, the legislature established six months in prison as the maximum penalty for the offenses charged. The fact that multiple convictions might result in a longer sentence does not alter the legislature’s characterization of the crime as a petty offense. Even if we held that characterization of the offense should be based on the maximum aggregate prison term, the prosecution could avoid jury trial by charging and trying the offenses separately. The trial court judgment is affirmed.

#### Concurrence (Kennedy, J.)

I concur in the judgment, but only because the magistrate declared at the outset that Lewis would face no more than a six month sentence. The Court’s decision today leads to the consequence that a defendant will be denied a jury trial irrespective of the number of petty crimes charged and the combined length of a prison sentence that might be faced upon multiple convictions. The essence of the Sixth Amendment is to guarantee the right to a trial by jury when punishment would place a defendant’s liberty at great risk. The Court’s decision undermines the protections of the Sixth Amendment by exposing defendants to unlimited prison terms based upon multiple convictions issued only by a judge sitting without a jury.

#### Dissent (Stevens, J.)

The Sixth Amendment expressly attaches the right of trial by jury to “all criminal prosecutions.” I believe that right attaches upon the commencement of prosecution. In my opinion, the maximum sentence attached to the entirety of the prosecution is the proper measure of the legislature’s determination of the seriousness of criminal charges. A judge may not deprive the defendant of the right to jury trial by promising a sentence no greater than six months. Conviction for multiple petty offenses injures the defendant’s liberty and reputation as much as conviction for a single serious offense.

**Key Terms:**

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

**Codispoti v. Pennsylvania**

94 S.Ct. 2687

Supreme Court of the United States

**Dominick CODISPOTI and Herbert Langnes, Petitioners,**

**v.**

**State of PENNSYLVANIA.**

No. 73—5615.

Argued March 25, 1974.Decided June 26, 1974.

**Synopsis**

Defendants, after denial of their request for a jury trial, were found guilty in the Court of Common Pleas of Allegheny County, Pennsylvania, on each of several separate charges of criminal contempt based on conduct that allegedly occurred during course of their criminal trial before another judge. Each defendant received for each contempt individual sentences which did not exceed six months, but which were to be served consecutively and aggregated to approximately three years. The Supreme Court of [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=If9ba5484342611d9abe5ec754599669c&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[Pennsylvania, 453 Pa. 619, 306 A.2d 294,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1973250034&pubNum=162&originatingDoc=Id4c4c44f9c1d11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed, and certiorari was granted. The Supreme Court, Mr. Justice White, held that an alleged contemnor is not entitled to a jury trial whenever a strong possibility exists that upon conviction he will face a substantial term of imprisonment regardless of punishment actually imposed, but in case of postverdict adjudications of various acts of contempt committed during trial, the Sixth Amendment requires a jury trial if the sentences imposed aggregates more than six months, even though no sentence for more than six months was imposed for any one act of contempt.

Reversed and remanded.

Mr. Justice Marshall filed an opinion concurring in judgment of court and in parts I and III of the court's opinion.

Mr. Justice Blackmun filed a dissenting opinion in which The Chief Justice, Mr. Justice Stewart, and Mr. Justice Rehnquist concurred.

For separate dissenting opinion by Mr. Justice Rehnquist, in which The Chief Justice concurred, see [94 S.Ct. 2707](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1974241922&pubNum=708&originatingDoc=Id4c4c44f9c1d11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

**\*\*RAMOS v. LOUISIANA\*\***

140 S.Ct. 1390

Supreme Court of the United States.

**Evangelisto RAMOS, Petitioner**

**v.**

**LOUISIANA**

No. 18-5924

Argued October 7, 2019Decided April 20, **2020**

**Synopsis**

**Background:** Defendant was convicted in the **Louisiana** Criminal District Court, Orleans Parish, No. 524–912, Section “F”, [Robin D. Pittman](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0385090501&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), J., of second-degree murder based on 10-to-2 jury verdict in favor of conviction, and was sentenced to life in prison without possibility of parole. Defendant appealed. The **Louisiana** Court of Appeal, [James F. McKay III](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0168993001&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), C.J., [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I5dca0a00c02e11e79c8f8bb0457c507d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[231 So.3d 44](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2043062969&pubNum=0003926&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), affirmed. Certiorari was granted.

[**Holding:**](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F32050796536) The Supreme Court, Justice [Gorsuch](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), held that the Sixth Amendment right to jury trial, as incorporated against the States by way of the Fourteenth Amendment, requires a unanimous verdict to convict a defendant of a serious offense, abrogating [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca v. Oregon*, 406 **U.S**. 404, 92 **S.Ct**. 1628, 32 **L.Ed**.**2d** 184](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), and [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I8bb1f6ed9bf111d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Johnson v.****Louisiana***, 406 **U.S**. 356, 92 **S.Ct**. 1620, 32 **L.Ed**.**2d** 152](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127121&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

**Reversed.**

Justices [Ginsburg](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), [Breyer](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), and [Sotomayor](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91) joined with respect to Parts II-B, IV-B-2, and V.

Justices [Ginsburg](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91) and [Breyer](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91) joined with respect to Part IV-A.

Justice [Sotomayor](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91) filed an opinion concurring as to all but Part IV-A.

Justice [Kavanaugh](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0364335801&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91) filed an opinion concurring in part.

Justice [Thomas](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91) filed an opinion concurring in the judgment.

Justice [Alito](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91) filed a dissenting opinion, in which Chief Justice [Roberts](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0258116001&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91) joined and in which Justice [Kagan](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91) joined as to all but Part III-D.

**Procedural Posture(s):** Petition for Writ of Certiorari; On Appeal.

***Syllabus***[**\***](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00012050796536)

In 48 States and federal court, a single juror's vote to acquit is enough to prevent a conviction. But two States, **Louisiana** and Oregon, have long punished people based on 10-to-2 verdicts. In this case, petitioner Evangelisto **Ramos** was convicted of a serious crime in a **Louisiana** court by a 10-to-2 jury verdict. Instead of the mistrial he would have received almost anywhere else, **Ramos** was sentenced to life without parole. He contests his conviction by a nonunanimous jury as an unconstitutional denial of the Sixth Amendment right to a jury trial.

***Held*: The judgment is reversed.**

[](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I5dca0a00c02e11e79c8f8bb0457c507d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[2016-1199 (La.App.4Cir. 11/2/17), 231 So.3d 44](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2043062969&pubNum=0003926&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), reversed.

Justice GORSUCH delivered the opinion of the Court with respect to Parts I, II–A, III, and IV–B–1, concluding that the Sixth Amendment right to a jury trial—as incorporated against the States by way of the Fourteenth Amendment—requires a unanimous verdict to convict a defendant of a serious offense. Pp. 1394 – 1399, 1399 – 1402, 1404 – 1407.

(a) The Constitution's text and structure clearly indicate that the Sixth Amendment term “trial by an impartial jury” carries with it *some* meaning about the content and requirements of a jury trial. One such requirement is that a jury must reach a unanimous verdict in order to convict. Juror unanimity emerged as a vital common law right in 14th-century England, appeared in the early American state constitutions, and provided the backdrop against which the Sixth Amendment was drafted and ratified. Postadoption treatises and 19th-century American legal treatises confirm this understanding. This Court has commented on the Sixth Amendment's unanimity requirement no fewer than 13 times over more than 120 years, see, *e.g.,*[](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I0fc8a9549cb611d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Thompson v. Utah*, 170 **U.S**. 343, 351, 18 **S.Ct**. 620, 42 L.Ed. 1061](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1898180010&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_351&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_351); [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Patton v. United States*, 281 **U.S**. 276, 288, 50 **S.Ct**. 253, 74 L.Ed. 854](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1930121924&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_288&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_288), and has also explained that the Sixth Amendment right to a jury trial is incorporated against the States under the Fourteenth Amendment, [*Duncan v.****Louisiana***, 391 **U.S**. 145, 148–150, 88 **S.Ct**. 1444, 20 **L.Ed**.**2d** 491](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1968131174&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_148&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_148). Thus, if the jury trial right requires a unanimous verdict in federal court, it requires no less in state court. Pp. 1394 – 1397.

(b) **Louisiana's** and Oregon's unconventional schemes were first confronted in [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca v. Oregon*, 406 **U.S**. 404, 92 **S.Ct**. 1628, 32 **L.Ed**.**2d** 184](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), and [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I8bb1f6ed9bf111d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Johnson v.****Louisiana***, 406 **U.S**. 356, 92 **S.Ct**. 1620, 32 **L.Ed**.**2d** 152](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127121&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), in a badly fractured set of opinions. A four-Justice plurality, questioning whether unanimity serves an important “function” in “contemporary society,” concluded that unanimity's costs outweighed its benefits. [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*, 406 **U.S**. at 410, 92 **S.Ct**. 1628](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_410&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_410). Four dissenting Justices recognized that the Sixth Amendment requires unanimity, and that the guarantee is fully applicable against the States under the Fourteenth Amendment. The remaining Justice, Justice Powell, adopted a “dual-track” incorporation approach. He agreed that the Sixth Amendment requires unanimity but believed that the Fourteenth Amendment does not render this guarantee fully applicable against the States—even though the dual-track incorporation approach had been rejected by the Court nearly a decade earlier, see [*Malloy v. Hogan*, 378 **U.S**. 1, 10–11, 84 **S.Ct**. 1489, 12 **L.Ed**.**2d** 653](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1964124849&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_10&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_10). Pp. 1397 – 1399.

(c) The best **Louisiana** can suggest is that all of the Court's prior statements that the Sixth Amendment *does* require unanimity are dicta. But the State offers no hint as to why the Court would walk away from those statements now and does not dispute the fact that the common law required unanimity. Instead, it argues that the Sixth Amendment's drafting history—in particular, that the original House version's explicit unanimity references were removed in the Senate version—reveals the framer's intent to leave this particular feature of the common law behind. But that piece of drafting history could just as easily support the inference that the language was removed as surplusage because the right was so plainly understood to be included in the right to trial by jury. Finally, the State invites the Court to perform a cost-benefit analysis on the historic features of common law jury trials and to conclude that unanimity does not make the cut. The dangers of that approach, however, can be seen in [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), where the plurality subjected the ancient guarantee of a unanimous jury verdict to its own functionalist assessment. Pp. 1399 – 1402.

(d) Factors traditionally considered by the Court when determining whether to preserve precedent on *stare decisis*grounds do not favor upholding [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). See [*Franchise Tax Bd. of Cal.* v. *Hyatt*, 587 **U**. **S**. ––––, ––––, 139 **S.Ct**. 1485, 1492, 203 **L.Ed**.**2d** 768](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2048247944&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). Starting with the quality of [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))’s reasoning, the plurality opinion and separate concurring opinion were gravely mistaken. And [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) sits uneasily with 120 years of preceding case law. When it comes to reliance interests, neither **Louisiana** nor Oregon claims anything like the prospective economic, regulatory, or social disruption litigants seeking to preserve precedent usually invoke. The fact that **Louisiana** and Oregon may need to retry defendants convicted of felonies by nonunanimous verdicts whose cases are still pending on direct appeal will surely impose a cost, but new rules of criminal procedure usually do, see*, e.g.,*[*United States v. Booker*, 543 **U.S**. 220, 125 **S.Ct**. 738, 160 **L.Ed**.**2d** 621](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2005966569&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), and prior convictions in only two States are potentially affected here. Pp. 1404 – 1407.

Justice GORSUCH, joined by Justice GINSBURG and Justice BREYER, concluded in Part IV–A that [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) lacks precedential force. Treating that case as precedential would require embracing the dubious proposition that a single Justice writing only for himself has the authority to bind this Court to already rejected propositions. No prior case has made such a suggestion. Pp. 1402 – 1405.

Justice GORSUCH, joined by Justice GINSBURG, Justice BREYER, and Justice SOTOMAYOR, concluded in Parts IV–B–2 and V that **Louisiana's** and Oregon's reliance interests in the security of their final criminal judgments do not favor upholding [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). Worries that defendants whose appeals are already complete might seek to challenge their nonunanimous convictions through collateral review are overstated. Cf. [*Teague v. Lane*, 489 **U.S**. 288, 109 **S.Ct**. 1060, 103 **L.Ed**.**2d** 334](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989027119&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))’s reliance interests are not boosted by **Louisiana's** recent decision to bar the use of nonunanimous jury verdicts. A ruling for **Louisiana** would invite other States to relax their own unanimity requirements, and **Louisiana** continues to allow nonunanimous verdicts for crimes committed before 2019. Pp. 1406 – 1408.

Justice THOMAS concluded that **Ramos**’ felony conviction by a nonunanimous jury is unconstitutional because the Sixth Amendment's protection against nonunanimous felony guilty verdicts applies against the States through the Privileges or Immunities Clause of the Fourteenth Amendment, not the Due Process Clause. Pp. 1420 – 1425.

[GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), J., announced the judgment of the Court, and delivered the opinion of the Court with respect to Parts I, II–A, III, and IV–B–1, in which [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), and [KAVANAUGH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0364335801&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), JJ., joined, an opinion with respect to Parts II–B, IV–B–2, and V, in which [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), and [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), JJ., joined, and an opinion with respect to Part IV–A, in which [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91) and [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), JJ., joined. [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), J., filed an opinion concurring as to all but Part IV–A. [KAVANAUGH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0364335801&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), J., filed an opinion concurring in part. [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), J., filed an opinion concurring in the judgment. [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), J., filed a dissenting opinion, in which [ROBERTS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0258116001&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), C. J., joined, and in which [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), J., joined as to all but Part III–D.

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[Jeff Landry](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0432711701&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), Attorney General, [Elizabeth B. Murrill](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0225241601&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), Solicitor Genera, [Michelle Ghetti](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0317722601&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), Deputy Solicitor General, [Colin Clark](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0509615001&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), Assistant Attorney General, **Louisiana** Department of Justice, Baton Rouge, **LA**, [Leon A. Cannizzaro](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0115486701&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91). Jr., District Attorney, Parish of Orleans, Donna Andrieu, Chief of Appeals, New Orleans, **LA**, [William S. Consovoy](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0358272601&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), [Jeffrey M. Harris](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0434173401&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), Consovoy McCarthy PLLC, Arlington, VA 22209, for respondent.

Jeffrey L. Fisher, [Brian H. Fletcher](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0423895001&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), [Pamela S. Karlan](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0471597101&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), Stanford Law School, Supreme Court, Litigation Clinic, Stanford, CA, [Yaira Dubin](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0500741599&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), O'Melveny & Myers, LLP, New York, NY, G. Ben Cohen, Shanita Farris, Erica Navalance, The Promise of Justice, Initiative, New Orleans, **LA**, for petitioner.

**Opinion**

Justice [GORSUCH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183411701&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91) announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, III, and IV–B–1, an opinion with respect to Parts II–B, IV–B–2, and V, in which Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), and Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91) join, and an opinion with respect to Part IV–A, in which Justice [GINSBURG](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91) and Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91) join.

**\*1393** Accused of a serious crime, Evangelisto **Ramos** insisted on his innocence and invoked **\*1394** his right to a jury trial. Eventually, 10 jurors found the evidence against him persuasive. But a pair of jurors believed that the State of **Louisiana** had failed to prove Mr. **Ramos's** guilt beyond reasonable doubt; they voted to acquit.

In 48 States and federal court, a single juror's vote to acquit is enough to prevent a conviction. But not in **Louisiana**. Along with Oregon, **Louisiana** has long punished people based on 10-to-2 verdicts like the one here. So instead of the mistrial he would have received almost anywhere else, Mr. **Ramos** was sentenced to life in prison without the possibility of parole.

Why do **Louisiana** and Oregon allow nonunanimous convictions? Though it's hard to say why these laws persist, their origins are clear. **Louisiana** first endorsed nonunanimous verdicts for serious crimes at a constitutional convention in 1898. According to one committee chairman, the avowed purpose of that convention was to “establish the supremacy of the white race,” and the resulting document included many of the trappings of the Jim Crow era: a poll tax, a combined literacy and property ownership test, and a grandfather clause that in practice exempted white residents from the most onerous of these requirements.[1](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00022050796536)

Nor was it only the prospect of African-Americans voting that concerned the delegates. Just a week before the convention, the **U**. **S**. Senate passed a resolution calling for an investigation into whether **Louisiana** was systemically excluding African-Americans from juries.[2](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00032050796536) Seeking to avoid unwanted national attention, and aware that this Court would strike down any policy of overt discrimination against African-American jurors as a violation of the Fourteenth Amendment,[3](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00042050796536) the delegates sought to undermine African-American participation on juries in another way. With a careful eye on racial demographics, the convention delegates sculpted a “facially race-neutral” rule permitting 10-to-2 verdicts in order “to ensure that African-American juror service would be meaningless.”[4](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00052050796536)

Adopted in the 1930s, Oregon's rule permitting nonunanimous verdicts can be similarly traced to the rise of the Ku Klux Klan and efforts to dilute “the influence of racial, ethnic, and religious minorities on Oregon juries.”[5](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00062050796536) In fact, no one before **us** contests any of this; courts in both **Louisiana** and Oregon have frankly acknowledged that race was a motivating factor in the adoption of their States’ respective nonunanimity rules.[6](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00072050796536)

We took this case to decide whether the Sixth Amendment right to a jury trial—as incorporated against the States by way of the Fourteenth Amendment—requires a unanimous verdict to convict a defendant of a serious offense.[7](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00082050796536)**Louisiana** insists that  **\*1395** this Court has never definitively passed on the question and urges **us** to find its practice consistent with the Sixth Amendment. By contrast, the dissent doesn't try to defend **Louisiana's** law on Sixth or Fourteenth Amendment grounds; tacitly, it seems to admit that the Constitution forbids States from using nonunanimous juries. Yet, unprompted by **Louisiana**, the dissent suggests our precedent requires **us** to rule for the State anyway. What explains all this? To answer the puzzle, it's necessary to say a bit more about the merits of the question presented, the relevant precedent, and, at last, the consequences that follow from saying what we know to be true.

**I**

The Sixth Amendment promises that “[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law.” The Amendment goes on to preserve other rights for criminal defendants but says nothing else about what a “trial by an impartial jury” entails.

Still, the promise of a jury trial surely meant *something*—otherwise, there would have been no reason to write it down. Nor would it have made any sense to spell out the places from which jurors should be drawn if their powers as jurors could be freely abridged by statute. Imagine a constitution that allowed a “jury trial” to mean nothing but a single person rubberstamping convictions without hearing any evidence—but simultaneously insisting that the lone juror come from a specific judicial district “previously ascertained by law.” And if that's not enough, imagine a constitution that included the same hollow guarantee *twice*—not only in the Sixth Amendment, but also in Article III.[8](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00092050796536) No: The text and structure of the Constitution clearly suggest that the term “trial by an impartial jury” carried with it *some* meaning about the content and requirements of a jury trial.

One of these requirements was unanimity. Wherever we might look to determine what the term “trial by an impartial jury trial” meant at the time of the Sixth Amendment's adoption—whether it's the common law, state practices in the founding era, or opinions and treatises written soon afterward—the answer is unmistakable. A jury must reach a unanimous verdict in order to convict.

The requirement of juror unanimity emerged in 14th century England and was soon accepted as a vital right protected by the common law.[9](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00102050796536) As Blackstone explained, no person could be found guilty of a serious crime unless “the truth of every accusation ... should ... be confirmed by the unanimous suffrage of twelve of his equals and neighbors, indifferently chosen, and superior to all suspicion.”[10](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00112050796536) A “ ‘verdict, taken from eleven, was no verdict’ ” at all.[11](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00122050796536)

This same rule applied in the young American States. Six State Constitutions explicitly required unanimity.[12](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00132050796536) Another four preserved the right to a jury trial in more general terms.[13](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00142050796536) But the variations did not matter much; consistent with the common law, state courts appeared to regard unanimity as an essential feature of the jury trial.[14](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00152050796536)

It was against this backdrop that James Madison drafted and the States ratified the Sixth Amendment in 1791. By that time, unanimous verdicts had been required for about 400 years.[15](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00162050796536) If the term “trial by an impartial jury” carried any meaning at all, it surely included a requirement as long and widely accepted as unanimity.

Influential, postadoption treatises confirm this understanding. For example, in 1824, Nathan Dane reported as fact that the **U**. **S**. Constitution required unanimity in criminal jury trials for serious offenses.[16](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00172050796536) A few years later, Justice Story explained in his Commentaries on the Constitution that “in common cases, the law not only presumes every man innocent, until he is proved guilty; but unanimity in the verdict of the jury is indispensable.”[17](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00182050796536) Similar statements can be found in American legal treatises throughout the 19th century.[18](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00192050796536)

[1](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F12050796536)Nor is this a case where the original public meaning was lost to time and only recently recovered. This Court has, repeatedly and over many years, recognized that the Sixth Amendment requires unanimity. As early as 1898, the Court said that a defendant enjoys a “constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous  **\*1397** verdict of a jury of twelve persons.”[19](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00202050796536) A few decades later, the Court elaborated that the Sixth Amendment affords a right to “a trial by jury as understood and applied at common law, ... includ[ing] all the essential elements as they were recognized in this country and England when the Constitution was adopted.”[20](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00212050796536) And, the Court observed, this includes a requirement “that the verdict should be unanimous.”[21](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00222050796536) In all, this Court has commented on the Sixth Amendment's unanimity requirement no fewer than 13 times over more than 120 years.[22](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00232050796536)

[2](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F22050796536)[3](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F32050796536)[4](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F42050796536)There can be no question either that the Sixth Amendment's unanimity requirement applies to state and federal criminal trials equally. This Court has long explained that the Sixth Amendment right to a jury trial is “fundamental to the American scheme of justice” and incorporated against the States under the Fourteenth Amendment.[23](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00242050796536) This Court has long explained, too, that incorporated provisions of the Bill of Rights bear the same content when asserted against States as they do when asserted against the federal government.[24](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00252050796536) So if the Sixth Amendment's right to a jury trial requires a unanimous verdict to support a conviction in federal court, it requires no less in state court.

**II**

**A**

How, despite these seemingly straightforward principles, have **Louisiana's** and Oregon's laws managed to hang on for so long? It turns out that the Sixth Amendment's otherwise simple story took a strange turn in 1972. That year, the Court confronted these States’ unconventional schemes for the first time—in [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*v. *Oregon*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))[25](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00262050796536) and a companion case, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I8bb1f6ed9bf111d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Johnson*v.***Louisiana***.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127121&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))[26](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00272050796536) Ultimately, the Court could do no more than issue a badly fractured set of opinions. Four dissenting Justices would not have hesitated to strike down the States’ laws, recognizing that the Sixth Amendment requires unanimity and that this guarantee is fully applicable against the States under the Fourteenth Amendment. **\*1398** [27](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00282050796536) But a four-Justice plurality took a very different view of the Sixth Amendment. These Justices declared that the real question before them was whether unanimity serves an important “function” in “contemporary society.”[28](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00292050796536) Then, having reframed the question, the plurality wasted few words before concluding that unanimity's costs outweigh its benefits in the modern era, so the Sixth Amendment should not stand in the way of **Louisiana** or Oregon.

The ninth Member of the Court adopted a position that was neither here nor there. On the one hand, Justice Powell agreed that, as a matter of “history and precedent, ... the Sixth Amendment requires a unanimous jury verdict to convict.”[29](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00302050796536) But, on the other hand, he argued that the Fourteenth Amendment does not render this guarantee against the federal government fully applicable against the States. In this way, Justice Powell doubled down on his belief in “dual-track” incorporation—the idea that a single right can mean two different things depending on whether it is being invoked against the federal or a state government.

Justice Powell acknowledged that his argument for dual-track incorporation came “late in the day.”[30](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00312050796536) Late it was. The Court had already, nearly a decade earlier, “rejected the notion that the Fourteenth Amendment applies to the States only a ‘watered-down, subjective version of the individual guarantees of the Bill of Rights.’ ”[31](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00322050796536) It's a point we've restated many times since, too, including as recently as last year.[32](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00332050796536) Still, Justice Powell frankly explained, he was “unwillin[g]” to follow the Court's precedents.[33](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00342050796536) So he offered up the essential fifth vote to uphold Mr. Apodaca's conviction—if based only on a view of the Fourteenth Amendment that he knew was (and remains) foreclosed by precedent.

**B**

In the years following [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), both **Louisiana** and Oregon chose to continue allowing nonunanimous verdicts. But their practices have always stood on shaky ground. After all, while Justice Powell's vote secured a favorable judgment for the States in [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), it's never been clear what rationale could support a similar result in future cases. Only two possibilities exist: Either the Sixth Amendment allows nonunanimous verdicts, or the Sixth Amendment's guarantee of a jury trial applies with less force to the States under the Fourteenth Amendment. Yet, as we've seen, both bear their problems. In [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) itself, a majority of Justices—including Justice Powell—recognized that the Sixth  **\*1399** Amendment demands unanimity, just as our cases have long said. And this Court's precedents, both then and now, prevent the Court from applying the Sixth Amendment to the States in some mutated and diminished form under the Fourteenth Amendment. So what could we possibly describe as the “holding” of [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))?

Really, no one has found a way to make sense of it. In later cases, this Court has labeled [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) an “exception,” “unusual,” and in any event “not an endorsement” of Justice Powell's view of incorporation.[34](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00352050796536) At the same time, we have continued to recognize the historical need for unanimity.[35](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00362050796536) We've been studiously ambiguous, even inconsistent, about what [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) might mean.[36](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00372050796536) To its credit, **Louisiana** acknowledges the problem. The State expressly tells **us** it is not “asking the Court to accord Justice Powell's solo opinion in [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) precedential force.”[37](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00382050796536) Instead, in an effort to win today's case, **Louisiana** embraces the idea that everything is up for grabs. It contends that this Court has never definitively ruled on the propriety of nonunanimous juries under the Sixth Amendment—and that we should use this case to hold for the first time that nonunanimous juries are permissible in state and federal courts alike.

**III**

**Louisiana's** approach may not be quite as tough as trying to defend Justice Powell's dual-track theory of incorporation, but it's pretty close. How does the State deal with the fact this Court has said 13 times over 120 years that the Sixth Amendment *does* require unanimity? Or the fact that five Justices in [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) said the same? The best the State can offer is to suggest that all these statements came in dicta.[38](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00392050796536)  **\*1400** But even supposing (without granting) that **Louisiana** is right and it's dicta all the way down, why would the Court now walk away from many of its own statements about the Constitution's meaning? And what about the prior 400 years of English and American cases requiring unanimity—should we dismiss all those as dicta too?

Sensibly, **Louisiana** doesn't dispute that the common law required unanimity. Instead, it argues that the drafting history of the Sixth Amendment reveals an intent by the framers to leave this particular feature behind. The State points to the fact that Madison's proposal for the Sixth Amendment originally read: “The trial of all crimes ... shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites....”[39](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00402050796536) **Louisiana** notes that the House of Representatives approved this text with minor modifications. Yet, the State stresses, the Senate replaced “impartial jury of freeholders of the vicinage” with “impartial jury of the State and district wherein the crime shall have been committed” and also removed the explicit references to unanimity, the right of challenge, and “other accustomed requisites.” In light of these revisions, **Louisiana** would have **us** infer an intent to abandon the common law's traditional unanimity requirement.

But this snippet of drafting history could just as easily support the opposite inference. Maybe the Senate deleted the language about unanimity, the right of challenge, and “other accustomed prerequisites” because all this was so plainly included in the promise of a “trial by an impartial jury” that Senators considered the language surplusage. The truth is that we have little contemporaneous evidence shedding light on why the Senate acted as it did.[40](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00412050796536) So rather than dwelling on text left on the cutting room floor, we are much better served by interpreting the language Congress retained and the States ratified. And, as we've seen, at the time of the Amendment's adoption, the right to a jury trial *meant* a trial in which the jury renders a unanimous verdict.

Further undermining **Louisiana's** inference about the drafting history is the fact it proves too much. If the Senate's deletion of the word “unanimity” changed the meaning of the text that remains, then the same would seemingly have to follow for the other deleted words as well. So it's not just unanimity that died in the Senate, but all the “other accustomed requisites” associated with the common law jury trial right—*i.e.,* *everything* history might have taught **us** about what it means to have a jury trial. Taking the State's argument from drafting history to its logical conclusion would thus leave the right to a “trial by jury” devoid of meaning. A right mentioned twice in the Constitution would be reduced to an empty promise. That can't be right.

Faced with this hard fact, **Louisiana's** only remaining option is to invite **us** to distinguish between the historic features of common law jury trials that (we think) serve “important enough” functions to migrate silently into the Sixth Amendment  **\*1401** and those that don't. And, on the State's account, we should conclude that unanimity isn't worthy enough to make the trip.

But to see the dangers of **Louisiana's** overwise approach, there's no need to look any further than [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) itself. There, four Justices, pursuing the functionalist approach **Louisiana** espouses, began by describing the “ ‘essential’ ” benefit of a jury trial as “ ‘the interposition ... of the commonsense judgment of a group of laymen’ ” between the defendant and the possibility of an “ ‘overzealous prosecutor.’ ”[41](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00422050796536) And measured against that muddy yardstick, they quickly concluded that requiring 12 rather than 10 votes to convict offers no meaningful improvement.[42](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00432050796536)Meanwhile, these Justices argued, States have good and important reasons for dispensing with unanimity, such as seeking to reduce the rate of hung juries.[43](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00442050796536)

Who can profess confidence in a breezy cost-benefit analysis like that? Lost in the accounting are the racially discriminatory *reasons* that **Louisiana** and Oregon adopted their peculiar rules in the first place.[44](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00452050796536) What's more, the plurality never explained why the promised benefit of abandoning unanimity—reducing the rate of hung juries—always scores as a credit, not a cost. But who can say whether any particular hung jury is a waste, rather than an example of a jury doing exactly what the plurality said it should—deliberating carefully and safeguarding against overzealous prosecutions? And what about the fact, too, that some studies suggest that the elimination of unanimity has only a small effect on the rate of hung juries?[45](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00462050796536) Or the fact that others profess to have found that requiring unanimity may provide other possible benefits, including more open-minded and more thorough deliberations?[46](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00472050796536) It seems the [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) plurality never even conceived of such possibilities.

[5](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F52050796536)Our real objection here isn't that the [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) plurality's cost-benefit analysis was too skimpy. The deeper problem is that the plurality subjected the ancient guarantee of a unanimous jury verdict to its own functionalist assessment in the  **\*1402** first place. And **Louisiana** asks **us** to repeat the error today, just replacing [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))’s functionalist assessment with our own updated version. All this overlooks the fact that, at the time of the Sixth Amendment's adoption, the right to trial by jury *included*a right to a unanimous verdict. When the American people chose to enshrine that right in the Constitution, they weren't suggesting fruitful topics for future cost-benefit analyses. They were seeking to ensure that their children's children would enjoy the same hard-won liberty they enjoyed. As judges, it is not our role to reassess whether the right to a unanimous jury is “important enough” to retain. With humility, we must accept that this right may serve purposes evading our current notice. We are entrusted to preserve and protect that liberty, not balance it away aided by no more than social statistics.[47](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00482050796536)

**IV**

**A**

If **Louisiana's** path to an affirmance is a difficult one, the dissent's is trickier still. The dissent doesn't dispute that the Sixth Amendment protects the right to a unanimous jury verdict, or that the Fourteenth Amendment extends this right to state-court trials. But, it insists, we must affirm Mr. **Ramos's** conviction anyway. Why? Because the doctrine of *stare decisis* supposedly commands it. There are two independent reasons why that answer falls short.

In the first place and as we've seen, not even **Louisiana** tries to suggest that [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) supplies a governing precedent. Remember, Justice Powell agreed that the Sixth Amendment requires a unanimous verdict to convict, so he would have no objection to that aspect of our holding today. Justice Powell reached a different result only by relying on a dual-track theory of incorporation that a majority of the Court had already rejected (and continues to reject). And to accept *that* reasoning as precedential, we would have to embrace a new and dubious proposition: that a single Justice writing only for himself has the authority to bind this Court to propositions it has already rejected.

This is not the rule, and for good reason—it would do more to destabilize than honor precedent. To see how, consider a  **\*1403** hypothetical. Suppose we face a question of first impression under the Fourth Amendment: whether a State must obtain a warrant before reading a citizen's email in the hands of an Internet provider and using that email as evidence in a criminal trial. Imagine this question splits the Court, with four Justices finding the Fourth Amendment requires a warrant and four Justices finding no such requirement. The ninth Justice agrees that the Fourth Amendment requires a warrant, but takes an idiosyncratic view of the consequences of violating that right. In her view, the exclusionary rule has gone too far, and should only apply when the defendant is prosecuted for a felony. Because the case before her happens to involve only a misdemeanor, she provides the ninth vote to affirm a conviction based on evidence secured by a warrantless search. Of course, this Court has longstanding precedent requiring the suppression of all evidence obtained in unconstitutional searches and seizures. [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I236cdffa9c1e11d9bdd1cfdd544ca3a4&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Mapp v. Ohio*, 367 **U.S**. 643, 81 **S.Ct**. 1684, 6 **L.Ed**.**2d** 1081 (1961)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1961125528&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). But like Justice Powell, our hypothetical ninth Justice sticks to her view and expressly rejects this Court's precedent. Like Justice Powell, this Justice's vote would be essential to the judgment. So if, as the dissent suggests, *that*is enough to displace precedent, would [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I236cdffa9c1e11d9bdd1cfdd544ca3a4&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Mapp*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1961125528&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))’s exclusionary rule now be limited to felony prosecutions?

Admittedly, this example comes from our imagination. It has to, because no case has before suggested that a single Justice may overrule precedent. But if the Court were to embrace the dissent's view of *stare decisis*, it would not stay imaginary for long. Every occasion on which the Court is evenly split would present an opportunity for single Justices to overturn precedent to bind future majorities. Rather than advancing the goals of predictability and reliance lying behind the doctrine of *stare decisis*, such an approach would impair them.

The dissent contends that, in saying this much, we risk defying [*Marks*v.*United States*.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118739&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))[48](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00492050796536) According to [*Marks*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118739&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), when “a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’ ”[49](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00502050796536) But notice that the dissent never actually gets around to telling **us** which opinion in [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) it considers to be the narrowest and controlling one under [*Marks*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118739&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))—or why. So while the dissent worries that we defy a [*Marks*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118739&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) precedent, it is oddly coy about where exactly that precedent might be found.

The parties recognize what the dissent does not: [*Marks*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118739&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) has nothing to do with this case. Unlike a [*Marks*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118739&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) dispute where the litigants duel over which opinion represents the narrowest and controlling one, the parties before **us**accept that [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) yielded no controlling opinion at all. In particular, both sides admit that Justice Powell's opinion cannot bind **us**—precisely because he relied on a dual-track rule of incorporation that an unbroken line of majority opinions before and after [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) has rejected. Still, the dissent presses the issue, suggesting that a single Justice's opinion *can* overrule prior precedents under “the logic” of [*Marks*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118739&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).[50](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00512050796536) But, as the dissent itself implicitly acknowledges, [*Marks*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118739&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) never sought to offer or defend such a rule. And, as we have seen, too, a  **\*1404** rule like that would do more to harm than advance *stare decisis*.

The dissent's backup argument fares no better. In the end, even the dissent is forced to concede that Justice Powell's *reasoning* in [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) lacks controlling force.[51](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00522050796536) So far, so good. But then the dissent suggests [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) somehow still manages to supply a controlling precedent as to its *result*.[52](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00532050796536) Look closely, though. The dissent's account of [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))’s *result* looks suspiciously like the *reasoning* of Justice Powell's opinion: “In [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca,*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))this means that when (1) a defendant is convicted in state court, (2) at least 10 of the 12 jurors vote to convict, and (3) the defendant argues that the conviction violates the Constitution because the vote was not unanimous, the challenge fails.”[53](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00542050796536) Where does the convenient “state court” qualification come from? Neither the [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) plurality nor the dissent included any limitation like that—their opinions turned on the meaning of the Sixth Amendment. What the dissent characterizes as [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))’s result turns out to be nothing more than Justice Powell's reasoning about dual-track incorporation dressed up to look like a logical proof.

All of this does no more than highlight an old truth. It is usually a judicial decision's reasoning—its *ratio* *decidendi*—that allows it to have life and effect in the disposition of future cases.[54](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00552050796536) As this Court has repeatedly explained in the context of summary affirmances, “ ‘unexplicated’ ” decisions may “ ‘settl[e] the issues for the parties, [but they are] not to be read as a renunciation by this Court of doctrines previously announced in our opinions.’ ”[55](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00562050796536) Much the same may be said here. [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))’s judgment line resolved that case for the parties in that case. It is binding in that sense. But stripped from any reasoning, its judgment alone cannot be read to repudiate this Court's repeated pre-existing teachings on the Sixth and Fourteenth Amendments.[56](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00572050796536)

**B**

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[6](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F62050796536)[7](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F72050796536)[8](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F82050796536)There's another obstacle the dissent must overcome. Even if we accepted  **\*1405** the premise that [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) established a precedent, no one on the Court today is prepared to say it was rightly decided, and *stare decisis*isn't supposed to be the art of methodically ignoring what everyone knows to be true.[57](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00582050796536) Of course, the precedents of this Court warrant our deep respect as embodying the considered views of those who have come before. But *stare decisis* has never been treated as “an inexorable command.”[58](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00592050796536) And the doctrine is “at its weakest when we interpret the Constitution”[59](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00602050796536) because a mistaken judicial interpretation of that supreme law is often “practically impossible” to correct through other means.[60](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00612050796536) To balance these considerations, when it revisits a precedent this Court has traditionally considered “the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision.”[61](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00622050796536) In this case, each factor points in the same direction.

Start with the quality of the reasoning. Whether we look to the plurality opinion or Justice Powell's separate concurrence, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) was gravely mistaken; again, no Member of the Court today defends either as rightly decided. Without repeating what we've already explained in detail, it's just an implacable fact that the plurality spent almost no time grappling with the historical meaning of the Sixth Amendment's jury trial right, this Court's long-repeated statements that it demands unanimity, or the racist origins of **Louisiana's** and Oregon's laws. Instead, the plurality subjected the Constitution's jury trial right to an incomplete functionalist analysis of its own creation for which it spared one paragraph. And, of course, five Justices expressly rejected the plurality's conclusion that the Sixth Amendment does not require unanimity. Meanwhile, Justice Powell refused to follow this Court's incorporation precedents. Nine Justices (including Justice Powell) recognized this for what it was; eight called it an error.

Looking to [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))’s consistency with related decisions and recent legal developments compounds the reasons for concern. [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) sits uneasily with 120 years of preceding case law. Given how unmoored it was from the start, it might seem unlikely that later developments could have done more to undermine the decision. Yet they have. While Justice Powell's dual-track theory of incorporation was already foreclosed in 1972, some at that time still argued that it might have a role to play outside the realm of criminal procedure. Since then, the Court has held otherwise.[62](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00632050796536) Until recently, dual-track incorporation attracted at least a measure of support in dissent. But this Court has now roundly rejected it.[63](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00642050796536) Nor has the plurality's rejection **\*1406** of the Sixth Amendment's historical unanimity requirement aged more gracefully. As we've seen, in the years since [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), this Court has spoken inconsistently about its meaning—but nonetheless referred to the traditional unanimity requirement on at least eight occasions.[64](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00652050796536) In light of all this, calling [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) an outlier would be perhaps too suggestive of the possibility of company.

When it comes to reliance interests, it's notable that neither **Louisiana** nor Oregon claims anything like the prospective economic, regulatory, or social disruption litigants seeking to preserve precedent usually invoke. No one, it seems, has signed a contract, entered a marriage, purchased a home, or opened a business based on the expectation that, should a crime occur, at least the accused may be sent away by a 10-to-2 verdict.[65](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00662050796536) Nor does anyone suggest that nonunanimous verdicts have “become part of our national culture.”[66](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00672050796536) It would be quite surprising if they had, given that nonunanimous verdicts are insufficient to convict in 48 States and federal court.

Instead, the only reliance interests that might be asserted here fall into two categories. The first concerns the fact **Louisiana** and Oregon may need to retry defendants convicted of felonies by nonunanimous verdicts whose cases are still pending on direct appeal. The dissent claims that this fact supplies the winning argument for retaining [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) because it has generated “enormous reliance interests” and overturning the case would provoke a “crushing” “tsunami” of follow-on litigation.[67](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00682050796536)

The overstatement may be forgiven as intended for dramatic effect, but prior convictions in only two States are potentially affected by our judgment. Those States credibly claim that the number of nonunanimous felony convictions still on direct appeal are somewhere in the hundreds,[68](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00692050796536) and retrying or plea bargaining these cases will surely impose a cost. But new rules of criminal procedures usually do, often affecting significant numbers of pending cases across the whole country. For example, after [*Booker*v. *United States*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2005966569&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) held that the Federal Sentencing Guidelines must be advisory rather than mandatory, this Court vacated and remanded nearly 800 decisions to the courts of appeals. Similar consequences likely followed when [*Crawford*v. *Washington*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2004190005&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) overturned prior interpretations of the Confrontation Clause[69](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00702050796536) or [*Arizona*v. *Gant*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2018636702&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))changed the law for searches incident to arrests.[70](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00712050796536)Our decision here promises to cause less, and certainly nothing before **us** supports the dissent's surmise that it will **\*1407** cause wildly more, disruption than these other decisions.

**2**

The second and related reliance interest the dissent seizes upon involves the interest **Louisiana** and Oregon have in the security of their final criminal judgments. In light of our decision today, the dissent worries that defendants whose appeals are already complete might seek to challenge their nonunanimous convictions through collateral (*i.e.,* habeas) review.

[9](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F92050796536)But again the worries outstrip the facts. Under [*Teague*v.*Lane*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989027119&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), newly recognized rules of criminal procedure do not normally apply in collateral review.[71](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00722050796536) True, [*Teague*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989027119&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))left open the possibility of an exception for “watershed rules” “implicat[ing] the fundamental fairness [and accuracy] of the trial.”[72](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00732050796536) But, as this language suggests, [*Teague*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989027119&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))’s test is a demanding one, so much so that this Court has yet to announce a new rule of criminal procedure capable of meeting it.[73](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00742050796536) And the test is demanding by design, expressly calibrated to address the reliance interests States have in the finality of their criminal judgments.[74](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00752050796536)

Nor is the [*Teague*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989027119&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) question even before **us**. Whether the right to jury unanimity applies to cases on collateral review is a question for a future case where the parties will have a chance to brief the issue and we will benefit from their adversarial presentation. That litigation is sure to come, and will rightly take into account the States’ interest in the finality of their criminal convictions. In this way, [*Teague*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989027119&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) frees **us** to say what we know to be true about the rights of the accused under our Constitution today, while leaving questions about the reliance interest States possess in their final judgments for later proceedings crafted to account for them. It would hardly make sense to ignore that two-step process and count the State's reliance interests in final judgments both here and again there. Certainly the dissent cites no authority for such double counting.

Instead, the dissent suggests that the feeble reliance interests it identifies should get a boost because the right to a unanimous jury trial has “little practical importance going forward.”[75](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00762050796536) In the dissent's telling, **Louisiana** has “abolished” nonunanimous verdicts and Oregon “seemed on the verge of doing the same until the Court intervened.”[76](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00772050796536) But, as the dissent itself concedes, a ruling for **Louisiana** would invite other States to relax their own unanimity requirements.[77](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00782050796536) In fact, 14 jurisdictions have already told **us** that they would value the right to “experiment” with nonunanimous juries.[78](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00792050796536) Besides, **Louisiana's** law bears only prospective effect, so the State continues to allow nonunanimous verdicts for crimes committed before 2019.[79](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00802050796536) And while the dissent speculates that our grant of certiorari contributed to the failure of legal reform efforts in Oregon, its citation does not support its surmise. **\*1408** No doubt, too, those who risk being subjected to nonunanimous juries in **Louisiana** and Oregon today, and elsewhere tomorrow, would dispute the dissent's suggestion that their Sixth Amendment rights are of “little practical importance.”

That point suggests another. In its valiant search for reliance interests, the dissent somehow misses maybe the most important one: the reliance interests of the American people. Taken at its word, the dissent would have **us** discard a Sixth Amendment right in perpetuity rather than ask two States to retry a slice of their prior criminal cases. Whether that slice turns out to be large or small, it cannot outweigh the interest we all share in the preservation of our constitutionally promised liberties. Indeed, the dissent can cite no case in which the one-time need to retry defendants has *ever*been sufficient to inter a constitutional right forever.

In the final accounting, the dissent's *stare decisis* arguments round to zero. We have an admittedly mistaken decision, on a constitutional issue, an outlier on the day it was decided, one that's become lonelier with time. In arguing otherwise, the dissent must elide the reliance the American people place in their constitutionally protected liberties, overplay the competing interests of two States, count some of those interests twice, and make no small amount of new precedent all its own.

**V**

On what ground would anyone have **us** leave Mr. **Ramos** in prison for the rest of his life? Not a single Member of this Court is prepared to say **Louisiana** secured his conviction constitutionally under the Sixth Amendment. No one before **us** suggests that the error was harmless. **Louisiana** does not claim precedent commands an affirmance. In the end, the best anyone can seem to muster against Mr. **Ramos** is that, if we dared to admit in his case what we all know to be true about the Sixth Amendment, we might have to say the same in some others. But where is the justice in that? Every judge must learn to live with the fact he or she will make some mistakes; it comes with the territory. But it is something else entirely to perpetuate something we all know to be wrong only because we fear the consequences of being right. The judgment of the Court of Appeals is

*Reversed*.

**Concurrence**

Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), concurring as to all but Part IV–A.

I agree with most of the Court's rationale, and so I join all but Part IV–A of its opinion. I write separately, however, to underscore three points. First, overruling precedent here is not only warranted, but compelled. Second, the interests at stake point far more clearly to that outcome than those in other recent cases. And finally, the racially biased origins of the **Louisiana** and Oregon laws uniquely matter here.

**I**

Both the majority and the dissent rightly emphasize that *stare decisis* “has been a fundamental part of our jurisprudence since the founding.” *Post*, at 1432 (opinion of ALITO, J.); see *ante*, at 1404 – 1405. Indeed, “[w]e generally adhere to our prior decisions, even if we question their soundness, because doing so ‘promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.’ ” [*Alleyne v. United States*, 570 **U.S**. 99, 118, 133 **S.Ct**. 2151, 186 **L.Ed**.**2d** 314 (2013)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030794220&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_118&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_118) (SOTOMAYOR, J., concurring) (quoting [*Payne v. Tennessee*, 501 **U.S**. 808, 827, 111 **S.Ct**. 2597, 115 **L.Ed**.**2d** 720 (1991)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991116033&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_827&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_827)).

**\*1409** But put simply, this is not a case where we cast aside precedent “simply because a majority of this Court now disagrees with” it. [*Alleyne*, 570 **U.S**. at 133, 133 **S.Ct**. 2151](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030794220&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_133&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_133) (ALITO, J., dissenting). Rather, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca* v. *Oregon,*406 **U**. **S**. 404, 92 **S.Ct**. 1628, 32 **L.Ed**.**2d** 184 (1972)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), was on shaky ground from the start. That was not because of the functionalist analysis of that Court's plurality: Reasonable minds have disagreed over time—and continue to disagree—about the best mode of constitutional interpretation. That the plurality in [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))used different interpretive tools from the majority here is not a reason on its own to discard precedent.

What matters instead is that, as the majority rightly stresses, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) is a universe of one—an opinion uniquely irreconcilable with not just one, but two, strands of constitutional precedent well established both before and after the decision. The Court has long recognized that the Sixth Amendment requires unanimity. *Ante,* at 1399 – 1400, 1404 – 1406. Five Justices in [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))itself disagreed with that plurality's contrary view of the Sixth Amendment. Justice Powell's theory of dual-track incorporation also fared no better: He recognized that his argument on that score came “late in the day.” [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I8bb1f6ed9bf111d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Johnson v.****Louisiana***, 406 **U.S**. 356, 375, 92 **S.Ct**. 1620, 32 **L.Ed**.**2d** 152 (1972)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127121&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_375&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_375) (concurring opinion).

Moreover, “[t]he force of *stare decisis* is at its nadir in cases concerning [criminal] procedur[e] rules that implicate fundamental constitutional protections.” [*Alleyne*, 570 **U.S**. at 116, n. 5, 133 **S.Ct**. 2151](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030794220&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_116&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_116). And the constitutional protection here ranks among the most essential: the right to put the State to its burden, in a jury trial that comports with the Sixth Amendment, before facing criminal punishment. See [*Codispoti* v. *Pennsylvania*, 418 **U**. **S**. 506, 515–516, 94 **S.Ct**. 2687, 41 **L.Ed**.**2d** 912 (1974)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1974127230&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_708_515&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_515) (“The Sixth Amendment represents a deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement” (internal quotation marks omitted)). Where the State's power to imprison those like **Ramos**rests on an erroneous interpretation of the jury-trial right, the Court should not hesitate to reconsider its precedents.

**II**

In contrast to the criminal-procedure context, “[c]onsiderations in favor of *stare decisis* are at their acme in cases involving property and contract rights.” [*Payne*, 501 **U.S**. at 828, 111 **S.Ct**. 2597](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991116033&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_828&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_828). Despite that fact, the Court has recently overruled precedent where the Court's shift threatened vast regulatory and economic consequences. [*Janus* v. *State, County, and Municipal Employees*, 585 **U**. **S**. ––––, 138 **S.Ct**. 2448, 201 **L.Ed**.**2d** 924 (2018)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2044822047&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); [*id*., at ––––, 138 **S.Ct**., at 2499](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2044822047&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_708_2499&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_2499) (KAGAN, J., dissenting) (noting that the Court's opinion called into question “thousands of ... contracts covering millions of workers”); see [*South Dakota* v. *Wayfair, Inc.*, 585 **U**. **S**. ––––, ––––, 138 **S.Ct**. 2080, 2098, 201 **L.Ed**.**2d** 403 (2018)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2044774567&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) (noting the “legitimate” burdens that the Court's overruling of precedent would place on vendors who had started businesses in reliance on a previous decision).

This case, by contrast, threatens no broad upheaval of private economic rights. Particularly when compared to the interests of private parties who have structured their affairs in reliance on our decisions, the States’ interests here in avoiding a modest number of retrials—emphasized at such length by the dissent—are much less weighty. They are certainly not new: Opinions that force changes in a State's criminal procedure typically impose such costs. And were this Court to take the dissent's approach—defending criminal-procedure  **\*1410**opinions as wrong as [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) simply to avoid burdening criminal justice systems—it would never correct its criminal jurisprudence at all.

To pick up on the majority's point, *ante*, at 1406 – 1407, in that alternate universe, a trial judge alone could still decide the critical facts necessary to sentence a defendant to death. [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I86342be19c9011d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Walton v. Arizona*, 497 **U.S**. 639, 110 **S.Ct**. 3047, 111 **L.Ed**.**2d** 511 (1990)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990098000&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), overruled by [*Ring v. Arizona*, 536 **U.S**. 584, 122 **S.Ct**. 2428, 153 **L.Ed**.**2d** 556 (2002)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002390142&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). An officer would still be able to search a car upon the arrest of any one of its recent occupants. [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic1ced5a09c1e11d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*New York v. Belton*, 453 **U.S**. 454, 101 **S.Ct**. 2860, 69 **L.Ed**.**2d** 768 (1981)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981128877&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), holding limited by [*Arizona v. Gant*, 556 **U.S**. 332, 129 **S.Ct**. 1710, 173 **L.Ed**.**2d** 485 (2009)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2018636702&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). And States could still deprive a defendant of the right to confront her accuser so long as the incriminating statement was “reliable.” [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I6b46b7ea9c2511d9bc61beebb95be672&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Ohio v. Roberts*, 448 **U.S**. 56, 100 **S.Ct**. 2531, 65 **L.Ed**.**2d** 597 (1980)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980116797&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), abrogated by [*Crawford v. Washington*, 541 **U.S**. 36, 124 **S.Ct**. 1354, 158 **L.Ed**.**2d** 177 (2004)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2004190005&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). The Constitution demands more than the continued use of flawed criminal procedures—all because the Court fears the consequences of changing course.

**III**

Finally, the majority vividly describes the legacy of racism that generated **Louisiana's** and Oregon's laws. *Ante,*at 1393 – 1394, 1400 – 1401, and n. 44. Although **Ramos** does not bring an equal protection challenge, the history is worthy of this Court's attention. That is not simply because that legacy existed in the first place—unfortunately, many laws and policies in this country have had some history of racial animus—but also because the States’ legislatures never truly grappled with the laws’ sordid history in reenacting them. See generally [*United States v. Fordice*, 505 **U.S**. 717, 729, 112 **S.Ct**. 2727, 120 **L.Ed**.**2d** 575 (1992)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992115430&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_729&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_729) (policies that are “traceable” to a State's *de jure* racial segregation and that still “have discriminatory effects” offend the Equal Protection Clause).

Where a law otherwise is untethered to racial bias—and perhaps also where a legislature actually confronts a law's tawdry past in reenacting it—the new law may well be free of discriminatory taint. That cannot be said of the laws at issue here. While the dissent points to the “legitimate” reasons for **Louisiana's** reenactment, *post*, at 3–4, **Louisiana's** perhaps only effort to contend with the law's discriminatory purpose and effects came recently, when the law was repealed altogether.

Today, **Louisiana's** and Oregon's laws are fully—and rightly—relegated to the dustbin of history. And so, too, is [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). While overruling precedent must be rare, this Court should not shy away from correcting its errors where the right to avoid imprisonment pursuant to unconstitutional procedures hangs in the balance.

**Concurrence in Part**

Justice [KAVANAUGH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0364335801&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), concurring in part.

In [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*v. *Oregon*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), this Court held that state juries need not be unanimous in order to convict a criminal defendant. [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[406 **U.S**. 404, 92 **S.Ct**. 1628, 32 **L.Ed**.**2d** 184 (1972)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). Two States, **Louisiana** and Oregon, have continued to use non-unanimous juries in criminal cases. Today, the Court overrules [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))and holds that state juries must be unanimous in order to convict a criminal defendant.

I agree with the Court that the time has come to overrule [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). I therefore join the introduction and Parts I, II–A, III, and IV–B–1 of the Court's persuasive and important opinion. I write separately to explain my view of how *stare decisis* applies to this case.

**I**

The legal doctrine of *stare decisis* derives from the Latin maxim “*stare decisis* *et non quieta movere*,” which means to stand by the thing decided and not disturb the calm. The doctrine reflects respect for the accumulated wisdom of judges who have previously tried to solve the same problem. In 1765, Blackstone—“the preeminent authority on English law for the founding generation,” [*Alden v. Maine*, 527 **U.S**. 706, 715, 119 **S.Ct**. 2240, 144 **L.Ed**.**2d** 636 (1999)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999146865&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_715&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_715)—wrote that “it is an established rule to abide by former precedents,” to “keep the scale of justice even and steady, and not liable to waver with every new judge's opinion.” 1 W. Blackstone, Commentaries on the Laws of England 69 (1765). The Framers of our Constitution understood that the doctrine of *stare decisis* is part of the “judicial Power” and rooted in Article III of the Constitution. Writing in Federalist 78, Alexander Hamilton emphasized the importance of *stare decisis*: To “avoid an arbitrary discretion in the courts, it is indispensable” that federal judges “should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them.” The Federalist No. 78, p. 529 (J. Cooke ed. 1961). In the words of THE CHIEF JUSTICE, *stare decisis*’ “greatest purpose is to serve a constitutional ideal—the rule of law.” [*Citizens United v. Federal Election Comm'n*, 558 **U.S**. 310, 378, 130 **S.Ct**. 876, 175 **L.Ed**.**2d** 753 (2010)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2021175488&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_378&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_378) (concurring opinion).

This Court has repeatedly explained that*stare decisis* “promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process.” [*Payne v. Tennessee*, 501 **U.S**. 808, 827, 111 **S.Ct**. 2597, 115 **L.Ed**.**2d**720 (1991)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991116033&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_827&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_827). The doctrine “permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.” [*Vasquez v. Hillery*, 474 **U.S**. 254, 265–266, 106 **S.Ct**. 617, 88 **L.Ed**.**2d** 598 (1986)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986102145&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_265&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_265).

The doctrine of *stare decisis* does not mean, of course, that the Court should never overrule erroneous precedents. All Justices now on this Court agree that it is sometimes appropriate for the Court to overrule erroneous decisions. Indeed, in just the last few Terms, every current Member of this Court has voted to overrule multiple constitutional precedents. See, *e.g.,*[*Knick* v. *Township of Scott*, 588 **U**. **S**. ––––, 139 **S.Ct**. 2162, 204 **L.Ed**.**2d** 558 (2019)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2048538046&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); [*Franchise Tax Bd. of Cal.* v. *Hyatt*, 587 **U**. **S**. ––––, 139 **S.Ct**. 1485, 203 **L.Ed**.**2d** 768 (2019)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2048247944&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); [*Janus* v. *State, County, and Municipal Employees*, 585 **U**. **S**. ––––, 138 **S.Ct**. 2448, 201 **L.Ed**.**2d** 924 (2018)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2044822047&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); [*Hurst* v. *Florida*, 577 **U**. **S**. ––––, 136 **S.Ct**. 616, 193 **L.Ed**.**2d** 504 (2016)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2037976642&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); [*Obergefell* v. *Hodges*, 576 **U**. **S**. 644, 135 **S.Ct**. 2584, 192 **L.Ed**.**2d** 609 (2015)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036545719&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); [*Johnson* v. *United States*, 576 **U**. **S**. 591, 135 **S.Ct**. 2551, 192 **L.Ed**.**2d** 569 (2015)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036545718&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); [*Alleyne v. United States*, 570 **U.S**. 99, 133 **S.Ct**. 2151, 186 **L.Ed**.**2d** 314 (2013)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2030794220&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); see also Baude, Precedent and Discretion, **2020** **S**. **Ct**. Rev. 1, 4 (forthcoming) (“Nobody on the Court believes in absolute stare decisis”).

Historically, moreover, some of the Court's most notable and consequential decisions have entailed overruling precedent.

The lengthy and extraordinary list of landmark cases that overruled precedent includes the single most important and greatest decision in this Court's history, [*Brown* v. *Board of Education*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1954121869&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), which repudiated the separate but equal doctrine of [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I090f8c749cc311d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Plessy v. Ferguson*, 163 **U.S**. 537, 16 **S.Ct**. 1138, 41 L.Ed. 256 (1896)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1896180043&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

As those many examples demonstrate, the doctrine of *stare decisis* does not dictate, and no one seriously maintains, that the Court should *never*overrule erroneous precedent. As the Court has often stated and repeats today, *stare decisis* is not an “inexorable command.” *E.g., ante,* at 1405.

On the other hand, as Justice Jackson explained, just “because one should avoid Scylla is no reason for crashing into Charybdis.” Jackson, Decisional Law and Stare Decisis, 30 A. B. A. J. 334 (1944). So no one advocates that the Court should *always*overrule erroneous precedent.

Rather, applying the doctrine of *stare decisis*, this Court ordinarily adheres to precedent, but *sometimes*overrules precedent. The difficult question, then, is when to overrule an erroneous precedent.

To begin with, the Court's precedents on precedent distinguish statutory cases from constitutional cases.

In statutory cases, *stare decisis* is comparatively strict, as history shows and the Court has often stated. That is because Congress and the President can alter a statutory precedent by enacting new legislation. To be sure, enacting new legislation requires finding room in a crowded legislative docket and securing the agreement of the House, the Senate (in effect, 60 Senators), and the President. Both by design and as a matter of fact, enacting new legislation is difficult—and far more difficult than the Court's cases sometimes seem to assume. Nonetheless, the Court has ordinarily left the updating or correction of erroneous statutory precedents to the legislative process. See, *e.g.,* [*Kimble v. Marvel Entertainment, LLC*, 576 **U.S**. 446, 456–457, 135 **S.Ct**. 2401, 192 **L.Ed**.**2d** 463 (2015)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036504422&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_456&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_456); [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I618a19a69c1f11d9bc61beebb95be672&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Patterson v. McLean Credit Union*, 491 **U.S**. 164, 172–173, 109 **S.Ct**. 2363, 105 **L.Ed**.**2d** 132 (1989)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989089493&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_172&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_172); [*Flood v. Kuhn*, 407 **U.S**. 258, 283–284, 92 **S.Ct**. 2099, 32 **L.Ed**.**2d** 728 (1972)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127159&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_283&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_283). The principle that “it is more important that the applicable rule of law be settled than that it be settled right” is “commonly true even where the error is a matter of serious concern, *provided correction can be had by legislation*.” [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Icde8e1079cc211d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Burnet v. Coronado Oil & Gas Co.*, 285 **U.S**. 393, 406, 52 **S.Ct**. 443, 76 L.Ed. 815 (1932)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1932123079&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_406&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_406) (Brandeis, J., dissenting) (emphasis added).[2](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00822050796536)

In constitutional cases, by contrast, the Court has repeatedly said—and says again today—that the doctrine of *stare decisis* is not as “inflexible.” [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Icde8e1079cc211d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Burnet*, 285 **U.S**. at 406, 52 **S.Ct**. 443](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1932123079&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_406&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_406) (Brandeis, J., dissenting); see also *ante,* at 1404 – 1405; [*Payne*, 501 **U.S**. at 828, 111 **S.Ct**. 2597](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991116033&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_828&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_828); [*Scott*, 437 **U.S**. at 101, 98 **S.Ct**. 2187](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1978114260&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_101&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_101). The reason is straightforward: As Justice O'Connor once wrote for the Court, *stare decisis* is not as strict “when we interpret the Constitution because our interpretation can be altered only by constitutional amendment or by overruling our prior decisions.” [*Agostini*, 521 **U.S**. at 235, 117 **S.Ct**. 1997](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997131755&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_235&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_235). The Court therefore “must balance the importance of having constitutional questions *decided* against the importance of having them *decided right.*” [*Citizens United*, 558 **U.S**. at 378, 130 **S.Ct**. 876](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2021175488&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_378&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_378) (ROBERTS, C. J., concurring). It follows “that in the unusual circumstance when fidelity to any particular precedent does more to damage this constitutional ideal than to advance it, we must be more willing to depart from that precedent.” [*Ibid.*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2021175488&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) In his canonical opinion in [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Icde8e1079cc211d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Burnet*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1932123079&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), Justice Brandeis described the Court's practice with respect to *stare decisis* in constitutional cases in a way that was accurate then and remains accurate now: In “cases involving the Federal Constitution, where correction through legislative action is practically impossible, this Court has often overruled its earlier decisions.” [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Icde8e1079cc211d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[285 **U.S**. at 406–407, 52 **S.Ct**. 443](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1932123079&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_406&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_406) (dissenting opinion).

That said, in constitutional as in statutory cases, to “overrule an important precedent is serious business.” Jackson, 30 A. B. A. J., at 334. In constitutional as in statutory cases, adherence to precedent is the norm. To overrule a constitutional decision, the Court's precedents on precedent still require a “special justification,” [*Allen*v. *Cooper*, 589 **U**. **S**. ––––, ––––, **140** **S.Ct**. 994, 1003, ––– **L.Ed**.**2d** –––– (**2020**)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2050616469&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) (internal quotation marks omitted); **\*1414** [*Arizona v. Rumsey*, 467 **U.S**. 203, 212, 104 **S.Ct**. 2305, 81 **L.Ed**.**2d** 164 (1984)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984125886&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_212&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_212), or otherwise stated, “strong grounds,” [*Janus*, 585 **U**. **S**., at ––––, 138 **S.Ct**., at 2478](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2044822047&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_708_2478&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_2478).

In particular, to overrule a constitutional precedent, the Court requires something “over and above the belief that the precedent was wrongly decided.” [*Allen*, 589 **U**. **S**., at ––––, **140** **S.Ct**., at 1003](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2050616469&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_708_1003&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_1003) (internal quotation marks omitted). As Justice Scalia put it, the doctrine of *stare decisis* always requires “reasons that go beyond mere demonstration that the overruled opinion was wrong,” for “otherwise the doctrine would be no doctrine at all.” [*Hubbard v. United States*, 514 **U.S**. 695, 716, 115 **S.Ct**. 1754, 131 **L.Ed**.**2d** 779 (1995)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995107868&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_716&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_716) (opinion concurring in part and concurring in judgment). To overrule, the Court demands a special justification or strong grounds.

But the “special justification” or “strong grounds” formulation elides a key question: What constitutes a special justification or strong grounds?[3](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00832050796536) In other words, in deciding whether to overrule an erroneous constitutional decision, how does the Court know when to overrule and when to stand pat?

As the Court has exercised the “judicial Power” over time, the Court has identified various *stare decisis* factors. In articulating and applying those factors, the Court has, to borrow James Madison's words, sought to liquidate and ascertain the meaning of the [Article III](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOARTIII&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) “judicial Power” with respect to precedent. The Federalist No. 37, at 236.

The *stare decisis* factors identified by the Court in its past cases include:

• the quality of the precedent's reasoning;

• the precedent's consistency and coherence with previous or subsequent decisions;

• changed law since the prior decision;

• changed facts since the prior decision;

• the workability of the precedent;

• the reliance interests of those who have relied on the precedent; and

• the age of the precedent.

But the Court has articulated and applied those various individual factors without establishing any consistent methodology or roadmap for how to analyze all of the factors taken together. And in my view, that muddle poses a problem for the rule of law and for this Court, as the Court attempts to apply *stare decisis* principles in a neutral and consistent manner.

As I read the Court's cases on precedent, those varied and somewhat elastic *stare decisis* factors fold into three broad considerations that, in my view, can help guide the inquiry and help determine what constitutes a “special justification” or “strong grounds” to overrule a prior constitutional decision.

*First*, is the prior decision not just wrong, but grievously or egregiously wrong? A garden-variety error or disagreement does not suffice to overrule. In the view of the Court that is considering whether to overrule, the precedent must be egregiously wrong as a matter of law in order for the Court to overrule it. In conducting that inquiry, the Court may examine the quality of the precedent's reasoning, consistency and coherence with other decisions, changed law, changed facts, and  **\*1415** workability, among other factors. A case may be egregiously wrong when decided, see, *e.g*., [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Id4c846ac9c1d11d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Korematsu v. United States*, 323 **U.S**. 214, 65 **S.Ct**. 193, 89 L.Ed. 194 (1944)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1944118365&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I090f8c749cc311d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Plessy v. Ferguson*, 163 **U.S**. 537, 16 **S.Ct**. 1138, 41 L.Ed. 256 (1896)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1896180043&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), or may be unmasked as egregiously wrong based on later legal or factual understandings or developments, see, *e.g*., [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic1dfecae9c1e11d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Nevada v. Hall*, 440 **U.S**. 410, 99 **S.Ct**. 1182, 59 **L.Ed**.**2d** 416 (1979)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979108044&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), or both, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic1dfecae9c1e11d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*ibid*.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979108044&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))

*Second*, has the prior decision caused significant negative jurisprudential or real-world consequences? In conducting that inquiry, the Court may consider jurisprudential consequences (some of which are also relevant to the first inquiry), such as workability, as well as consistency and coherence with other decisions, among other factors. Importantly, the Court may also scrutinize the precedent's real-world effects on the citizenry, not just its effects on the law and the legal system. See, *e.g.,*[*Brown v. Board of Education*, 347 **U.S**. at 494–495, 74 **S.Ct**. 686](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1954121869&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_494&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_494); [*Barnette*, 319 **U.S**. at 630–642, 63 **S.Ct**. 1178](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1943120939&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_630&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_630); see also [*Payne*, 501 **U.S**. at 825–827, 111 **S.Ct**. 2597](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991116033&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_825&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_825).

*Third*, would overruling the prior decision unduly upset reliance interests? This consideration focuses on the legitimate expectations of those who have reasonably relied on the precedent. In conducting that inquiry, the Court may examine a variety of reliance interests and the age of the precedent, among other factors.

In short, the first consideration requires inquiry into how wrong the precedent is as a matter of law. The second and third considerations together demand, in Justice Jackson's words, a “sober appraisal of the disadvantages of the innovation as well as those of the questioned case, a weighing of practical effects of one against the other.” Jackson, 30 A. B. A. J., at 334.

Those three considerations together provide a structured methodology and roadmap for determining whether to overrule an erroneous constitutional precedent. The three considerations correspond to the Court's historical practice and encompass the various individual factors that the Court has applied over the years as part of the *stare decisis* calculus. And they are consistent with the Founding understanding and, for example, Blackstone's shorthand description that overruling is warranted when (and only when) a precedent is “manifestly absurd or unjust.” 1 Blackstone, Commentaries on the Laws of England, at 70.

Taken together, those three considerations set a high (but not insurmountable) bar for overruling a precedent, and they therefore limit the number of overrulings and maintain stability in the law.[4](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00842050796536) Those three considerations also constrain judicial discretion in deciding when to overrule an erroneous precedent. To be sure, applying those considerations is not a purely mechanical exercise, and I do not claim otherwise. I suggest only that those three considerations may better structure how to consider the many traditional *stare decisis*factors.

It is inevitable that judges of good faith applying the *stare decisis* considerations will sometimes disagree about when to overrule an erroneous constitutional precedent, as the Court does in this case. To begin with, judges may disagree about whether a prior decision is wrong in the first place—and importantly, that disagreement is sometimes the *real*dispute when judges joust over *stare decisis*. But even when judges agree that a prior decision **\*1416** is wrong, they may disagree about whether the decision is so egregiously wrong as to justify an overruling. Judges may likewise disagree about the severity of the jurisprudential or real-world consequences caused by the erroneous decision and, therefore, whether the decision is worth overruling. In that regard, some judges may think that the negative consequences can be addressed by narrowing the precedent (or just living with it) rather than outright overruling it. Judges may also disagree about how to measure the relevant reliance interests that might be affected by an overruling. And on top of all of that, judges may also disagree about how to weigh and balance all of those competing considerations in a given case.[5](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00852050796536)

This case illustrates that point. No Member of the Court contends that the result in [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) is correct. But the Members of the Court vehemently disagree about whether to overrule [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

**II**

Applying the three broad *stare decisis* considerations to this case, I agree with the Court's decision to overrule [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

*First*, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))is egregiously wrong. The original meaning and this Court's precedents establish that the Sixth Amendment requires a unanimous jury. *Ante,* at 1396 – 1397; see, *e.g.,*[](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Patton v. United States*, 281 **U.S**. 276, 288, 50 **S.Ct**. 253, 74 L.Ed. 854 (1930)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1930121924&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_288&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_288); [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I0fc8a9549cb611d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Thompson v. Utah*, 170 **U.S**. 343, 351, 18 **S.Ct**. 620, 42 L.Ed. 1061 (1898)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1898180010&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_351&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_351). And the original meaning and this Court's precedents establish that the Fourteenth Amendment incorporates the Sixth Amendment jury trial right against the States. See [*Duncan v.****Louisiana***, 391 **U.S**. 145, 149, 88 **S.Ct**. 1444, 20 **L.Ed**.**2d** 491 (1968)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1968131174&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_149&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_149); [*id.,* at 166, 88 **S.Ct**. 1444](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1968131174&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) (Black, J., concurring); see also [*Malloy*, 378 **U.S**. at 10–11, 84 **S.Ct**. 1489](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1964124849&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_10&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_10); see generally [*Timbs* v. *Indiana*, 586 **U**. **S**. ––––, 139 **S.Ct**. 682, 203 **L.Ed**.**2d** 11 (2019)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2047576340&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); [*McDonald v. Chicago*, 561 **U.S**. 742, 130 **S.Ct**. 3020, 177 **L.Ed**.**2d** 894 (2010)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022394586&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). When [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) was decided, it was already an outlier in the Court's jurisprudence, and over time it has become even more of an outlier. As the Court today persuasively explains, the original meaning of the Sixth and Fourteenth Amendments and this Court's two lines of decisions—the Sixth Amendment jury cases and the Fourteenth Amendment incorporation cases—overwhelmingly demonstrate that [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))’s holding is egregiously wrong.[6](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00862050796536)

*Second*, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))causes significant negative consequences. It is true that [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))is workable. But [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))sanctions the conviction at trial or by guilty plea of some defendants who might not be convicted under the proper constitutional rule (although exactly how many is of course unknowable). That consequence has traditionally supplied some support for overruling an egregiously wrong criminal-procedure precedent. See generally [*Malloy*, 378 **U.S**. 1, 84 **S.Ct**. 1489, 12 **L.Ed**.**2d** 653](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1964124849&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

In addition, and significant to my analysis of this case, the origins and effects of the non-unanimous jury rule strongly support overruling [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). **Louisiana** achieved statehood in 1812. And throughout most of the 1800s, the State required unanimous juries in criminal cases. But at its 1898 state constitutional convention, **Louisiana** enshrined non-unanimous juries into the state constitution. Why the change? The State wanted to diminish the influence of black jurors, who had won the right to serve on juries through the Fourteenth Amendment in 1868 and the Civil Rights Act of 1875. See [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ie9839d6db5c211d9bc61beebb95be672&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Strauder v. West Virginia*, 100 **U.S**. 303, 308–310, 25 L.Ed. 664 (1880)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1800132385&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_308&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_308); T. Aiello, Jim Crow's Last Stand: Nonunanimous Criminal Jury Verdicts in **Louisiana** 16, 19 (2015). Coming on the heels of the State's 1896 victory in [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I090f8c749cc311d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Plessy v. Ferguson*, 163 **U.S**. 537, 16 **S.Ct**. 1138, 41 L.Ed. 256](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1896180043&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), the 1898 constitutional convention expressly sought to “establish the supremacy of the white race.” Semmes, Chairman of the Committee on the Judiciary, Address at the **Louisiana** Constitutional Convention in 1898, in Official Journal of the Proceedings of the Constitutional Convention of the State of **Louisiana** 375 (H. Hearsey ed. 1898). And the convention approved non-unanimous juries as one pillar of a comprehensive and brutal program of racist Jim Crow measures against African-Americans, especially in voting and jury service. See Aiello, *supra*, at 16–26; Frampton, [The Jim Crow Jury, 71 Vand. L. Rev. 1593, 1620 (2018)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=0475096051&pubNum=0001277&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=LR&fi=co_pp_sp_1277_1620&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_1277_1620).[7](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00872050796536)

In light of the racist origins of the non-unanimous jury, it is no surprise that non-unanimous juries can make a difference in practice, especially in cases involving black defendants, victims, or jurors. After all,  **\*1418** that was the whole point of adopting the non-unanimous jury requirement in the first place. And the math has not changed. Then and now, non-unanimous juries can silence the voices and negate the votes of black jurors, especially in cases with black defendants or black victims, and only one or two black jurors. The 10 jurors “can simply ignore the views of their fellow panel members of a different race or class.” [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I8bb1f6ed9bf111d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Johnson v.****Louisiana***, 406 **U.S**. 356, 397, 92 **S.Ct**. 1620, 32 **L.Ed**.**2d** 152 (1972)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127121&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_397&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_397) (Stewart, J., dissenting). That reality—and the resulting perception of unfairness and racial bias—can undermine confidence in and respect for the criminal justice system. The non-unanimous jury operates much the same as the unfettered peremptory challenge, a practice that for many decades likewise functioned as an engine of discrimination against black defendants, victims, and jurors. In effect, the non-unanimous jury allows backdoor and unreviewable peremptory strikes against up to 2 of the 12 jurors.

In its 1986 decision in [*Batson* v. *Kentucky*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986122459&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), the Court recognized the pervasive racial discrimination woven into the traditional system of unfettered peremptory challenges. See [476 **U.S**. at 85–89, 91, 106 **S.Ct**. 1712](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986122459&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_85&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_85). The Court therefore overruled a prior decision, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I0a41058b9bf011d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Swain v. Alabama*, 380 **U.S**. 202, 85 **S.Ct**. 824, 13 **L.Ed**.**2d** 759 (1965)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1965125035&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), that had allowed those challenges. See generally [*Flowers* v. *Mississippi*, 588 **U**. **S**. ––––, 139 **S.Ct**. 2228, 204 **L.Ed**.**2d** 638 (2019).](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2048538049&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))

In my view, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))warrants the same fate as [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I0a41058b9bf011d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Swain*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1965125035&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). After all, the “requirements of unanimity and impartial selection thus complement each other in ensuring the fair performance of the vital functions of a criminal court jury.” [*Johnson*, 406 **U.S**. at 398, 92 **S.Ct**. 1650](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972244290&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_398&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_398) (Stewart, J., dissenting). And as Justice Thurgood Marshall forcefully explained in dissent in [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), to “fence out a dissenting juror fences out a voice from the community, and undermines the principle on which our whole notion of the jury now rests.” [*Johnson,* 406 **U.S**. at 402, 92 **S.Ct**. 1651](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972244291&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_402&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_402) (Marshall, J., dissenting in both [*Johnson*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972244291&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))and [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))).

To be clear, one could advocate for and justify a non-unanimous jury rule by resort to neutral and legitimate principles. England has employed non-unanimous juries, and various legal organizations in the United States have at times championed non-unanimous juries. See, *e.g.,* Juries Act 1974, ch. 23, § 17 (Eng.); ABA Project on Standards for Criminal Justice, Trial By Jury § 1.1, p. 7 (App. Draft 1968); ALI, Code of Criminal Procedure § 355, p. 99 (1930). And **Louisiana's** modern policy decision to retain nonunanimous juries—as distinct from its original decision in the late 1800s to adopt non-unanimous juries—may have been motivated by neutral principles (or just by inertia).

But the question at this point is not whether the Constitution prohibits non-unanimous juries. It does. Rather, the disputed question here is whether to overrule an erroneous constitutional precedent that allowed non-unanimous juries. And on that question—the question whether to overrule—the Jim Crow origins and racially discriminatory effects (and the perception thereof) of non-unanimous juries in **Louisiana** and Oregon should matter and should count heavily in favor of overruling, in my respectful view. After all, the non-unanimous jury “is today the last of **Louisiana's** Jim Crow laws.” Aiello, *supra,* at 63. And this Court has emphasized time and again the “imperative to purge racial prejudice from the administration of justice” generally and from the jury system in particular. [*PenaRodriguez* v. *Colorado*, 580 **U**. **S**. ––––, –––– – ––––, 137 **S.Ct**. 855, 867, 197 **L.Ed**.**2d** 107 (2017)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2041162858&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) (collecting cases).

To state the point in simple terms: Why stick by an erroneous precedent that is egregiously wrong as a matter of constitutional law, that allows convictions of some who would not be convicted under the proper constitutional rule, and that tolerates and reinforces a practice that is thoroughly racist in its origins and has continuing racially discriminatory effects?

*Third*, overruling [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))would not unduly upset reliance interests. Only **Louisiana** and Oregon employ non-unanimous juries in criminal cases. To be sure, in those two States, the Court's decision today will invalidate some non-unanimous convictions where the issue is preserved and the case is still on direct review. But that consequence almost always ensues when a criminal-procedure precedent that favors the government is overruled. See [*Ring*, 536 **U.S**. 584, 122 **S.Ct**. 2428](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002390142&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); [*Batson*, 476 **U.S**. 79, 106 **S.Ct**. 1712](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986122459&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). And here, at least, I would “count that a small price to pay for the uprooting of this weed.” [*Hubbard*, 514 **U.S**. at 717, 115 **S.Ct**. 1754](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995107868&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_717&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_717)(Scalia, J., concurring in part and concurring in judgment).

Except for the effects on that limited class of directreview cases, it will be relatively easy going forward for **Louisiana** and Oregon to transition to the unanimous jury rule that the other 48 States and the federal courts use. Indeed, in 2018, **Louisiana** amended its constitution to require jury unanimity in criminal trials for crimes committed on or after January 1, 2019, meaning that the transition is already well under way in **Louisiana**.

Importantly, moreover, this Court applies a separate non-retroactivity doctrine to mitigate the disruptive effects of overrulings in criminal cases. Under the Court's precedents, new constitutional rules apply on direct review, but generally do not apply retroactively on habeas corpus review. See [*Teague v. Lane*, 489 **U.S**. 288, 311, 109 **S.Ct**. 1060, 103 **L.Ed**.**2d** 334 (1989)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989027119&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_311&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_311) (plurality opinion); [*Griffith v. Kentucky*, 479 **U.S**. 314, 328, 107 **S.Ct**. 708, 93 **L.Ed**.**2d** 649 (1987)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1987004131&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_328&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_328). [*Teague*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989027119&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) recognizes only two exceptions to that general habeas non-retroactivity principle: “if (1) the rule is substantive or (2) the rule is a ‘watershed rul[e] of criminal procedure’ implicating the fundamental fairness and accuracy of the criminal proceeding.” [*Whorton v. Bockting*, 549 **U.S**. 406, 416, 127 **S.Ct**. 1173, 167 **L.Ed**.**2d** 1 (2007)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2011559751&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_416&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_416) (internal quotation marks omitted). The new rule announced today—namely, that state criminal juries must be unanimous—does not fall within either of those two narrow [*Teague*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989027119&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))exceptions and therefore, as a matter of federal law, should not apply retroactively on habeas corpus review.

The first [*Teague*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989027119&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))exception does not apply because today's new rule is procedural, not substantive: It affects “only the *manner of determining* the defendant's culpability.” [*Schriro v. Summerlin*, 542 **U.S**. 348, 353, 124 **S.Ct**. 2519, 159 **L.Ed**.**2d** 442 (2004)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2004622663&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_353&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_353).

The second [*Teague*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989027119&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))exception does not apply because today's new rule, while undoubtedly important, is not a “watershed” procedural rule. This Court has flatly stated that “it is unlikely that any such rules” have “yet to emerge.” [*Whorton*, 549 **U.S**. at 417, 127 **S.Ct**. 1173](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2011559751&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_417&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_417) (internal quotation marks omitted). In “the years since [*Teague*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989027119&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), we have rejected every claim that a new rule satisfied the requirements for watershed status.”

[*Id.*, at 418, 421, 127 **S.Ct**. 1173](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2011559751&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) (rejecting retroactivity for [*Crawford v. Washington*, 541 **U.S**. 36, 124 **S.Ct**. 1354, 158 **L.Ed**.**2d** 177 (2004)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2004190005&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))); see, *e.g.,* [*Beard v. Banks*, 542 **U.S**. 406, 420, 124 **S.Ct**. 2504, 159 **L.Ed**.**2d** 494 (2004)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2004622599&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_420&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_420)(rejecting retroactivity for [*Mills v. Maryland*, 486 **U.S**. 367, 108 **S.Ct**. 1860, 100 **L.Ed**.**2d** 384 (1988)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988073361&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))); [*Summerlin*, 542 **U.S**. at 358, 124 **S.Ct**. 2519](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2004622663&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_358&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_358) (rejecting retroactivity for  **\*1420** [*Ring v. Arizona*, 536 **U.S**. 584, 122 **S.Ct**. 2428, 153 **L.Ed**.**2d** 556 (2002)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002390142&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))); [*O'Dell* v. *Netherland*, 521 **U.S**. 151, 167–168, 117 **S.Ct**. 1969, 138 **L.Ed**.**2d** 351 (1997)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997129562&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_167&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_167)(rejecting retroactivity for [*Simmons v. South Carolina*, 512 **U.S**. 154, 114 **S.Ct**. 2187, 129 **L.Ed**.**2d** 133 (1994)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1994131068&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))); [*Lambrix v. Singletary*, 520 **U.S**. 518, 539–540, 117 **S.Ct**. 1517, 137 **L.Ed**.**2d** 771 (1997)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997107251&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_539&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_539) (rejecting retroactivity for [*Espinosa v. Florida*, 505 **U.S**. 1079, 112 **S.Ct**. 2926, 120 **L.Ed**.**2d** 854 (1992)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992117656&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) (*per curiam*)); [*Sawyer v. Smith*, 497 **U.S**. 227, 241–245, 110 **S.Ct**. 2822, 111 **L.Ed**.**2d** 193 (1990)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990096219&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_241&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_241) (rejecting retroactivity for [*Caldwell v. Mississippi*, 472 **U.S**. 320, 105 **S.Ct**. 2633, 86 **L.Ed**.**2d** 231 (1985)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985129532&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))); see also [*Allen v. Hardy*, 478 **U.S**. 255, 261, 106 **S.Ct**. 2878, 92 **L.Ed**.**2d** 199 (1986)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986134005&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_261&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_261) (*per curiam*) (rejecting retroactivity for [*Batson v. Kentucky*, 476 **U.S**. 79, 106 **S.Ct**. 1712, 90 **L.Ed**.**2d** 69 (1986)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986122459&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))); [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Id8ddeb629c1c11d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*DeStefano v. Woods*, 392 **U.S**. 631, 635, 88 **S.Ct**. 2093, 20 **L.Ed**.**2d** 1308 (1968)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1968101642&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_635&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_635) (*per curiam*) (rejecting retroactivity for [*Duncan,*391 **U.S**. 145, 88 **S.Ct**. 1444, 20 **L.Ed**.**2d** 491](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1968131174&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))).

So assuming that the Court faithfully applies [*Teague*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989027119&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), today's decision will not apply retroactively on federal habeas corpus review and will not disturb convictions that are final.[8](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00882050796536)

In addition, as to ineffective-assistance-of-counsel claims, an attorney presumably would not have been deficient for failing to raise a constitutional jury-unanimity argument before today's decision—or at the very least, before the Court granted certiorari in this case. Before today, after all, this Court's precedents had repeatedly allowed non-unanimous juries in state criminal cases. In that situation, the Courts of Appeals have consistently held that an attorney is not ineffective for failing to anticipate or advocate for the overruling of a constitutional precedent of this Court. See, *e.g.,*[*Walker v. United States*, 810 F.3d 568, 577 (CA8 2016)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2037998438&pubNum=0000506&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_506_577&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_506_577); [*United States v. Smith*, 241 F.3d 546, 548 (CA7 2001)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001139520&pubNum=0000506&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_506_548&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_506_548); [*Honeycutt v. Mahoney*, 698 F.2d 213, 216–217 (CA4 1983)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1983103098&pubNum=0000350&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_350_216&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_350_216); see also [*Steiner v. United States*, 940 F.3d 1282, 1293 (CA11 2019)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2049417283&pubNum=0000506&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_506_1293&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_506_1293) (*per curiam*); [*Snider v. United States*, 908 F.3d 183, 192 (CA6 2018)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2045952341&pubNum=0000506&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_506_192&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_506_192); [*Green v. Johnson*, 116 F.3d 1115, 1125 (CA5 1997)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997138150&pubNum=0000506&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_506_1125&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_506_1125).

For those reasons, the reliance interests at stake in this case are not especially substantial, and they do not mandate adherence to [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).[9](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00892050796536)

\* \* \*

In sum, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))is egregiously wrong, it has significant negative consequences, and overruling it would not unduly upset reliance interests. I therefore agree with the Court's decision to overrule [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca.*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))[10](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00902050796536)

**Concurrence**

Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), concurring in the judgment.

I agree with the Court that petitioner Evangelisto **Ramos**’ felony conviction by a  **\*1421** nonunanimous jury was unconstitutional. I write separately because I would resolve this case based on the Court's longstanding view that the Sixth Amendment includes a protection against nonunanimous felony guilty verdicts, without undertaking a fresh analysis of the meaning of “trial ... by an impartial jury.” I also would make clear that this right applies against the States through the Privileges or Immunities Clause of the Fourteenth Amendment, not the Due Process Clause.

**I**

I begin with the parties’ dispute as to whether the Sixth Amendment right to a trial by jury includes a protection against nonunanimous felony guilty verdicts. On this question, I do not write on a blank slate. As the Court acknowledges, our decisions have long recognized that unanimity is required. See *ante*, at 1396 – 1397. Because this interpretation is not demonstrably erroneous, I would resolve the Sixth Amendment question on that basis.

**A**

This Court first decided that the Sixth Amendment protected a right to unanimity in [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I0fc8a9549cb611d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Thompson v. Utah*, 170 **U.S**. 343, 18 **S.Ct**. 620, 42 L.Ed. 1061 (1898)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1898180010&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). The Court reasoned that Thompson, a Utah prisoner, was protected by the Sixth Amendment when Utah was still a Territory because “the right of trial by jury in suits at common law appl[ied] to the Territories of the United States.” [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I0fc8a9549cb611d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Id.*, at 346, 18 **S.Ct**. 620](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1898180010&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). The Court then stated that this right “made it impossible to deprive him of his liberty except by [a] unanimous verdict.” [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I0fc8a9549cb611d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Id.*, at 355, 18 **S.Ct**. 620](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1898180010&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); see also [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I0fc8a9549cb611d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*id.*, at 351, 353, 18 **S.Ct**. 620](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1898180010&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

The Court has repeatedly reaffirmed the Sixth Amendment's unanimity requirement. In [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Patton v. United States*, 281 **U.S**. 276, 50 **S.Ct**. 253, 74 L.Ed. 854 (1930)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1930121924&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), the Court stated that the Sixth Amendment protects the right “that the verdict should be unanimous,” [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*id.*, at 288, 50 **S.Ct**. 253](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1930121924&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). In [*Andres v. United States*, 333 **U.S**. 740, 68 **S.Ct**. 880, 92 L.Ed. 1055 (1948)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1948115733&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), the Court repeated that “[u]nanimity in jury verdicts is required” by the Sixth Amendment, [*id.*, at 748, 68 **S.Ct**. 880](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1948115733&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). And in [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca v. Oregon*, 406 **U.S**. 404, 92 **S.Ct**. 1628, 32 **L.Ed**.**2d**184 (1972)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), five Justices agreed that “the Sixth Amendment's guarantee of trial by jury embraces a guarantee that the verdict of the jury must be unanimous,” [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*id.,* at 414, 92 **S.Ct**. 1628](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) (Stewart, J., joined by Brennan and Marshall, JJ., dissenting); see also [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I8bb1f6ed9bf111d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Johnson v.****Louisiana***, 406 **U.S**. 356, 371, 92 **S.Ct**. 1620, 32 **L.Ed**.**2d** 152 (1972)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127121&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_371&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_371) (Powell, J., concurring) (explaining views in [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))and its companion case); [*id.*, at 382–383, 108 **S.Ct**. 1860](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988073361&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_382&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_382) (Douglas, J., joined by Brennan and Marshall, JJ., dissenting) (same). We have accepted this interpretation of the Sixth Amendment in recent cases. See [*Southern Union Co. v. United States*, 567 **U.S**. 343, 356, 132 **S.Ct**. 2344, 183 **L.Ed**.**2d** 318 (2012)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2027945852&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_356&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_356); [*Blakely v. Washington*, 542 **U.S**. 296, 301, 124 **S.Ct**. 2531, 159 **L.Ed**.**2d** 403 (2004)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2004622625&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_301&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_301); [*Apprendi v. New Jersey*, 530 **U.S**. 466, 477, 120 **S.Ct**. 2348, 147 **L.Ed**.**2d** 435 (2000)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000387238&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_477&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_477).

**B**

The question then becomes whether these decisions are entitled to *stare decisis* effect. As I have previously explained, “the Court's typical formulation of the *stare decisis* standard does not comport with our judicial duty under [Article III](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000583&cite=USCOARTIII&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) because it elevates demonstrably erroneous decisions—meaning decisions outside the realm of permissible interpretation—over the text of the Constitution and other duly enacted federal law.” [*Gamble* v. *United States*, 587 **U**. **S**. ––––, ––––, 139 **S.Ct**. 1960, 1981, 204 **L.Ed**.**2d** 322 (2019)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2048498596&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) (concurring **\*1422**opinion). There is considerable evidence that the phrase “trial ... by ... jury” in the Sixth Amendment was understood since the founding to require that a felony guilty verdict be unanimous. Because our precedents are thus not outside the realm of permissible interpretation, I will apply them.

**1**

Blackstone—“the preeminent authority on English law for the founding generation,” [*Alden v. Maine*, 527 **U.S**. 706, 715, 119 **S.Ct**. 2240, 144 **L.Ed**.**2d** 636 (1999)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999146865&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_715&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_715)—wrote that no subject can “be affected either in his property, his liberty, or his person, but by the unanimous consent” of a jury, 3 W. Blackstone, Commentaries on the Laws of England 379 (1772); see also 4 [*id.*, at 343, 124 **S.Ct**. 2531](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2004622625&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_343&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_343). Another influential treatise author, Hale, wrote that “the law of England hath afforded the best method of trial, that is possible, ... namely by a jury ... all concurring in the same judgment.” 1 M. Hale, Pleas of the Crown 33 (1736) (emphasis deleted). Such views continued in scholarly works throughout the early Republic. See, *e.g.,* 2 J. Story, Commentaries on the Constitution of the United States § 777, p. 248 (1833); 6 N. Dane, Digest of American Law, ch. LXXXII, Art. 2, § 1, p. 226 (1824); 2 J. Wilson, Works of the Honourable James Wilson 349–350 (1804).

The uniform practice among the States was in accord. Despite isolated 17th-century colonial practices allowing nonunanimous juries, “unanimity became the accepted rule during the 18th century, as Americans became more familiar with the details of English common law and adopted those details in their own colonial legal systems.” [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*, *supra*, at 408, n. 3, 92 **S.Ct**. 1628](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_408&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_408) (plurality opinion). In the founding era, six States explicitly mentioned unanimity in their constitutions. See Del. Declaration of Rights § 14 (1776); Md. Declaration of Rights, Art. XIX (1776); N. C. Declaration of Rights § IX (1776); Pa. Declaration of Rights, Art. IX (1776); Vt. Const., Art. XI (1786); Va. Declaration of Rights § 8 (1776). Four more States clearly referred to the common-law jury right, which included unanimity. Ky. [Const., Art. XII, § 6](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000016&cite=LACOART12S6&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) (1792); N. J. Const., Art. XXII (1776); N. Y. Const., Art. XLI (1777); S. C. Const., Art. IX, [§ 6](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000016&cite=LACOART12S6&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) (1790). Some States did not explicitly refer to either the common law or unanimity. See, *e.g.,* Ga. Const., Art. LXI (1777); Mass. Declaration of Rights, Art. XII (1780). But there is reason to believe that they nevertheless understood unanimity to be required. See, *e.g.,* [*Rouse v. State*, 4 Ga. 136, 147 (1848)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1848001348&pubNum=0000359&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_359_147&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_359_147).

In light of the express language used in some State Constitutions, respondent **Louisiana** argues that the omission of an express unanimity requirement in the Sixth Amendment reflects a deliberate choice. This argument fails to establish that the Court's decisions are demonstrably erroneous. The House of Representatives passed a version of the amendment providing that “[t]he trial of all crimes ... shall be by an impartial jury of freeholders of the vicinage, with the requisite of unanimity for conviction, of the right of challenge, and other accustomed requisites,” 1 Annals of Cong. 435 (1789), but the final Amendment contained no reference to vicinage or unanimity. See Amdt. 6. I agree with Justice Harlan and the Court that “the meaning of this change is wholly speculative” and that there is “no concrete evidence” that the Senate rejected the requirement of unanimity. [*Baldwin v. New York*, 399 **U.S**. 66, 123, n. 9, 90 **S.Ct**. 1886, 26 **L.Ed**.**2d** 437 (1970)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1970134246&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_123&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_123) (Harlan, J., dissenting); see also *ante*, at 11–12; Letter from J. Madison to E. Pendleton (Sept. 14, 1789), in 1 Letters and Other Writings of James Madison 491 (1867). There is thus sufficient evidence to  **\*1423**support this Court's prior interpretation that the Sixth Amendment right to a trial by jury requires unanimity.

**2**

There is also considerable evidence that this understanding persisted up to the time of the Fourteenth Amendment's ratification. State courts, for example, continued to interpret the phrase “trial by jury” to require unanimity in felony guilty verdicts. The New Hampshire Superior Court of Judicature expounded on the point:

“The terms ‘jury,’ and ‘trial by jury,’ are, and for ages have been well known in the language of the law. They were used at the adoption of the constitution, and always, it is believed, before that time, and almost always since, in a single sense.

“A jury for the trial of a cause ... must return their unanimous verdict upon the issue submitted to them.

“All the books of the law describe a trial jury substantially as we have stated it. And a ‘trial by jury’ is a trial by such a body, so constituted and conducted. So far as our knowledge extends, these expressions were used at the adoption of the constitution and always before, in these senses alone by all classes of writers and speakers.” [*Opinion of Justices*, 41 N.H. 550, 551–552 (1860)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1860004293&pubNum=0000579&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_579_551&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_579_551).

Other state courts held the same view. The Missouri Supreme Court in 1860 called unanimity one of the “essential requisites in a jury trial,” [*Vaughn v. Scade*, 30 Mo. 600, 603](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1860010648&pubNum=0000555&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_555_603&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_555_603), and the Ohio Supreme Court in 1853 called it one of “the essential and distinguishing features of the trial by jury, as known at common law, and generally, if not universally, adopted in this country,” [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic847df19ce4c11d9bf60c1d57ebc853e&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Work v. State*, 2 OhioSt. 296, 306](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1853000106&pubNum=0000633&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_633_306&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_633_306).

Treatises from the Reconstruction era likewise adopted this position. A leading work on criminal procedure explained that if a “statute authorizes [a jury] to find a verdict upon anything short of ... unanimous consent,” it “is void.” 1 J. Bishop, Criminal Procedure § 761, p. 532 (1866). A widely read treatise on constitutional law reiterated that “ ‘by a jury’ is generally understood to mean” a body that “must *unanimously* concur in the guilt of the accused before a conviction can be had.” G. Paschal, The Constitution of the United States 210 (1876) (capitalization omitted). And a volume on the jury trial was in agreement. See J. Proffatt, Trial by Jury § 77, p. 112 (1877).

\* \* \*

Based on this evidence, the Court's prior interpretation of the Sixth Amendment's guarantee is not demonstrably erroneous. It is within the realm of permissible interpretations to say that “trial ... by ... jury” in that Amendment includes a protection against nonunanimous felony guilty verdicts.

**II**

The remaining question is whether that right is protected against the States. In my view, the Privileges or Immunities Clause provides this protection. I do not adhere to this Court's decisions applying due process incorporation, including [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and—it seems—the Court's opinion in this case.

The Privileges or Immunities Clause provides that “[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States.” Amdt. 14, § 1. At the time of the Fourteenth Amendment's ratification, “the terms ‘privileges’ and ‘immunities’ had an established meaning as synonyms of ‘rights.’ ” [*McDonald v. Chicago*, 561 **U.S**. 742, 813, 130 **S.Ct**. 3020, 177 **L.Ed**.**2d** 894 (2010)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022394586&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_813&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_813) (THOMAS, J., concurring in part and concurring in judgment).  **\*1424** “[T]he ratifying public understood the Privileges or Immunities Clause to protect constitutionally enumerated rights” against abridgment by the States. [*Id.*, at 837, 130 **S.Ct**. 3020](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022394586&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). The Sixth Amendment right to a trial by jury is certainly a constitutionally enumerated right. See [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=If234ad699cc111d9bdd1cfdd544ca3a4&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Maxwell v. Dow*, 176 **U.S**. 581, 606–608, 20 **S.Ct**. 448, 44 L.Ed. 597 (1900)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1900108690&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_606&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_606) (Harlan, J., dissenting).

The Court, however, has made the Due Process Clause serve the function that the Privileges or Immunities Clause should serve. Although the Privileges or Immunities Clause grants “United States citizens a certain collection of rights—*i.e.*, privileges or immunities—attributable to that status,” the Court has interpreted the Clause “quite narrowly.” [*McDonald*, 561 **U.S**. at 808, 130 **S.Ct**. 3020](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022394586&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_808&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_808) (opinion of THOMAS, J.). Perhaps to compensate for this limited view of the Privileges or Immunities Clause, it has incorporated individual rights against the States through the Due Process Clause. [*Id.*, at 809, 130 **S.Ct**. 3020](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022394586&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

Due process incorporation is a demonstrably erroneous interpretation of the Fourteenth Amendment. As I have explained before, “[t]he notion that a constitutional provision that guarantees only ‘process’ before a person is deprived of life, liberty, or property could define the substance of those rights strains credulity for even the most casual user of words.” [*Id.*, at 811, 130 **S.Ct**. 3020](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022394586&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). The unreasonableness of this interpretation is underscored by the Court's struggle to find a “guiding principle to distinguish ‘fundamental’ rights that warrant protection from nonfundamental rights that do not,” [*ibid.*,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022394586&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) as well as its many incorrect decisions based on this theory, see [*Obergefell* v. *Hodges*, 576 **U**. **S**. 644, 135 **S.Ct**. 2584, 192 **L.Ed**.**2d** 609 (2015)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036545719&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); [*Roe v. Wade*, 410 **U.S**. 113, 93 **S.Ct**. 705, 35 **L.Ed**.**2d** 147 (1973)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1973126316&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ie184435c94ea11e9a76eb9e71287f4ea&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Dred Scott v. Sandford*, 60 **U.S**. (19 How.) 393, 15 L.Ed. 691 (1857)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1856193196&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

I “decline to apply the legal fiction” of due process incorporation. [*Timbs* v. *Indiana*, 586 **U**. **S**. ––––, ––––, 139 **S.Ct**. 682, 692, 203 **L.Ed**.**2d** 11 (2019)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2047576340&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780____&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780____) (THOMAS, J., concurring in judgment) (internal quotation marks omitted). As a result, I part ways with the Court on both its affirmative argument about the Fourteenth Amendment and its treatment of [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), in which five Justices agreed the Sixth Amendment included a right to unanimity but a different majority concluded that the right did not apply to the States. See *ante*, at 1397 – 1400.

I would accept petitioner's invitation to decide this case under the Privileges or Immunities Clause. The Court conspicuously avoids saying which clause it analyzes. See, *e.g., ante,* at 1394 – 1395, 1397. But one assumes from its silence that the Court is either following our due process incorporation precedents or believes that “nothing in this case turns on” which clause applies, [*Timbs*, *supra*, at ––––, 139 **S.Ct**., at 691](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2047576340&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_708_691&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_691) (GORSUCH, J., concurring).

I have already rejected our due process incorporation cases as demonstrably erroneous, and I fundamentally disagree with applying that theory of incorporation simply because it reaches the same result in the case before **us**. Close enough is for horseshoes and hand grenades, not constitutional interpretation. The textual difference between protecting “citizens” (in the Privileges or Immunities Clause) and “person[s]” (in the Due Process Clause) will surely be relevant in another case. And our judicial duty—not to mention the candor we owe to our fellow citizens—requires **us** to put an end to this Court's due process prestidigitation, which no one is willing to defend on the merits.

I would simply hold that, because all of the opinions in [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))addressed the  **\*1425** Due Process Clause, its Fourteenth Amendment ruling does not bind **us** because the proper question here is the scope of the Privileges or Immunities Clause. I cannot understand why the Court, having decided to abandon [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), refuses to correctly root its holding in the Privileges or Immunities Clause.[1](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00912050796536)

**III**

There is no need to prove the original meaning of the Sixth Amendment right to a trial by jury in this case.[2](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00922050796536)The evidence that I have recounted is enough to establish that our previous interpretations of the Sixth Amendment are not demonstrably erroneous. What is necessary, however, is a clear understanding of the means by which the Sixth Amendment right applies against the States. We should rely on the Privileges or Immunities Clause, not the Due Process Clause or the Fourteenth Amendment in some vague sense. Accordingly, I concur only in the judgment.

**Dissent**

Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91), with whom THE CHIEF JUSTICE joins, and with whom Justice [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I94778a42828311eaa154dedcbee99b91) joins as to all but Part III–D, dissenting.

The doctrine of *stare decisis* gets rough treatment in today's decision. Lowering the bar for overruling our precedents, a badly fractured majority casts aside an important and long-established decision with little regard for the enormous reliance the decision has engendered. If the majority's approach is not just a way to dispose of this one case, the decision marks an important turn.

Nearly a half century ago in [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca v. Oregon*, 406 **U.S**. 404, 92 **S.Ct**. 1628, 32 **L.Ed**.**2d** 184 (1972)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), the Court held that the Sixth Amendment permits non-unanimous verdicts in state criminal trials, and in all the years since then, no Justice has even hinted that [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) should be reconsidered. Understandably thinking that [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))was good law, the state courts in **Louisiana** and Oregon have tried thousands of cases under rules that permit such verdicts. But today, the Court does away with [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and, in so doing, imposes a potentially crushing burden on the courts and criminal justice systems of those States. The Court, however, brushes aside these consequences and even suggests that the States should have known better than to count on our decision.

To add insult to injury, the Court tars **Louisiana** and Oregon with the charge of racism for permitting nonunanimous verdicts—even though this Court found such verdicts to be constitutional and even though there are entirely legitimate arguments for allowing them.

I would not overrule [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). Whatever one may think about the correctness of the decision, it has elicited enormous and entirely **\*1426** reasonable reliance. And before this Court decided to intervene, the decision appeared to have little practical importance going forward. **Louisiana** has now abolished non-unanimous verdicts, and Oregon seemed on the verge of doing the same until the Court intervened.[1](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00932050796536)

In Part II of this opinion, I will address the surprising argument, advanced by three Justices in the majority, that [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) was never a precedent at all, and in Part III, I will explain why *stare decisis* supports retention of that precedent. But before reaching those issues, I must say something about the rhetoric with which the majority has seen fit to begin its opinion.

**I**

Too much public discourse today is sullied by *ad hominem* rhetoric, that is, attempts to discredit an argument not by proving that it is unsound but by attacking the character or motives of the argument's proponents. The majority regrettably succumbs to this trend. At the start of its opinion, the majority asks this rhetorical question: “Why do **Louisiana** and Oregon allow nonunanimous convictions?” *Ante*, at 1394. And the answer it suggests? Racism, white supremacy, the Ku Klux Klan. *Ante*, at 1393 – 1394. Non-unanimous verdicts, the Court implies, are of a piece with Jim Crow laws, the poll tax, and other devices once used to disfranchise African-Americans. *Ibid*.

If **Louisiana** and Oregon originally adopted their laws allowing non-unanimous verdicts for these reasons,[2](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00942050796536)that is deplorable, but what does that have to do with the broad constitutional question before **us**? The answer is: nothing.

For one thing, whatever the reasons why **Louisiana** and Oregon originally adopted their rules many years ago, both States readopted their rules under different circumstances in later years. **Louisiana's** constitutional convention of 1974 adopted a new, narrower rule, and its stated purpose was “judicial efficiency.” [*State v. Hankton*, 2012-0375, p. 19 (La.App.4Cir. 8/2/13), 122 So.3d 1028, 1038](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031223957&pubNum=0003926&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_3926_1038&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_3926_1038). “In that debate no mention was made of race.” [*Ibid.*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2031223957&pubNum=0004365&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); 7 Records of the **Louisiana** Constitutional Convention of 1973: Convention Transcripts 1184–1189 (**La**. Constitutional Convention Records Comm'n 1977). The people of **Louisiana** ratified the new Constitution. The majority makes no effort to show either that the delegates to the constitutional convention retained the rule for discriminatory purposes or that proponents of the new Constitution made racial appeals when approval was submitted to the people. The same is true for Oregon's revisions and reenactments. [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=ND629A500B53111DB8E46AD894CF6FAAB&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[Ore. Const., Art. I, § 11](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1003293&cite=ORCNARTIS11&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) (amended May 18, 1934); [Ore. Rev. Stat. § 136.450](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000534&cite=ORSTS136.450&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) (1997); § 136.610 (1971).

The more important point, however, is that today's decision is not limited to anything particular about **Louisiana** or Oregon. The Court holds that the Sixth Amendment requires jury unanimity in *all*state criminal trials. If at some future time another State wanted to allow non-unanimous verdicts, today's decision would rule that out—even if all that State's lawmakers were angels.

For this reason, the origins of the **Louisiana** and Oregon rules have no bearing on the broad constitutional question that the Court decides. That history would be relevant if there were no legitimate reasons  **\*1427** why anyone might think that allowing non-unanimous verdicts is good policy. But that is undeniably false.[3](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00952050796536)

Some years ago the British Parliament enacted a law allowing non-unanimous verdicts.[4](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00962050796536) Was Parliament under the sway of the Klan? The Constitution of Puerto Rico permits non-unanimous verdicts.[5](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00972050796536) Were the framers of that Constitution racists? Non-unanimous verdicts were once advocated by the American Law Institute and the American Bar Association.[6](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00982050796536) Was their aim to promote white supremacy? And how about the prominent scholars who have taken the same position?[7](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00992050796536) Racists all? Of course not. So all the talk about the Klan, etc., is entirely out of place.[8](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B01002050796536) We should set an example of rational and civil discourse instead of contributing to the worst current trends.

**II**

Now to what matters.

**A**

I begin with the question whether [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) was a precedent at all. It is remarkable that it is even necessary to address this question, but in Part IV–A of the principal opinion, three Justices take the position that [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) was never a precedent. The  **\*1428** only truly fitting response to this argument is: “Really?”

Consider what it would mean if [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) was never a precedent. It would mean that the entire legal profession was fooled for the past 48 years. Believing that [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))was a precedent, the courts of **Louisiana** and Oregon tried thousands of cases under rules allowing conviction by a vote of 11 to 1 or 10 to 2, and appellate courts in those States upheld these convictions based on [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).[9](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B01012050796536) But according to three Justices in the majority, these courts were deluded.

This Court, for its part, apparently helped to perpetuate the illusion, since it reiterated time and again what [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) had established. See [*Timbs*v.*Indiana*, 586 **U**. **S**. ––––, ––––, n. 1, 139 **S.Ct**. 682, 687 n. 1, 203 **L.Ed**.**2d** 11 (2019)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2047576340&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_708_687&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_687) ([](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) held “that the Sixth Amendment requires jury unanimity in federal, but not state, criminal proceedings”); [*McDonald v. Chicago*, 561 **U.S**. 742, 766, n. 14, 130 **S.Ct**. 3020, 177 **L.Ed**.**2d** 894 (2010)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022394586&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_766&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_766) (Sixth Amendment “does not require a unanimous jury verdict in state criminal trials”); [*United States v. Gaudin*, 515 **U.S**. 506, 511, n. 2, 115 **S.Ct**. 2310, 132 **L.Ed**.**2d** 444 (1995)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995130203&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_511&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_511) ([](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) “conclude[d] that jury unanimity is not constitutionally required”); [*Schad v. Arizona*, 501 **U.S**. 624, 634, n. 5, 111 **S.Ct**. 2491, 115 **L.Ed**.**2d** 555 (1991)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991113020&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_634&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_634) (plurality opinion) (“[A] state criminal defendant, at least in noncapital cases, has no federal right to a unanimous jury verdict”); [*Brown v.****Louisiana***, 447 **U.S**. 323, 330–331, 100 **S.Ct**. 2214, 65 **L.Ed**.**2d** 159 (1980)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980116776&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_330&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_330) (plurality opinion) (“[T]he constitutional guarantee of trial by jury” does not prescribe “the exact proportion of the jury that must concur in the verdict”); [*Burch v.****Louisiana***, 441 **U.S**. 130, 136, 99 **S.Ct**. 1623, 60 **L.Ed**.**2d** 96 (1979)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979135093&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_136&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_136) ([](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) “conclude[d] that a jury's verdict need not be unanimous to satisfy constitutional requirements”); [*Ludwig v. Massachusetts*, 427 **U.S**. 618, 625, 96 **S.Ct**. 2781, 49 **L.Ed**.**2d** 732 (1976)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1976142441&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_625&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_625)(“holding” in [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))was that “the jury's verdict need not be unanimous”); see also [*Holland v. Illinois*, 493 **U.S**. 474, 511, 110 **S.Ct**. 803, 107 **L.Ed**.**2d** 905 (1990)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990023719&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_511&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_511) (Stevens, J., dissenting) (“we have permitted nonunanimous verdicts,” citing [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))); [*McKoy v. North Carolina*, 494 **U.S**. 433, 468, 110 **S.Ct**. 1227, 108 **L.Ed**.**2d** 369 (1990)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1990043800&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_468&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_468) (Scalia, J., dissenting) (the Court has “approved verdicts by less than a unanimous jury,” citing [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))).

Consistent with these statements of the governing law, whenever defendants convicted by non-unanimous verdicts sought review in this Court and asked that [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) be overruled, the Court denied those requests—without a single registered dissent.[10](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B01022050796536) Even the legal academy, never shy  **\*1429** about puncturing misconceptions, was taken in.[11](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B01032050796536) Everybody thought [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) was a precedent. But, according to three of the Justices in the majority, everybody was fooled. [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), the precedent, was a mirage. Can this be true?

No, it cannot. The idea that [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) was a phantom precedent defies belief. And it certainly disserves important objectives that *stare decisis* exists to promote, including evenhandedness, predictability, and the protection of legitimate reliance. See, *e*.*g*., [*Gamble*v*. United States*, 587 **U**. **S**. ––––, ––––, 139 **S.Ct**. 1960, 1981, 204 **L.Ed**.**2d** 322 (2019)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2048498596&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)); [*Kimble v. Marvel Entertainment, LLC*, 576 **U.S**. 446, 455–456, 135 **S.Ct**. 2401, 192 **L.Ed**.**2d**463 (2015)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036504422&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_455&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_455); [*Payne v. Tennessee*, 501 **U.S**. 808, 827, 111 **S.Ct**. 2597, 115 **L.Ed**.**2d** 720 (1991)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991116033&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_827&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_827).

**B**

Under any reasonable understanding of the concept, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))was a precedent, that is, “a decided case that furnishes a basis for determining later cases involving similar facts or issues.” Black's Law Dictionary 1366 (10th ed. 2014); see also J. Salmond, Jurisprudence 191 (10th ed. 1947); M. Gerhardt, The Power of Precedent 3 (2008); Landes & Posner, Legal Precedent: A Theoretical and Empirical Analysis, 19 J. Law & Econ. 249, 250 (1976).

Even though there was no opinion of the Court, the decision satisfies even the narrowest understanding of a precedent as this Court has understood the concept: The decision prescribes a particular outcome when all the conditions in a clearly defined set are met. See [*Seminole Tribe of Fla. v. Florida*, 517 **U.S**. 44, 67, 116 **S.Ct**. 1114, 134 **L.Ed**.**2d** 252 (1996)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996077541&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_67&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_67) (explaining that, at the very least, we are bound by the “result” in a prior case). In [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca,*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) this means that when (1) a defendant is convicted in state court, (2) at least 10 of the 12 jurors vote to convict, and (3) the defendant argues that the conviction violates the Constitution because the vote was not unanimous, the challenge fails. A majority of the Justices in [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) expressly agreed on that result, and that result is a precedent that had to be followed in subsequent cases until [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) was overruled.

That this result constituted a precedent follows *a fortiori* from our cases holding that even our summary affirmances of lower **\*1430** court decisions are precedents for “the precise issues presented and necessarily decided” by the judgment below. [*Mandel v. Bradley*, 432 **U.S**. 173, 176, 97 **S.Ct**. 2238, 53 **L.Ed**.**2d** 199 (1977)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118812&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_176&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_176) (*per curiam*). If the [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) Court had summarily affirmed a state-court decision holding that a jury vote of 10 to 2 did not violate the Sixth Amendment, that summary disposition would be a precedent. Accordingly, it is impossible to see how a full-blown decision of this Court reaching the same result can be regarded as a non-precedent.[12](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B01042050796536)

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What do our three colleagues say in response? They begin by suggesting that **Louisiana** conceded that [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) is not a precedent. See *ante,* at 1402 – 1403. This interpretation of the State's position is questionable,[13](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B01052050796536) but even if **Louisiana** made that concession, how could that settle the matter? What about Oregon, the only State that still permits non-unanimous verdicts? Oregon certainly did not make such a concession. On the contrary, it submitted an *amicus* brief arguing strenuously that [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) is a precedent and that it should be retained. Brief for State of Oregon as *Amicus Curiae* 6–32. And what about any other State that might want to allow such verdicts in the future? So the majority's reliance on **Louisiana's** purported concession simply will not do.

Our three colleagues’ next try is to argue that [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) is not binding because a case has no *ratio decidendi*when a majority does not agree on the reason for the result. *Ante*, at 1404, and n. 54. This argument, made in passing, constitutes an attack on the rule that the Court adopted in [*Marks v. United States*, 430 **U.S**. 188, 97 **S.Ct**. 990, 51 **L.Ed**.**2d** 260 (1977)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118739&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), for determining the holding of a decision when there is no majority opinion. Under the [*Marks*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118739&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) rule, “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.” [*Id.*, at 193, 97 **S.Ct**. 990](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118739&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) (internal quotation marks omitted). This rule ascribes precedential status to decisions made without majority agreement on the underlying rationale, and it is therefore squarely contrary to the argument of the three Justices who regard [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) as non-precedential.

The [*Marks*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118739&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) rule is controversial, and two Terms ago, we granted review in a case that implicated its meaning. See [*Hughes*v.*United States,*584 **U**. **S**. ––––, 138 **S.Ct**. 1765, 201 **L.Ed**.**2d** 72 (2018)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2044660849&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). But we ultimately decided the case on another ground and left the [*Marks*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118739&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))rule intact. As long as that rule stands, it refutes the argument that [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) is not binding because a majority did not agree on a common rationale.

Finally, our three colleagues contend that treating [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))as a precedent would require the Court “to embrace a new and dubious proposition: that a single Justice writing only for himself has the authority to bind this Court to propositions it has already rejected.” *Ante*, at 1402. This argument appears to weave together **\*1431** three separate questions relating to the precedential effect of decisions in which there is no majority opinion. I will therefore attempt to untangle these questions and address each in turn.

An initial question is whether, in a case where there is no opinion of the Court, the position taken by a single Justice in the majority can constitute the binding rule for which the decision stands. Under [*Marks*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118739&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), the clear answer to this question is yes. The logic of [*Marks*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118739&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) applies equally no matter what the division of the Justices in the majority, and I am aware of no case holding that the [*Marks*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118739&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) rule is inapplicable when the narrowest ground is supported by only one Justice. Certainly the lower courts have understood [*Marks*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118739&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))to apply in that situation.[14](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B01062050796536)

The next question is whether the [*Marks*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118739&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) rule applies any differently when the precedent that would be established by a fractured decision would overrule a prior precedent. Again, the logic of [*Marks*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118739&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) dictates an affirmative answer, and I am aware of no case holding that the [*Marks*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118739&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) rule applies any differently in this situation. But as far as the present case is concerned, this question is academic because [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) did not overrule any prior decision of this Court. At most, what the Court had “recognized,” *ante,* at 1396 – 1397, in prior cases is that the Sixth Amendment guaranteed the right to a unanimous jury verdict *in trials in federal and territorial courts*.[15](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B01072050796536) Whether the same rule applied in state prosecutions had not been decided, and indeed, until [*Duncan v.****Louisiana***, 391 **U.S**. 145, 154–158, 88 **S.Ct**. 1444, 20 **L.Ed**.**2d** 491 (1968)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1968131174&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_154&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_154), was handed down just four years before [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), the Sixth Amendment had not been held to apply to the States.

The final question is whether Justice Powell's reasoning in [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))—namely, his view that the Fourteenth Amendment did not incorporate every aspect of the Sixth Amendment jury-trial right—is a binding precedent, and the answer to that question is no. When, in the years after [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), new questions arose about the scope of the jury-trial right in state court—as they did in cases like [*Apprendi v. New Jersey*, 530 **U.S**. 466, 120 **S.Ct**. 2348, 147 **L.Ed**.**2d** 435 (2000)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000387238&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), and [*Blakely v. Washington*, 542 **U.S**. 296, 124 **S.Ct**. 2531, 159 **L.Ed**.**2d** 403 (2004)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2004622625&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))—nobody thought for a second that [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) committed the Court to Justice Powell's view that the right has different dimensions in state and federal cases. And no one on this Court or on a lower court had any trouble locating the narrow common ground between Justice Powell and the plurality in [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)): The States need not require unanimity to comply with the Constitution.

For all these reasons, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) clearly was a precedent, and if the Court wishes to be done with it, it must explain why  **\*1432** overruling [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) is consistent with the doctrine of *stare decisis*.

**III**

**A**

*Stare decisis* has been a fundamental part of our jurisprudence since the founding, and it is an important doctrine. But, as we have said many times, it is not an “inexorable command.” [*Payne*, 501 **U.S**. at 828, 111 **S.Ct**. 2597](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991116033&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_828&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_828); [*Gamble*, 587 **U**. **S**., at –––– – ––––, 139 **S.Ct**., at 1969–1970 (slip op., at 11–12)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2048498596&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_708_1969&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_1969). There are circumstances when past decisions must be overturned, but we begin with the presumption that we will follow precedent, and therefore when the Court decides to overrule, it has an obligation to provide an explanation for its decision.

This is imperative because the Court should have a body of *neutral* principles on the question of overruling precedent. The doctrine should not be transformed into a tool that favors particular outcomes.[16](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B01082050796536)

**B**

What is the majority's justification for overruling [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))? With no apparent appreciation of the irony, today's majority, which is divided into four separate camps,[17](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B01092050796536) criticizes the [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) majority as “badly fractured.” *Ante*, at 1397. But many important decisions currently regarded as precedents were decided without an opinion of the Court.[18](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B01102050796536) Does the majority mean to suggest that all such precedents are fair game?

The majority's primary reason for overruling [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) is the supposedly poor “quality” of Justice White's plurality opinion and Justice Powell's separate opinion. *Ante*, at 1404 – 1406. The majority indicts Justice White's opinion on five grounds: (1) it “spent almost no time grappling with the historical meaning of the Sixth Amendment's jury trial right,”[19](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B01112050796536) (2) it did not give due weight to the “Court's long-repeated statements that [the right] demands unanimity,”[20](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B01122050796536) (3) it did not take into account  **\*1433** “the racist origins of [the] Louisian[a] and Orego[n] laws,”[21](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B01132050796536) (4) it looked to the function of the jury-trial right,[22](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B01142050796536) and (5) it engaged in “a breezy cost-benefit analysis” that, in any event, did not properly weigh the costs and benefits.[23](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B01152050796536) All these charges are overblown.

First, it is quite unfair to criticize Justice White for not engaging in a detailed discussion of the original meaning of the Sixth Amendment jury-trial right since he had already done that just two years before in his opinion for the Court in [*Williams v. Florida*, 399 **U.S**. 78, 92–100, 90 **S.Ct**. 1893, 26 **L.Ed**.**2d** 446 (1970)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1970134247&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_92&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_92). In [*Williams*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1970134247&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), after examining that history, he concluded that the Sixth Amendment did not incorporate every feature of the common-law right (a conclusion that the majority, by the way, does not dispute). And in [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), he built on the analysis in [*Williams*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1970134247&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))*.*Accordingly, there was no need to repeat what had been said before.

Second, it is similarly unfair to criticize Justice White for not discussing the prior decisions that commented on jury unanimity. None of those decisions went beyond saying that this was a feature of the common-law right or cursorily stating that unanimity was required.[24](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B01162050796536) And as noted, [*Williams*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1970134247&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) had already held that the Sixth Amendment did not preserve all aspects of the common-law right.

Third, the failure of Justice White (and Justice Powell) to take into account the supposedly racist origins of the **Louisiana** and Oregon laws should not be counted as a defect for the reasons already discussed. See *supra,* at 1426 – 1427.

Fourth, it is hard to know what to make of the functionalist charge. One Member of the majority explicitly disavows this criticism, see *ante*, at 1409 (SOTOMAYOR, J., concurring in part), and it is most unlikely that all the Justices in the majority are ready to label all functionalist decisions as poorly reasoned. Most of the landmark criminal procedure decisions from roughly [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))’s time fall into that category. See [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I236cdffa9c1e11d9bdd1cfdd544ca3a4&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Mapp v. Ohio*, 367 **U.S**. 643, 654, 81 **S.Ct**. 1684, 6 **L.Ed**.**2d** 1081 (1961)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1961125528&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_654&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_654) (Fourth Amendment); [*Miranda v. Arizona*, 384 **U.S**. 436, 444, 86 **S.Ct**. 1602, 16 **L.Ed**.**2d** 694 (1966)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_444&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_444) (Fifth Amendment); [*Gideon v. Wainwright*, 372 **U.S**. 335, 344–345, 83 **S.Ct**. 792, 9 **L.Ed**.**2d** 799 (1963)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1963125313&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_344&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_344) (Sixth Amendment); [*Furman v. Georgia*, 408 **U.S**. 238, 239, 92 **S.Ct**. 2726, 33 **L.Ed**.**2d** 346 (1972)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127195&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_239&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_239) (*per curiam*) (Eighth Amendment).[25](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B01172050796536) Are they all now up for grabs?

The functionalist criticism dodges the knotty problem that led Justice White to look to the underlying purpose of the jury-trial right. Here is the problem. No one questions that the Sixth Amendment incorporated *the core*of the common-law jury-trial right, but did it incorporate *every feature* of the right? Did it constitutionalize the requirement that there be 12 jurors even though nobody can say why 12 is the magic number? And did it incorporate features that we now find highly objectionable, such as the exclusion of women from jury service? At the time of the adoption of  **\*1434** the Sixth Amendment (and for many years thereafter), women were not regarded as fit to serve as a defendant's peers. Unless one is willing to freeze in place late 18th-century practice, it is necessary to find a principle to distinguish between the features that were incorporated and those that were not. To do this, Justice White's opinion for the Court in [*Williams*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1970134247&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) looked to the underlying purpose of the jury-trial right, which it identified as interposing a jury of the defendant's peers to protect against oppression by a “ ‘corrupt or overzealous prosecutor’ ” or a “ ‘compliant, biased, or eccentric judge.’ ” [399 **U.S**. at 100, 90 **S.Ct**. 1893](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1970134247&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_100&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_100) (quoting [*Duncan*, 391 **U.S**. at 156, 88 **S.Ct**. 1444](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1968131174&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_156&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_156)).

The majority decries this “functionalist” approach but provides no alternative. It does not claim that the Sixth Amendment incorporated every feature of common-law practice, but it fails to identify any principle for identifying the features that were absorbed. On the question of jury service by women, the majority's only answer, buried in a footnote, is that the exclusion of women was outlawed by “further constitutional amendments,” *ante*, at 1402, n. 47, presumably the Fourteenth Amendment. Does that mean that the majority disagrees with the holding in [*Taylor v.****Louisiana***, 419 **U.S**. 522, 95 **S.Ct**. 692, 42 **L.Ed**.**2d** 690 (1975)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1975129717&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))—another opinion by Justice White—that the exclusion of women from jury service violates *the Sixth Amendment*? [*Id.*, at 531, 533–536, 95 **S.Ct**. 692](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1975129717&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).[26](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B01182050796536)

Fifth, it is not accurate to say that Justice White based his conclusion on a cost-benefit analysis of requiring jury unanimity. His point, rather, was that what the Court had already identified as the fundamental purpose of the jury-trial right was not undermined by allowing a verdict of 11 to 1 or 10 to 2.

I cannot say that I would have agreed either with Justice White's analysis or his bottom line in [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) if I had sat on the Court at that time, but the majority's harsh criticism of his opinion is unwarranted.

What about Justice Powell's concurrence? The majority treats Justice Powell's view as idiosyncratic, but it does not merit that derision. Justice Powell's belief that the Constitution allows the States a degree of flexibility in the interpretation of certain constitutional rights, although not our dominant approach in recent years, [*McDonald*, 561 **U.S**. at 759–766, 130 **S.Ct**. 3020](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022394586&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_759&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_759), has old and respectable roots. For a long time, that was the Court's approach. See [*id*., at 759–761, 130 **S.Ct**. 3020](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022394586&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). Only gradually did the Court abandon this “two-tier” system, see [*id.*, at 762–767, 130 **S.Ct**. 3020](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022394586&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), and it was not until **\*1435** [*Duncan*, *supra,* at 154–158, 88 **S.Ct**. 1444](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1968131174&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_154&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_154), decided just four years before [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), that the Sixth Amendment jury-trial right was held to apply to the States at all. Justice Powell's approach is also not without recent proponents, including, at least with respect to the Second Amendment, Justices now in the majority.[27](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B01192050796536)

Even now, our cases do not hold that *every* provision of the Bill of Rights applies in the same way to the Federal Government and the States. A notable exception is the Grand Jury Clause of the Fifth Amendment, a provision that, like the Sixth Amendment jury-trial right, reflects the importance that the founding generation attached to juries as safeguards against oppression. In [*Hurtado v. California*, 110 **U.S**. 516, 538, 4 **S.Ct**. 292, 28 L.Ed. 232 (1884)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1884280037&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_538&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_538), the Court held that the Grand Jury Clause does not bind the States and that they may substitute preliminary hearings at which the decision to allow a prosecution to go forward is made by a judge rather than a defendant's peers. That decision was based on reasoning that is not easy to distinguish from Justice Powell's in [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca.*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) [*Hurtado*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1884280037&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) remains good law and is critically important to the 28 States that allow a defendant to be prosecuted for a felony without a grand jury indictment.[28](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B01202050796536) If we took the same approach to the [*Hurtado*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1884280037&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))question that the majority takes in this case, the holding in that case could be called into question.

The majority's only other reason for overruling [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))is that it is inconsistent with related decisions and recent legal developments. *Ante*, at 1405 – 1406; *ante*, at 1409 (SOTOMAYOR, J., concurring in part). I agree that Justice Powell's view on incorporation is not in harmony with the bulk of our case law, but the majority's point about “recent legal developments” is **\*1436** an exaggeration. No subsequent Sixth Amendment decision has undercut the plurality. And while Justice Powell's view on incorporation has been further isolated by later cases holding that two additional provisions of the Bill of Rights apply with full force to the States, see [*Timbs*, 586 **U**. **S**., at ––––, 139 **S.Ct**., at 687](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2047576340&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_708_687&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_687) (Eighth Amendment's Excessive Fines Clause); [*McDonald*, *supra,* at 791, 130 **S.Ct**. 3020](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022394586&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_791&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_791) (plurality opinion) (Second Amendment), the project of complete incorporation was nearly done when [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) was handed down. See [*McDonald*, *supra*, at 765, n. 13, 130 **S.Ct**. 3020](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2022394586&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_765&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_765).

While the majority worries that [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) is inconsistent with our cases on incorporation, the majority ignores something far more important: the way in which [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) is intertwined with the body of our Sixth Amendment case law. As I have explained, see *supra*, at 1433 – 1434, the [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) plurality's reasoning was based on the same fundamental mode of analysis as that in [*Williams*, 399 **U.S**. 78, 90 **S.Ct**. 1893, 26 **L.Ed**.**2d**446](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1970134247&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), which had held just two years earlier that the Sixth Amendment did not constitutionalize the common law's requirement that a jury have 12 members. Although only one State, Oregon, now permits non-unanimous verdicts, many more allow six-person juries.[29](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B01212050796536) Repudiating the reasoning of [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) will almost certainly prompt calls to overrule [*Williams.*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1970134247&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))

**C**

Up to this point, I have discussed the majority's reasons for overruling [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca,*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))but that is only half the picture. What convinces me that [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) should be retained are the enormous reliance interests of **Louisiana** and Oregon. For 48 years, **Louisiana** and Oregon, trusting that [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) is good law, have conducted thousands and thousands of trials under rules allowing non-unanimous verdicts. Now, those States face a potential tsunami of litigation on the jury-unanimity issue.

At a minimum, all defendants whose cases are still on direct appeal will presumably be entitled to a new trial if they were convicted by a less-than-unanimous verdict and preserved the issue in the trial court. And at least in Oregon, even if no objection was voiced at trial, defendants may be able to challenge their convictions based on plain error. See Ore. Rule App. Proc. 5.45(1), and n. 1 (2019); [*State v. Serrano*, 355 Ore. 172, 179, 324 P.3d 1274, 1280 (2014)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2033248776&pubNum=0004645&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_4645_1280&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_4645_1280). Oregon asserts that more than a thousand defendants whose cases are still on direct appeal may be able to challenge their convictions if [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) is overruled. Brief for State of Oregon as *AmicusCuriae* 12–13.[30](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B01222050796536) The State also reports that “[d]efendants are arguing that an instruction allowing for non-unanimous verdicts is a structural error that requires reversal for *all* convictions, even for those for which the jury was not polled or those for which the jury was unanimous.” *Id*., at 14.

Unimpressed by these potential consequences, the majority notes that we “vacated and remanded nearly 800 decisions” for resentencing after [*United States v. Booker*, 543 **U.S**. 220, 125 **S.Ct**. 738, 160 **L.Ed**.**2d** 621 (2005)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2005966569&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), held that the Federal Sentencing Guidelines are not mandatory. *Ante*, at 1406 – 1407. But the burden of  **\*1437**resentencing cannot be compared with the burden of retrying cases. And while resentencing was possible in all the cases affected by [*Booker*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2005966569&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), there is no guarantee that all the cases affected by today's ruling can be retried. In some cases, key witnesses may not be available, and it remains to be seen whether the criminal justice systems of Oregon and **Louisiana** have the resources to handle the volume of cases in which convictions will be reversed.

These cases on direct review are only the beginning. Prisoners whose direct appeals have ended will argue that today's decision allows them to challenge their convictions on collateral review, and if those claims succeed, the courts of **Louisiana** and Oregon are almost sure to be overwhelmed.

The majority's response to this possibility is evasive. It begins by hinting that today's decision will not apply on collateral review under the framework adopted in [*Teague v. Lane*, 489 **U.S**. 288, 315, 109 **S.Ct**. 1060, 103 **L.Ed**.**2d** 334 (1989)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989027119&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_315&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_315) (plurality opinion). Under [*Teague*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989027119&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), “an old rule applies both on direct and collateral review,” but if today's decision constitutes a new procedural rule, prisoners will be able to rely on it in a collateral proceeding only if it is what we have termed a “watershed rule” that implicates “the fundamental fairness and accuracy of the criminal proceeding.” [*Whorton v. Bockting*, 549 **U.S**. 406, 416, 127 **S.Ct**. 1173, 167 **L.Ed**.**2d** 1 (2007)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2011559751&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_416&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_416). Noting that we have never found a new rule of criminal procedure to qualify as “watershed,” the Court hints that the decision in this case is likely to meet the same fate.

But having feinted in this direction, the Court quickly changes course and says that the application of today's decision to prisoners whose appeals have ended should not concern **us**. *Ante*, at 1406 – 1407. That question, we are told, will be decided in a later case. *Ibid*.

The majority cannot have it both ways. As long as retroactive application on collateral review remains a real possibility, the crushing burden that this would entail cannot be ignored. And while it is true that this Court has been chary in recognizing new watershed rules, it is by no means clear that [*Teague*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989027119&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) will preclude the application of today's decision on collateral review.

[*Teague*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989027119&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) applies only to a “new rule,” and the positions taken by some in the majority may lead to the conclusion that the rule announced today is an old rule. Take the proposition, adopted by three Members of the majority, that [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) was never a precedent. Those Justices, along with the rest of the majority, take the position that our cases established well before [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))both that the Sixth Amendment requires unanimity, *ante*, at 1396 – 1397, and that it applies in the same way in state and federal court, *ante*, at 1398 – 1399. Thus, if [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) was never a precedent and did not disturb what had previously been established, it may be argued that today's decision does not impose a new rule but instead merely recognizes what the correct rule has been for many years.

Two other Justices in the majority acknowledge that [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) was a precedent and thus would presumably regard today's decision as a “new rule,” but the question remains whether today's decision qualifies as a “watershed rule.” Justice KAVANAUGH concludes that it does not and all but decides—without briefing or argument—that the decision will not apply retroactively on federal collateral review and similarly that there will be no successful claims of ineffective assistance of counsel for failing to challenge [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). See *ante,*at 1418 – 1420 (opinion concurring in part).

The remaining Justices in the majority, and those of **us** in dissent, express no view on this question, but the majority's depiction of the unanimity requirement as a hallowed right that **Louisiana** and Oregon flouted for ignominious reasons certainly provides fuel for the argument that the rule announced today meets the test. And in Oregon, the State most severely impacted by today's decision, watershed status may not matter since the State Supreme Court has reserved decision on whether state law gives prisoners a greater opportunity to invoke new precedents in state collateral proceedings. See [*Verduzco v. State*, 357 Ore. 553, 574, 355 P.3d 902, 914 (2015)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2036792402&pubNum=0004645&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_4645_914&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_4645_914).[31](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B01232050796536)

Whatever the ultimate resolution of the retroactivity question, the reliance here is not only massive; it is concrete. Cf. [*Dickerson v. United States*, 530 **U.S**. 428, 443, 120 **S.Ct**. 2326, 147 **L.Ed**.**2d** 405 (2000)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2000387247&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_443&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_443) (reliance weighed heavily in favor of precedent simply because the warnings in [*Miranda v. Arizona*, 384 **U.S**. 436, 86 **S.Ct**. 1602, 16 **L.Ed**.**2d** 694](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966131580&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), had become “part of our national culture”). In my view, it weighs decisively against overruling [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca.*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))

In reaching this conclusion, I do not disregard the interests of petitioner and others who were convicted by a less-than-unanimous vote. It is not accurate to imply that these defendants would have been spared conviction if unanimity had been required. In many cases, if a unanimous vote had been needed, the jury would have continued to deliberate and the one or two holdouts might well have ultimately voted to convict.[32](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B01242050796536) This is almost certainly the situation in Oregon, where it is estimated that as many as two-thirds of all criminal trials have ended with a non-unanimous verdict. See Brief for State of Oregon as *Amicus* *Curiae* 12. It is impossible to believe that all these cases would have resulted in mistrials if unanimity had been demanded. Instead, after a vote of 11 to 1 or 10 to 2, it is likely that deliberations would have continued and unanimity would have been achieved.

Nevertheless, the plight of defendants convicted by non-unanimous votes is important and cannot be overlooked, but that alone cannot be dispositive of the *stare decisis* question. Otherwise, *stare decisis* would never apply in a case in which a criminal defendant challenges a precedent that led to conviction.

**D**

The reliance in this case far outstrips that asserted in recent cases in which past precedents were overruled. Last Term, when we overturned two past decisions, there were strenuous dissents voicing fears about the future of *stare decisis*. See [*Franchise Tax Bd. of Cal.*v.*Hyatt*, 587 **U**. **S**. ––––, ––––, 139 **S.Ct**. 1485, 1492, 203 **L.Ed**.**2d** 768 (2019)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2048247944&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) (BREYER, J., dissenting); [*Knick*v.*Township of Scott*, 588 **U**. **S**. ––––, ––––, 139 **S.Ct**. 2162, 2180, 204 **L.Ed**.**2d** 558 (2019)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2048538046&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) (KAGAN, J., dissenting). Yet in neither of those cases was there reliance like that present here.

In [*Franchise Tax Board*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2048247944&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), the dissent claimed only the airiest sort of reliance, the public's expectation that past decisions would remain on the books. [587 **U**. **S**., at –––– – ––––, 139 **S.Ct**., at 1492](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2048247944&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_708_1492&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_1492) (opinion of BREYER, J.). And in [*Knick*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2048538046&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), the dissent disclaimed any reliance at all. [588 **U**. **S**., at ––––, 139 **S.Ct**., at 2180](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2048538046&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780____&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780____) (opinion of KAGAN, J.). The same was true the year before in [*South Dakota*v*. Wayfair*, *Inc*., 585 **U**. **S**. ––––, 138 **S.Ct**. 2080, 201 **L.Ed**.**2d** 403 (2018)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2044774567&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), where the dissent did not contend that any legitimate reliance interests weighed in favor of preserving the decision that the Court overruled. [*Id.*, at –––– – ––––, 138 **S.Ct**., at 2101](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2044774567&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_708_2101&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_2101) (opinion of ROBERTS, C. J.). And our unanimous decision in [*Pearson v. Callahan*, 555 **U.S**. 223, 233, 129 **S.Ct**. 808, 172 **L.Ed**.**2d** 565 (2009)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2017919146&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_233&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_233), found that no reliance interests were involved.

In other cases overruling prior decisions, the dissents claimed that reliance interests were at stake, but whatever one may think about the weight of those interests, no one can argue that they are comparable to those in this case.

In [*Montejo v.****Louisiana***, 556 **U.S**. 778, 793–797, 129 **S.Ct**. 2079, 173 **L.Ed**.**2d** 955 (2009)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2018897274&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_793&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_793), the Court abrogated a prophylactic rule that had been adopted in [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic1d2a6319c1e11d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Michigan v. Jackson*, 475 **U.S**. 625, 106 **S.Ct**. 1404, 89 **L.Ed**.**2d**631 (1986)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986116817&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), to protect a defendant's right to counsel during postarraignment interrogation. The dissent did not claim that any defendants had relied on this rule, arguing instead that the public at large had an interest “in knowing that counsel, once secured, may be reasonably relied upon as a medium between the accused and the power of the State.” [*Montejo*, *supra*, at 809, 129 **S.Ct**. 2079](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2018897274&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_809&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_809) (opinion of Stevens, J.). This abstract interest, if it can be called reliance in any proper sense of the term, is a far cry from what is at stake here.

In [*Citizens United v. Federal Election Comm'n*, 558 **U.S**. 310, 130 **S.Ct**. 876, 175 **L.Ed**.**2d** 753 (2010)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2021175488&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), where we overruled precedent allowing laws that prohibited corporations’ election-related speech, we found that “[n]o serious reliance interests” were implicated, [*id.*, at 365, 130 **S.Ct**. 876](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2021175488&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), since the only reliance asserted by the dissent was the time and effort put in by federal and state lawmakers in adopting the provisions at issue, [*id*., at 411–412, 130 **S.Ct**. 876](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2021175488&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) (Stevens, J., concurring in part and dissenting in part). In this case, by contrast, what is at stake is not the time and effort of **Louisiana** and Oregon lawmakers but a monumental litigation burden and the potential inability to retry cases that might well have ended with a unanimous verdict if that had been required.

Finally, in [*Janus*v.*State, County, and Municipal Employees*, 585 **U**. **S**. ––––, 138 **S.Ct**. 2448, 201 **L.Ed**.**2d** 924 (2018)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2044822047&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), where we overruled [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I1d1bb4939c9711d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Abood v. Detroit Bd. of Ed.*, 431 **U.S**. 209, 97 **S.Ct**. 1782, 52 **L.Ed**.**2d** 261 (1977)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118782&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), we carefully considered and addressed the question of reliance, and whatever one may think about the extent of the legitimate reliance in that case, it is not in the same league as that present here. [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I1d1bb4939c9711d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Abood*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118782&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) had held that a public sector employer may require non-union members to pay a portion of the dues collected from union members. [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I1d1bb4939c9711d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[431 **U.S**. at 235–236, 97 **S.Ct**. 1782](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118782&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_780_235&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_235). In overruling that decision, we acknowledged that existing labor contracts might have been negotiated in reliance on [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I1d1bb4939c9711d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Abood*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118782&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), but we noted that most labor contracts are of short duration, that unions had been on notice for some time that the Court had serious misgivings about [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I1d1bb4939c9711d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Abood*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118782&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), and that unions could have insisted on contractual provisions to protect their interests if [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I1d1bb4939c9711d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Abood*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977118782&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) later fell.[*Janus*, *supra*, at –––– – ––––, 138 **S.Ct**., at 2448–2499](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2044822047&pubNum=0000708&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&fi=co_pp_sp_708_2448&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_2448).[33](https://1.next.westlaw.com/Document/I94778a42828311eaa154dedcbee99b91/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef00000178292fbe7274a3430d%3Fppcid%3Dba6140c24e804e3f83752fb0cca1568c%26Nav%3DCASE%26fragmentIdentifier%3DI94778a42828311eaa154dedcbee99b91%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5d1c33db2f3128d3d6894e67e1640e6e&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=ba6140c24e804e3f83752fb0cca1568c&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B01252050796536)

By striking down a precedent upon which there has been massive and entirely reasonable reliance, the majority sets an important precedent about *stare decisis*. I assume that those in the majority will apply the same standard in future cases.

\* \* \*

Under the approach to *stare decisis* that we have taken in recent years, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ic83821719be811d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=25da7bb89777484e8d8babb15c71f3df&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[*Apodaca*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972127122&pubNum=0000780&originatingDoc=I94778a42828311eaa154dedcbee99b91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))should not be overruled. I would therefore affirm the judgment below, and I respectfully dissent.

# Strauder v. West Virginia

#### United States Supreme Court 100 U.S. 303 (1880)

#### Rule of Law

**The Fourteenth Amendment prohibits states from enacting laws that deny any of its citizens equal protection under the law.**

# Apodaca v. Oregon

#### United States Supreme Court 406 U.S. 404 (1972)

#### Rule of Law

**A nonunanimous jury verdict in a criminal trial does not violate the Sixth Amendment right to trial by jury, at least with respect to votes of 10–2 or more.**

#### Facts

Apodaca, Madden, and Cooper (defendants) were all convicted of serious, unrelated crimes in jury trials in Oregon. Apodaca and Madden were convicted by a vote of 11–1; Cooper was convicted by a vote of 10–2. The defendants challenged their convictions on the grounds that a nonunanimous jury verdict in a criminal trial violates the Sixth Amendment right to trial by jury.

#### Issue

Does a nonunanimous jury verdict in a criminal trial violate the Sixth Amendment right to trial by jury?

#### Holding and Reasoning (White, J.)

No. A criminal conviction by a vote of 10–2 or 11–1 does not violate the Sixth Amendment right to trial by jury. The fact that a unanimous verdict was required of juries at common law does not mean that it is automatically required by the Constitution. Juries protect defendants against prosecutorial or judicial misconduct by leaving questions of culpability to the “common sense” of the community. A unanimous verdict is not essential to the performance of this function. Rather, all that is required is an impartial and representative jury of ordinary people making an honest judgment. Allowing nonunanimous verdicts will certainly reduce the number of hung juries, but it does not deny the essential protections guaranteed by the Sixth Amendment. The defendants’ argument that a unanimous verdict is needed to give effect to the reasonable doubt standard fails. The necessity of proving guilt beyond a reasonable doubt in a criminal trial is a function of due process and is irrelevant in this Sixth Amendment inquiry. Further, while juries must be representative of the community, that does not mean that anyone with a minority viewpoint should be able to defeat a verdict. Juries need not be perfectly representative so long as no class of people has been purposefully left out. Moreover, those with minority viewpoints are still able to fully participate and influence deliberations. Accordingly, at least with respect to verdicts based on votes of 10–2 or more, nonunanimous jury verdicts in criminal trials do not violate the Sixth Amendment. The convictions are affirmed.

#### Concurrence (Blackmun, J.)

Although nonunanimous verdicts do not violate the constitution, allowing such verdicts is not good policy. Most likely, a split verdict with less than a 75 percent majority would be unconstitutional.

#### Dissent (Douglas, J.)

Nonunanimous jury verdicts are less reliable than unanimous verdicts. Allowing nonunanimous verdicts eliminates meaningful debate and compromise. As a practical matter, juries will not debate further once the required majority is reached. If a unanimous verdict were required, the minority might persuade the rest to acquit or convict of a lesser charge. The Court’s ruling favors the prosecution, as more hung juries will now result in convictions in Oregon and Louisiana. Unanimous jury verdicts and the reasonable doubt standard are so fundamental to our constitutional system that only a constitutional amendment should modify them. The Court’s decision diminishes protections for the accused and sets the stage for further erosion of the reasonable doubt standard. The radical changes to the criminal justice system made by this ruling should be left to the political branches, not the judiciary.

**Key Terms:**

**Right to Trial by Jury Clause** - Guarantee contained in the Sixth Amendment that any criminal defendant is entitled to have his case heard by an unbiased, local jury

# Johnson v. Louisiana

#### United States Supreme Court 406 U.S. 356 (1972)

#### Rule of Law

**A state law that authorizes conviction for a crime on a guilty verdict issued by nine out of twelve jurors does not violate the defendant’s constitutional due process rights.**

#### Facts

Johnson (defendant) was convicted on robbery charges under a guilty verdict rendered by nine of twelve jurors. Johnson appealed his conviction and argued that conviction by less than a unanimous jury failed to prove guilt beyond a reasonable doubt. The supreme court of the state of Louisiana (plaintiff) affirmed Johnson’s conviction. Johnson petitioned the United States Supreme Court for review.

#### Issue

Does a state law that authorizes conviction for a crime on a guilty verdict issued by nine out of twelve jurors violate the defendant’s constitutional due process rights?

#### Holding and Reasoning (White, J.)

No. A state law that authorizes conviction for a crime on a guilty verdict issued by nine out of twelve jurors does not violate the defendant’s constitutional due process rights. Johnson argues that jurors will inevitably ignore minority opinions and vote to convict a defendant without fully weighing the grounds that might lead to a reasonable doubt about the defendant’s guilt. We have no evidence to support the contention that a majority of jurors would arbitrarily terminate deliberations without giving due consideration to arguments in favor of acquittal. It is far more likely that a jury will render a majority vote only after having reached the point in deliberations at which arguments in favor of acquittal have been considered and found unpersuasive. When arguments in favor of acquittal have ceased to be persuasive, a reasonable juror should question whether any remaining doubts over guilt are in fact reasonable. The state legislature determined that unanimity is not essential to a fair jury verdict. Johnson’s assumptions about juror behavior find no support in the evidence. As such, we will not overturn the judgment of the state legislature. Disagreement among rational jurors does not amount to failure of proof beyond a reasonable doubt. The mere fact that three jurors disagreed with the opinion of the other nine jurors does not establish reasonable doubt. Federal court juries are required to reach a unanimous decision and the failure to reach a unanimous decision results in the defendant being afforded a new trial. If disagreement by a minority of jurors was indicative of the existence of reasonable doubt, the appropriate result would be a directed verdict of acquittal. As such we conclude that a verdict rendered by nine out of twelve jurors is a valid verdict and does not violate a defendant’s due process rights. The state supreme court judgment is affirmed.

#### Dissent (Stewart, J.)

I believe the Fourteenth Amendment requires a unanimous jury verdict to sustain a constitutional conviction. The Court’s decision opens the door for a jury majority to deny meaningful participation by the minority on the basis of race or class. An impartially selected and unanimous jury is essential to prevent convictions on discriminatory grounds. We recognize a host of constitutional requirements acknowledging the risks of improper jury actions including change of venue requirements, protections against biased media coverage and ex parte communications, and exclusion of unduly prejudicial evidence. The requirements of impartiality and unanimity are equally essential to the assurance of a fair jury. The Court’s decision can only undermine public confidence in the fairness of the criminal justice system because it would allow convictions to stand on the verdict of a jury divided along racial lines. In light of the court’s general reluctance to overturn jury verdicts, the requirement of unanimity is essential to the fair administration of the criminal justice system.

**Key Terms:**

**Fourteenth Amendment –** Provides that all persons born or naturalized in the United States are U.S. citizens. Also provides that no state shall: (1) abridge the privileges or immunities of a U.S. citizen; (2) deprive any person of life, liberty, or property, without due process of law; or (3) deny equal protection of the laws to anyone within its jurisdiction.

**Due Process -** A constitutional guarantee that a law shall not be unreasonable, arbitrary, or capricious and that individuals will be given notice of legal proceedings conducted fairly with an opportunity for an individual to be heard before the government may impose sanctions on one’s life, liberty, or property.

**Thompson v. Utah**

18 S.Ct. 620

Supreme Court of the United States

**THOMPSON**

**v.**

**STATE OF UTAH.**

No. 553.

April 25, 1898.

## Synopsis

In Error to the Supreme Court of the State of Utah.

**Opinion**

Mr. Justice HARLAN delivered the opinion of the court.

By an indictment returned in the district court of the Second judicial district of the territory of Utah at its May term, 1895,-that being a court of general jurisdiction,-the plaintiff in error and one Jack Moore were charged with the crime of grand larceny, alleged to have been committed March 2, 1895, in Wayne county, of that territory, by unlawfully and feloniously stealing, taking, and driving a way one calf, the property of Heber Wilson.

The case was first tried when Utah was a territory, and by a jury composed of twelve persons. Both of the defendants were found guilty as charged, and were recommended to the mercy of the court. A new trial having been granted, the case was removed for trial to another county. But it was not again tried until after the admission of Utah into the Union as a state.

At the second trial the defendant was found guilty. He moved for a new trial upon the ground, among others, that the jury that tried him was composed of only eight jurors; whereas by the law in force at the time of the commission of the alleged offense a lawful jury in his case could not be composed of less than twelve jurors. The application for a new trial having been overruled, and the accused having been called for sentence, he renewed his objection to the composition of the jury, and moved by counsel that the verdict be set aside, and another trial ordered.

This objection was overruled, the accused duly excepting to the action of the court. He was then sentenced to the state prison for the term of three years. The judgment of conviction was affirmed by the supreme court of Utah, the court  **\*345** holding that the trial of the accused by a jury composed of eight persons was consistent with the constitution of the United [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I28f88552f85311d9bf60c1d57ebc853e&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[States. 50 Pac. 409](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1897011843&pubNum=660&originatingDoc=I0fc8a9549cb611d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

By the statutes of the territory of Utah in force at the time of the commission of the alleged offense it was provided that a trial jury in a district court should consist of twelve, and in a justice's court of six, persons, unless the parties to the action or proceeding, in other than criminal cases, agreed upon a less number; that a felony was a crime punishable with death or by imprisonment in the penitentiary, every other crime being a misdemeanor; that the stealing of a calf was grand larceny, and punishable by confinement in the penitentiary for not less than one nor more than ten years; that no person should be convicted of a public offense unless by the verdict of a jury, accepted and recorded by the court, or upon a plea of guilty, or upon judgment against him upon a demurrer, or upon the judgment of a court, a jury having been waived in a criminal action not amounting to a felony; and that issues of fact should be tried by jury, unless a trial in that mode was waived in criminal cases not amounting to a felony by the consent of both parties expressed in open court and entered in its minutes. 2 Comp. Laws Utah 1888, §§ 3065, 4380, 4643, 4644, 4790, 4997.

**\*\*621** By the constitution of the state of Utah it is provided: ‘In capital cases the right of trial by jury shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous.’ Const. art. 1, § 10. Also: ‘All criminal prosecutions and penal actions which may have arisen or which may arise before the change from a territorial to a state government, and which shall then be pending, shall be prosecuted to judgment and execution in the name of the state and in the court having jurisdiction thereof. All offenses committed against the laws of the territory of Utah before the change from a territorial to a state government, and which shall not have been prosecuted before such change, may be prosecuted in the name and by the authority of the state  **\*346** of Utah with like effect, as though such change had not taken place, and all penalties incurred shall remain the same as if this constitution had not been adopted.’ Id. art. 24, § 6.

As the offense of which the plaintiff in error was convicted was a felony, and as, by the law in force when the crime was committed, he could not have been tried by a jury of less number than twelve jurors, the question is presented whether the provision in the constitution of Utah, providing for a jury of eight persons in courts of general jurisdiction, except in capital cases, can be made applicable to a felony committed within the limits of the state while it was a territory, without bringing that provision into conflict with the clause of the constitution of the United States prohibiting the passage by any state of an ex post facto law.

The constitution of the United States provides: ‘The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be at such place or places as the congress may by law have directed.’ Const. U. S. art. 3, § 2. And by the sixth amendment of the constitution it is declared: ‘In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confrouted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.’

That the provisions of the constitution of the United States relating to the right of trial by jury in suits at common law apply to the territories of the United States is no longer an open question. [Webster v. Reid, 11 How. 437, 460;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1800139138&pubNum=780&originatingDoc=I0fc8a9549cb611d993e6d35cc61aab4a&refType=RP&fi=co_pp_sp_780_460&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_460) [Publishing Co. v. Fisher, 166 U. S. 464, 468, 17 Sup. Ct. 618;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1897180085&pubNum=708&originatingDoc=I0fc8a9549cb611d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [Springville City v. Thomas, 166 U. S. 707, 17 Sup. Ct. 717.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1897180141&pubNum=708&originatingDoc=I0fc8a9549cb611d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) In the last-named case it was claimed that the territorial legislature of Utah was empowered by the organic act of the territory of September 9, 1850 (9 Stat. 453, c. 51, § 6), to provide that unanimity **\*347** of action on the part of jurors in civil cases was not necessary to a valid verdict. This court said: ‘In our opinion, the seventh amendment secured unanimity in finding a verdict as an essential feature of trial by jury in common-law cases, and the act of congress could not impart the power to change the constitutional rule, and could not be treated as attempting to do so.’

It is equally beyond question that the provisions of the national constitution relating to trials by jury for crimes and to criminal prosecutions apply to the territories of the United States.

The judgment of this court in [Reynolds v. U. S., 98 U. S. 145, 154,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1878199070&pubNum=780&originatingDoc=I0fc8a9549cb611d993e6d35cc61aab4a&refType=RP&fi=co_pp_sp_780_154&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_154)-which was a criminal prosecution in the territory of Utah,-assumed that the sixth amendment applied to criminal prosecutions in that territory.

In [Callan v. Wilson, 127 U. S. 540, 548, 551, 8 Sup. Ct. 1301,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1888180191&pubNum=708&originatingDoc=I0fc8a9549cb611d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) which was a criminal prosecution by information in the police court of the District of Columbia, the accused claimed that the right of trial by jury was secured to him by the third article of the constitution as well as by the fifth and sixth amendments. The contention of the government was that the constitution did not secure the right of trial by jury to the people of the District of Columbia; that the original provision, that when a crime was not committed within any state ‘the trial shall be at such place or places as the congress may by law have directed,’ had, probably, reference only to offenses committed on the high seas; that in adopting the sixth amendment the people of the states were solicitous about trial by jury in the states, and nowhere else, leaving it entirely to congress to declare in what way persons should be tried who might be accused of crime on the high seas and in the District of Columbia and in places to be thereafter ceded for the purposes, respectively, of a seat of government, forts, magazines, arsenals, and dock yards; and, consequently, that that amendment should be deemed to have superseded so much of the third article of the constitution as related to the trial of crimes by jury. That contention was overruled, this court saying: ‘As the guaranty of a trial by jury, in the third article, implied  **\*348** a trial in that mode, and according to the settled rules of the common law, the enumeration, in the sixth amendment, of the rights of the accused in criminal prosecutions, is to be taken as a declaration of what those rules were, and is to be referred to the anxiety of the people of the states to have in the supreme law of the land, and so far as the agencies of the general government were concerned, a full and distinct recognition of those rules, as involving the fundamental rights of  **\*\*622** life, liberty, and property. This recognition was demanded and secured for the benefit of all the people of the United States, as well those permanently or temporarily residing in the District of Columbia as those residing or being in the several states. There is nothing in the history of the constitution or of the original amendments to justify the assertion that the people of this District may be lawfully deprived of the benefit of any of the constitutional guaranties of life, liberty, and property; especially of the privilege of trial by jury in criminal cases.’ ‘We cannot think,’ the court further said, ‘that the people of this District have, in that regard, less rights than those accorded to the people of the territories of the United States.’

In [Late Corporation of Church of Jesus Christ of Latter-Day Saints v. U. S., 136 U. S. 1, 44, 10 Sup. Ct. 792,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1890145167&pubNum=708&originatingDoc=I0fc8a9549cb611d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) one of the questions considered was the extent of the authority which the United States might exercise over the territories and their inhabitants. In the opinion of Mr. Justice Bradley reference was made to previous decisions of this court, in one of which-[National Bank v. County of Yankton, 101 U. S. 129, 133](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1801193419&pubNum=780&originatingDoc=I0fc8a9549cb611d993e6d35cc61aab4a&refType=RP&fi=co_pp_sp_780_133&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_133)-it was said that congress, in virtue of the sovereignty of the United States, could not only abrogate the laws of the territorial legislatures, but may itself legislate directly for the local government; that it could make a void act of the territorial legislature valid, and a valid act vold; that it had full and complete legislative authority over the people of the territories and all the departments of the territorial governments; that it ‘may do for the territories what the people, under the constitution of the United States, may do for the states.’ Reference was also made to [Murphy v. Ramsey, 114 U. S. 15, 44, 5 Sup. Ct. 747,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1885180171&pubNum=708&originatingDoc=I0fc8a9549cb611d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) in which it was said: ‘The people of the United States,  **\*349**as sovereign owners of the national territories, have supreme power over them and their inhabitants. In the exercise of this sovereign dominion they are represented by the government of the United States, to whom all the powers of government over that subject have been delegated, subject only to such restrictions as are expressed in the constitution, or are necessarily implied in its terms.’ The opinion of the court in Late Corporation of Church of Jesus Christ of Latter-Day Saints v. U. S. then proceeded: ‘Doubtless congress, in legislating for the territories, would be subject to those fundamental limitations in favor of personal rights which are formulated in the constitution and its amendments; but these limitations would exist rather by inference and the general spirit of the constitution, from which congress derives all its powers, than by any express and direct application of its provisions. The supreme power of congress over the territories and over the acts of the territorial legislatures established therein is generally expressly reserved in the organic acts establishing governments in said territories. This is true of the territory of Utah. In the sixth section of the act establishing a territorial government in Utah, approved September 9, 1850, it is declared ‘that the legislative powers of said territory shall extend to all rightful subjects of legislation, consistent with the constitution of the United States and the provisions of this act. \* \* \* All the laws passed by the legislative assembly and governor shall be submitted to the congress of the United States, and if disapproved shall be null and of no effect.’ 9 Stat. 454.'

Assuming, then, that the provisions of the constitution relating to trials for crimes and to criminal prosecutions apply to the territories of the United States, the next inquiry is whether the jury referred to in the original constitution and in the sixth amendment is a jury constituted, as it was at common law, of twelve persons, neither more nor less. 2 Hale, P. C. 161; 1 Chit. Cr. Law, 505. This question must be answered in the affirmative. When Magna Charta declared that no freeman should be deprived of life, etc., ‘but by the judgment of his peers or by the law of the land,’ it referred to a trial by twelve jurors. Those who emigrated to this  **\*350** country from England brought with them this great privilege ‘as their birthright and inheritance, as a part of that admirable common law which had fenced around and interposed barriers on every side against the approaches of arbitrary power.’ 2 Story, Const. § 1779. In Bac. Abr. tit. ‘Juries,’ it is said: ‘The trial per pais, or by a jury of one's country, is justly esteemed one of the principal excellencies of our constitution; for what greater security can any person have in his life, liberty, or estate than to be sure of the being devested of nor injured in any of these without the sense and verdict of twelve honest and impartial men of his neighborhood? And hence we find the common law herein confirmed by Magna Charta.’ So, in 1 Hale, P. C. 33: ‘The law of England hath afforded the best method of trial that is possible of this and all other matters of fact, namely, by a jury of twelve men all concurring in the same judgment, by the testimony of witnesses viva voce in the presence of the judge and jury, and by the inspection and direction of the judge.’ It must consequently be taken that the word ‘jury’ and the words ‘trial by jury’ were placed in the constitution of the United States with reference to the meaning affixed to them in the law as it was in this country and in England at the time of the adoption of that instrument; and that when Thompson committed the offense of grand larceny in the territory of Utah-which was under the complete jurisdiction of the United States for all purposes of government and legislation-the supreme law of the land required that he should be tried by a jury composed of not less than twelve persons. And such was the requirement of the statutes of Utah while it was a territory.

Was it, then, competent for the state of Utah, upon its admission into the Union, to do, in respect of Thompson's crime, what the United States could not have done while Utah  **\*\*623** was a territory, namely, to provide for his trial by a jury of eight persons?

We are of opinion that the state did not acquire, upon its admission into the Union, the power to provide, in respect of felonies committed within its limits while it was a territory,  **\*351** that they should be tried otherwise than by a jury such as is provided by the constitution of the United States. When Thompson's crime was committed, it was his constitutional right to demand that his liberty should not be taken from him except by the joint action of the court and the unanimous verdict of a jury of twelve persons. To hold that a state could deprive him of his liberty by the concurrent action of a court and eight jurors would recognize the power of the state not only to do what the United States, in respect of Thompson's crime, could not, at any time, have done by legislation, but to take from the accused a substantial right belonging to him when the offense was committed.

It is not necessary to review the numberous cases in which the courts have determined whether particular statutes come within the constitutional prohibition of ex post facto laws. It is suflicient now to say that a statute belongs to that class which by its necessary operation and ‘in its relation to the offense, or its consequences, alters the situation of the accused to his disadvantage.’ [U. S. v. Hall, 2 Wash. C. C. 366, Fed. Cas. No. 15,285;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1800135539&pubNum=801&originatingDoc=I0fc8a9549cb611d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I2cd49fdd9cc611d991d0cc6b54f12d4d&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[Kring v. Missouri, 107 U. S. 221, 228, 2 Sup. Ct. 443;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1883180190&pubNum=708&originatingDoc=I0fc8a9549cb611d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [In re Medley, 134 U. S. 160, 171, 10 Sup. Ct. 384.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1890180087&pubNum=708&originatingDoc=I0fc8a9549cb611d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) Of course, a statute is not of that class unless it materially impairs the right of the accused to have the question of his guilt determined according to the law as it was when the offense was committed. And therefore it is well settled that the accused is not entitled of right to be tried in the exact mode, in all respects, that may be prescribed for the trial of criminal cases at the time of the commission of the offense charged against him. Cooley, in his Treatise on Constitutional Limitations, after referring to some of the adjudged cases relating to expost facto laws, says: ‘But, so far as mere modes of procedure are concerned, a party has no more right, in a criminal than in a civil action, to insist that his case shall be disposed of under the law in force when the act to be investigated is charged to have taken place. Remedies must always be under the control of the legislature, and it would create endless confusion in legal proceedings if every case was to be conducted only in accordance with the rules of practice and heard only by the courts in existence **\*352** when its facts arose. The legislature may abolish courts and create new ones, and it may prescribe altogether different modes of procedure in its discretion, though it cannot lawfully, we think, in so doing, dispense with any of those substantial protections with which the existing law surrounds the person accused of crime.’ Chapter 9, \*272. And this view was substantially approved by this court in Kring v. Missouri, above cited. So, in [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=If23152039cc111d9bdd1cfdd544ca3a4&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[Hopt v. Utah, 110 U. S. 574, 590, 4 Sup. Ct. 202,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1884180179&pubNum=708&originatingDoc=I0fc8a9549cb611d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) it was said that no one had a vested right in mere modes of procedure, and that it was for the state, upon grounds of public policy, to regulate procedure at its pleasure. [This court, in Duncan v. Missouri, 152, U. S. 378, 382, 14 Sup. Ct. 570,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1894180021&pubNum=708&originatingDoc=I0fc8a9549cb611d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) said that statutes regulating procedure, if they leave untouched all the substantial protections with which existing law surrounds the person accused of crime, are not within the constitutional inhibition of ex post facto laws. But it was held in Hopt v. Utah, above cited, that a statute that takes from the accused a substantial right given to him by the law in force at the time to which his guilt relates would be ex post facto in its nature and operation, and that legislation of that kind cannot be sustained simply because, in a general sense, it may be said to regulate procedure. The difficulty is not so much as to the soundness of the general rule that an accused has no vested right in particular modes of procedure as in determining whether particular statutes by their operation take from an accused any right that was regarded, at the time of the adoption of the constitution, as vital for the protection of life and liberty, and which he enjoyed at the time of the commission of the offense charged against him.

Now, Thompson's crime, when committed, was punishable by the territory of Utah proceeding in all its legislation under the sanction of and in subordination to the authority of the United States. The court below substituted, as a basis of judgment and sentence to imprisonment in the penitentiary, the unanimous verdict of eight jurors in place of a unanimous verdict of twelve. It cannot therefore, be said that the constitution of Utah, when applied to Thompson's case, did not deprive him of a substantial right involved in his liberty, and  **\*353** did not materially alter the situation to his disadvantage. If, in respect to felonies committed in Utah while it was a territory, it was competent for the state to prescribe a jury of eight persons, it could just as well have prescribed a jury of four or two, and, perhaps, have dispensed altogether with a jury, and provided for a trial before a single judge.

The supreme court of Utah held that this case came within the principles announced by it in [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ia47e50baf83f11d99439b076ef9ec4de&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[State v. Bates, 14 Utah, 293, 301, 47 Pac. 78.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1896012115&pubNum=660&originatingDoc=I0fc8a9549cb611d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) In the latter case no reference was made to the ex post facto clause of the constitution of the United States. But it was held that the requirement of eight jurors in courts of general jurisdiction, except in capital cases, was not in conflict with the sixth amendment of the constitution of the United States,-the court saying that, ‘if a jury of eight men is as likely to ascertain the truth as twelve, that number secures the end,’ and that ‘there can be no magic in the number twelve, though hallowed by time.’ But the  **\*\*624** wise men who framed the constitution of the United States and the people who approved it were of opinion that life and liberty, when involved in criminal prosecutions, would not be adequately secured except through the unanimous verdict of twelve jurors. It was not for the state, in respect of a crime committed within its limits while it was a territory, to dispense with that guaranty simply because its people had reached the conclusion that the truth could be as well ascertained, and the liberty of an accused be as well guarded, by eight as by twelve jurors in a criminal case.

It is said that the accused did not object, until after verdict, to a trial jury composed of eight persons, and therefore he should not be heard to say that his trial by such a jury was in violation of his constitutional rights. It is sufficient to say that it was not in the power of one accused of felony, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt. The law in force when this crime was committed did not permit any tribunal to deprive him of his liberty, except one constituted of a court and a jury of twelve persons. In the case of Hopt v. Utah, above cited, the question arose whether  **\*354** the right of an accused, charged with felony, to be present before triors of challenges to jurors was waived by his failure to object to their retirement from the court room, or to their trial of the several challenges in his absence. The court said: ‘We are of opinion that it was not within the power of the accused or his counsel to dispense with the statutory requirement as to his personal presence at the trial. The argument to the contrary necessarily proceeds upon the ground that he alone is concerned as to the mode by which he may be deprived of his life or liberty, and that the chief object of the prosecution is to punish him for the crime charged. But this is a mistaken view as well of the relations which the accused holds to the public as of the end of human punishment. The natural life, says Blackstone, cannot legally be disposed of or destroyed by any individual, neither by the person himself nor by any other of his fellow creatures, merely upon their own authority. 1 Bl. Comm. 133. The public has an interest in his life and liberty. Neither can be lawfully taken except in the mode prescribed by law. That which the law makes essential in proceedings involving the deprivation of life and liberty cannot be dispensed with or affected by the consent of the accused, much less by his mere failure, when on trial and in custody, to object to Unauthorized methods. The great end of punishment is not the expiation of atonement of the offense committed, but the prevention of future offenses of the same kind. 4 Bl. Comm. 11. Such being the relation which the citizen holds to the public, and the object of punishment for public wrongs, the legislature has deemed it essential to the protection of one whose life or liberty is involved in a prosecution for felony that he shall be personally present at the trial; that is, at every stage of the trial when his substantial rights may be affected by the proceedings against him. If he be deprived of his life or liberty without being so present, such deprivation would be without that due process of law required by the constitution.’

If one under trial for a felony the punishment of which is confinement in a penitentiary could not legally consent that the trial proceed in his absence, still less could he assent to be  **\*355** deprived of his liberty by a tribunal not authorized by law to determine his guilt.

In our opinion, the provision in the constitution of Utah providing for the trial in courts of general jurisdiction of criminal cases, not capital, by a jury composed of eight persons, is ex post facto in its application to felonies committed before the territory became a state, because, in respect of such crimes, the constitution of the United States gave the accused, at the time of the commission of his offense, the right to be tried by a jury of twelve persons, and made it impossible to deprive him of his liberty except by the unanimous verdict of such a jury.

The judgment is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion. Reversed.

Mr. Justice BREWER and Mr. Justice PECKHAM, dissented.

**Maxwell v. Utah**

20 S.Ct. 448

Supreme Court of the United States

**CHARLES L. MAXWELL, Plff. in Err.,**

**v.**

**GEORGE N. DOW, as Warden of the Utah State Prison.**

No. 384.

Argued December 4, 1899.Decided February 26, 1900.

## Synopsis

IN ERROR to the Supreme Court of the State of Utah to review a decision denying a writ of habeas corpus on the ground of the unconstitutionality of a statute. Affirmed.

The facts are stated in the opinion.

**Opinion**

Mr. Justice Peckham delivered the opinion of the court:

On the 27th of June, 1898, an information was filed against the plaintiff in error by the prosecuting attorney of the county, in a state court of the state of Utah, charging him with the crime of robbery committed within the county in May, 1898. In September, 1898, he was tried before a jury composed of but eight jurors, and convicted and sentenced to imprisonment in the state prison for eighteen years, and since that time has been confined in prison, undergoing the sentence of the state court.

In May, 1899, he applied to the supreme court of the state for a writ of habeas corpus, and alleged in his sworn petition that he was a natural-born citizen of the United States, and that his imprisonment was unlawful because he was prosecuted under an information instead of by indictment by a grand jury, and was tried by a jury composed of eight, instead of twelve jurors. He specially set up and claimed (1) that to prosecute him by information abridged his privileges and immunities as a citizen of the United States, under [Article 5 of the Amendments to the Constitution of the United States](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOARTV&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), and also violated section 1 of Article 14 of those Amendments; (2) that a trial by jury of only eight persons abridged his privileges and immunities as a citizen of the United States, under Article 6, and also violated section 1 of Article 14 of such Amendments; (3) that a trial by such a jury and his subsequent imprisonment by reason of the verdict of that jury deprived him of his liberty without due process of law, in violation of section 1 of Article 14, which provides that no state shall deprive any person of life, liberty, or property without due process of law.

**\*583** The supreme court of the state, after a hearing of the case, denied the petition for a writ, and remanded the prisoner to the custody of the keeper of the state prison to undergo the remainder of his sentence; and he then sued out a writ of error and brought the case here.

The questions to be determined in this court are (1) as to the validity, with reference to the Federal Constitution, of the proceeding against the plaintiff in error on an information instead of by an indictment by a grand jury; and (2) the validity of the trial of the plaintiff in error by a jury composed of eight instead of twelve jurors.

We think the various questions raised by the plaintiff in error have in substance, though not all in terms, been decided by this court in the cases to which attention will be called. The principles which have been announced in those cases clearly prove the validity of the clauses in the Constitution of Utah which are herein attacked as in violation of the Constitution of the United States. It will therefore be necessary in this case to do but little else than call attention to the former decisions of this court, and thereby furnish a conclusive answer to the contentions of plaintiff in error.

The proceeding by information, and also the trial by a jury composed of eight jurors, were both provided for by the state Constitution.

Section 13, Article 1, of the Constitution of Utah provides:

‘Offenses heretofore required to be prosecuted by indictment shall be prosecuted by information after examination and commitment by a magistrate, unless the examination be waived by the accused with the consent of the state, or by indictment, with or without such examination and commitment. The grand jury shall consist of seven persons, five of whom must concur to find an indictment; but no grand jury shall be drawn or summoned unless in the opinion of the judge of the district public interest demands it.’

Section 10, article 1, of that Constitution is as follows:

‘In capital cases the right of trial by jury  **\*\*450** shall remain inviolate. In courts of general jurisdiction, except in capital cases, a jury shall consist of eight jurors. In courts of inferior  **\*584** jurisdiction a jury shall consist of four jurors. In criminal cases the verdict shall be unanimous. In civil cases three fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded.’

The objection that the proceeding by information does not amount to due process of law has been heretofore overruled, and must be regarded as settled by the case of [*Hurtado* v. *California*, 110 U. S. 516, 28 L. ed. 232,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1884280037&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [4 Sup. Ct. Rep. 111, 292.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1884188680&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_708_292&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_292) The case has since been frequently approved. [*Hallinger* v. *Davis*, 146 U. S. 314, 322, 36 L. ed. 986, 991,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1892139678&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_780_322&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_322) [13 Sup. Ct. Rep. 105;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1892139678&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [*McNulty* v. *California*, 149 U. S. 645, 37 L. ed. 882,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1893180056&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [13 Sup. Ct. Rep. 959;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1893180056&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [*Hodgson* v. *Vermont*, 168 U. S. 262, 272, 42 L. ed. 461, 464,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1897180198&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_780_272&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_272) [18 Sup. Ct. Rep. 80;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1897180198&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [*Holden* v. *Hardy*, 169 U. S. 366, 384, 42 L. ed. 780,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1898180104&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_780_384&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_384) [18 Sup. Ct. Rep. 383;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1898180104&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [*Brown* v. *New Jersey*, 175 U. S. 172, 176,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1899180188&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_780_176&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_176) [20 Sup. Ct. Rep. 77, 44 L. ed. 119;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1899180188&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [*Bolln* v. *Nebraska*, 176 U. S. 83,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1900108754&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [20 Sup. Ct. Rep. 287, 44 L. ed. -](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1900108754&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))-.

But the plaintiff in error contends that the *Hurtado Case* did not decide the question whether the state law violated that clause in the Fourteenth Amendment which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States. Although the opinion is mainly devoted to an inquiry whether the California law was a violation of the ‘due process clause’ of the above-mentioned amendment, yet the matter in issue in the case was as to the validity of the state law, and the court held it valid. It was alleged by the counsel for the plaintiff in error, before the court which passed sentence, that the proceeding was in conflict with the Fifth and the Fourteenth Amendments, and those grounds were before this court. The Fifth Amendment was referred to in the opinion delivered in this court, and it was held not to have been violated by the state law, although that amendment provides for an indictment by a grand jury. This decision could not have been arrived at if a citizen of the United States were entitled, by virtue of that clause of the Fourteenth Amendment relating to the privileges and immunities of citizens of the United States, to claim in a state court that he could not be prosecuted for an infamous crime unless upon an indictment by a grand jury. In a Federal court no person can be held to answer for a capital or otherwise infamous crime unless by indictment by a grand jury, with the exceptions stated in the  **\*585** Fifth Amendment. Yet this amendment was held in the *Hurtado Case* not to apply to a prosecution for murder in a state court pursuant to a state law. The claim was made in the case (and referred to in the opinion) that the adoption of the Fourteenth Amendment provided an additional security to the individual against oppression by the states themselves, and limited their powers to the same extent as the amendments theretofore adopted had limited the powers of the Federal government. By holding that the conviction upon an information was valid, the court necessarily held that an indictment was not necessary; that exemption from trial for an infamous crime, excepting under an indictment, was not one of those privileges or immunities of a citizen of the United States which a state was prohibited from abridging. The whole case was probably regarded as involved in the question as to due process of law. The particular objection founded upon the privileges and immunities of citizens of the United States is now taken and insisted upon in this case.

Under these circumstances it may not be improper to inquire as to the validity of a conviction in a state court, for an infamous crime, upon an information filed by the proper officer under the authority of the Constitution and laws of the state wherein the crime was committed and the conviction took place; confining the inquiry to the question of the effect of the provision in the Fourteenth Amendment prohibiting the states from making or enforcing any law which abridges the privileges or immunities of citizens of the United States. To the other objection, that a conviction upon an information deprives a person of his liberty without due process of law, the *Hurtado Case* is, as we have said, a complete and conclusive answer.

The inquiry may be pursued in connection with that in regard to the validity of the provision in the state Constitution for a trial before a jury to be composed of but eight jurors in criminal cases which are not capital. One of the objections to this provision is that its enforcement has abridged the privileges and immunities of the plaintiff in error as a citizen of the United States; the other objection being that a  **\*586** conviction thus obtained has resulted in depriving the plaintiff in error of his liberty without due process of law. Postponing an inquiry in regard to this last objection until we have examined the other, we proceed to inquire, What are the privileges and immunities of a citizen of the United States which no state can abridge? Do they include the right to be exempt from trial, for an infamous crime, in a state court and under state authority except upon presentment by a grand jury? And do they also include the right in all criminal prosecutions in a state court to be tried by a jury composed of twelve jurors?

That a jury composed, as at common law, of twelve jurors was intended by the Sixth Amendment to the Federal Constitution, there can be no doubt. [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I0fc8a9549cb611d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[*Thompson* v. *Utah*, 170 U. S. 343, 349, 42 L. ed. 1061,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1898180010&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_780_349&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_349) [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I0fc8a9549cb611d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[18 Sup. Ct. Rep. 620.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1898180010&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) And as the right of trial by jury in certain suits at common law is preserved by the Seventh Amendment, such a trial implies that there shall be an unanimous verdict of twelve jurors in all Federal courts where a jury trial is held. [*American Pub. Co.* v. *Fisher*, 166 U. S. 464, 41 L. ed. 1079,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1897180085&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [17 Sup. Ct. Rep. 618;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1897180085&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [*Springville* v. *Thomas*, 166 U. S. 707, 41 L. ed. 1172,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1897180141&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [17 Sup. Ct. Rep. 816](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1897149134&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

**\*\*451** It would seem to be quite plain that the provision in the Utah Constitution for a jury of eight jurors in all state criminal trials, for other than capital offenses, violates the Sixth Amendment, provided that amendment is now to be construed as applicable to criminal prosecutions of citizens of the United States in state courts.

It is conceded that there are certain privileges or immunities possessed by a citizen of the United States, because of his citizenship, and that they cannot be abridged by any action of the states. In order to limit the powers which it was feared might be claimed or exercised by the Federal government, under the provisions of the Constitution as it was when adopted, the first ten amendments to that instrument were proposed to the legislatures of the several states by the first Congress on the 25th of September, 1789. They were intended as restraints and limitations upon the powers of the general government, and were not intended to and did not have any effect upon the powers of the respective states. This has  **\*587** been many times decided. The cases herewith cited are to that effect, and they cite many others which decide the same matter. [*Spies* v. *Illinois*, 123 U. S. 131, 166, 31 L. ed. 80, 86,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1887180305&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_780_166&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_166) [8 Sup. Ct. Rep. 21;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&pubNum=708&cite=8SCT21&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [*Holden*v. *Hardy*, 169 U. S. 366, 382, 42 L. ed. 780, 787,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1898180104&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_780_382&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_382) [18 Sup. Ct. Rep. 383;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1898180104&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [*Brown* v. *New Jersey*, 175 U. S. 172, 174,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1899180188&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_780_174&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_174) [20 Sup. Ct. Rep. 77, 44 L. ed. -](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1899180188&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))-.

It is claimed, however, that since the adoption of the Fourteenth Amendment the effect of the former amendments has been thereby changed and greatly enlarged. It is now urged in substance that all the provisions contained in the first ten amendments, so far as they secure and recognize the fundamental rights of the individual as against the exercise of Federal power, are by virtue of this amendment to be regarded as privileges or immunities of a citizen of the United States, and therefore the states cannot provide for any procedure in state courts which could not be followed in a Federal court because of the limitations contained in those amendments. This was also the contention made upon the argument in the [*Spies Case*, 123 U. S. 151, 31 L. ed. 80,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1887180305&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [8 Sup. Ct. Rep. 21;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&pubNum=708&cite=8SCT21&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) but in the opinion of the court therein, which was delivered by Mr. Chief Justice Waite, the question was not decided because it was held that the case did not require its decision.

In the [*Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1872196552&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) the subject of the privileges or immunities of citizens of the United States, as distinguished from those of a particular state, was treated by Mr. Justice Miller in delivering the opinion of the court. He stated that the argument in favor of the plaintiffs, claiming that the ordinance of the city of New Orleans was invalid, rested wholly on the assumption that the citizenship is the same and the privileges and immunities guaranteed by the Fourteenth Amendment are the same as to citizens of the United States and citizens of the several states. This he showed to be not well founded; that there was a citizenship of the United States and a citizenship of the states, which were distinct from each other, depending upon different characteristics and circumstances in the individual; that it was only privileges and immunities of the citizen of the United States that were placed by the amendment under the protection of the Federal Constitution, and that the privileges and immunities of a citizen of a state, whatever they might be, were not  **\*588** intended to have any additional protection by the paragraph in question, but they must rest for their security and protection where they have heretofore rested.

He then proceeded to inquire as to the meaning of the words ‘privileges and immunities' as used in the amendment, and said that the first occurrence of the phrase in our constitutional history is found to be in the fourth article of the old confederation, in which it was declared ‘that the better to secure and perpetuate mutual friendship and intercourse among the people of the different states in this union the free inhabitants of each of these states, paupers, vagabonds, and fugitives from justice excepted, shall be entitled to all the privileges and immunities of free citizens in the several states; and the people of each state shall have free ingress and egress to and from any other state, and shall enjoy therein all the privileges of trade and commerce, subject to the same duties, impositions, and restrictions as the inhabitants thereof respectively.’ A provision corresponding to this he found in the Constitution of the United States in section 2 of the Fourth Article, wherein it is provided that ‘the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states.’ What those privileges were is not defined in the Constitution, but the justice said there could be but little question that the purpose of both those provisions was the same, and that the privileges and immunities intended were the same in each. He then referred to the case of *Corfield* v. *Coryell*, decided by Mr. Justice Washington in the circuit court for the district of Pennsylvania, in 1823 ([4 Wash. C. C. 371, Fed. Cas. No. 3,230),](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1800149906&pubNum=801&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))where the question of the meaning of this clause in the Constitution was raised. Answering the question, what were the privileges and immunities of citizens of the several states, Mr. Justice Washington said in that case:

‘We feel no hesitation in confining these expressions to those privileges and immunities which are in their nature *fundamental*; which belong of right to the citizens of all free governments, and which have at all times been enjoyed by the citizens of the several states which compose this Union from the time of their becoming free, independent, and sovereign.  **\*589** What these fundamental principles are it would perhaps be more tedious than difficult to enumerate. They may, however, be all comprehended under the following general heads: Protection by the government, the enjoyment of life and liberty with the right to acquire and possess property of every kind, and to pursue  **\*\*452** and obtain happiness and safety, subject, nevertheless, to such restraints as the government may prescribe for the general good of the whole.’

Having shown that prior to the Fourteenth Amendment the legislation under review would have been regarded as relating to the privileges or immunities of citizens of the state, with which the United States had no concern, Justice Miller continued:

‘It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent amendments no claim or pretense was set up that those rights depended on the Federal government for their existence or protection, beyond the very few express limitations which the Federal Constitution imposed up on the states-such, for instance, as the prohibition against *ex post facto* laws, bills of attainder, and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions the entire domain of the privileges and immunities of citizens of the states, as above defined, lay within the constitutional and legislative power of the states, and without that of the Federal government. Was it the purpose of the Fourteenth Amendment, by the simple declaration that no state should make or enforce any law which shall abridge the privileges and immunities of citizens of the United States, to transfer the security and protection of all the civil rights, which we have mentioned, from the states to the Federal government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the states?

‘All this and more must follow, if the proposition of the plaintiffs in error be sound. For not only are these rights subject to the control of Congress whenever in its discretion any  **\*590** of them are supposed to be abridged by state legislation, but that body may also pass laws in advance, limiting and restricting the exercise of legislative power by the states, in their most ordinary and usual functions, as in its judgment it may think proper on all such subjects. And, still further, such a construction, followed by the reversal of the judgments of the supreme court of Louisiana in these cases, would constitute this court a perpetual censor upon all legislation of the states, on the civil rights of their own citizens, with authority to nullify such as it did not approve as consistent with those rights as they existed at the time of the adoption of this amendment. The argument, we admit, is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the state governments by subjecting them to the control of Congress in the exercise of powers heretofore universally conceded to them of the most ordinary and fundamental character; when, in fact, it radically changes the whole theory of the relations of the state and Federal governments to each other and of both these governments to the people,-the argument has a force that is irresistible in the absence of language which expresses such a purpose too clearly to admit of doubt. We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the states which ratified them.’

If the rights granted by the Louisiana legislature did not infringe upon the privileges or immunities of citizens of the United States, the question arose as to what such privileges were, and in enumerating some of them, without assuming to state them all, it was said that a citizen of the United States, as such, had the right to come to the seat of government to assert claims or transact business, to seek the protection of the government or to share its offices; he had the right of free access to its seaports, its various offices throughout the country, and to the courts of justice in the several states; to demand **\*591** the care and protection of the general government over his life, liberty, and property when on the high seas or within the jurisdiction of a foreign government; the right, with others, to peaceably assemble and petition for a redress of grievances; the right to the writ of habeas corpus, and to use the navigable waters of the United States, however they may penetrate the territory of the several states; also all rights secured to our citizens by treaties with foreign nations; the right to become citizens of any state in the Union by a bona fide residence therein, with the same rights as other citizens of that state; and the rights secured to him by the Thirteenth and Fifteenth. Amendments to the Constitution. A right, such as is claimed here, was not mentioned, and we may suppose it was regarded as pertaining to the state, and not covered by the amendment.

Other objections to the judgment were fully examined, and the result was reached that the legislation of the state of Louisiana complained of violated no provision of the Constitution of the United States.

We have made this extended reference to the case because of its great importance, the thoroughness of the treatment of the subject, and the great ability displayed by the author of the opinion. Although his suggestion that only discrimination by a state against the negroes as a class or on account of their race was covered by the amendment as to the equal protection of the laws has not been affirmed by the later cases, yet it was but the expression of his belief as to want would be the decision of the court when a case came before it involving that point. The opinion upon the matters actually involved and maintained by the judgment in the case has never been doubted or overruled by any judgment of this court. It remains one of the leading cases upon the subject of **\*\*453** that portion of the Fourteenth Amendment of which it treats.

The definition of the words ‘privileges and immunities,’ as given by Mr. Justice Washington, was adopted in substance in [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ib4784cc9b5f811d9bc61beebb95be672&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[*Paul* v. *Virginia*, 8 Wall. 180, 19 L. ed. 360,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1868195752&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) and in [*Ward* v. *Maryland*, 12 Wall. 430,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1870158849&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [20 L. ed. 453.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1870153045&pubNum=470&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) These rights, it is said in the *Slaughter-House Cases*, have always been held to be the class of **\*592** rights which the state governments were created to establish and secure.

In the same volume as the *Slaughter-House Cases* is that of [*Bradwell* v. *Illinois*, 16 Wall. 130, 21 L. ed. 442,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1872196969&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) where it is held that the right to practise law in the courts of a state is not a privilege or immunity of a citizen of the United States, within the meaning of the Fourteenth Amendment. And in [*Minor* v. *Happersett*, 21 Wall. 162, 22 L. ed. 627,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1831195061&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) it was held that the right of suffrage was not necessarily one of the privileges or immunities of citizenship before the adoption of the Fourteenth Amendment, and although a woman was in one sense a citizen of the United States yet she did not obtain the right of suffrage by the adoption of that amendment. The right to vote is a most important one in our form of government, yet it is not given by the amendment.

In speaking of the meaning of the phrase ‘privileges and immunities of citizens of the several states,’ under section 2d, article fourth, of the Constitution, it was said by the present Chief Justice, in [*Cole* v. *Cunningham*, 133 U. S. 107, 33 L. ed. 538,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1890180141&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [10 Sup. Ct. Rep. 269,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1890180141&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) that the intention was ‘to confer on the citizens of the several states a general citizenship, and to communicate all the privileges and immunities which the citizens of the same state would be entitled to under the like circumstances, and this includes the right to institute actions.’

And in [*Blake* v. *McClung*, 172 U. S. 239, 248, 43 L. ed. 432,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1898180165&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_780_248&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_248) [19 Sup. Ct. Rep. 165,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1898180165&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) various cases are cited regarding the meaning of the words ‘privileges and immunities,’ under the Fourth Article of the Constitution, in not one of which is there any mention made of the right claimed in this case as one of the privileges or immunities of citizens in the several states.

These cases show the meaning which the courts have attached to the expression, as used in the Fourth Article of the Constitution, and the argument is not labored which gives the same meaning to it when used in the Fourteenth Amendment.

That the primary reason for that amendment was to secure the full enjoyment of liberty to the colored race is not denied; yet it is not restricted to that purpose, and it applies to everyone, **\*593** white or black, that comes within its provisions. But, as said in the *Slaughter-House Cases*, the protection of the citizen in his rights as a citizen of the state still remains with the state. This principle is again announced in the decision in [*United States* v. *Cruikshank*, 92 U. S. 542, 23 L. ed. 588,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1800134839&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) wherein it is said that sovereignty, for the protection of the rights of life and personal liberty within the respective states, rests alone with the states. But if all these rights are included in the phrase ‘privileges and immunities' of citizens of the United States, which the states by reason of the Fourteenth Amendment cannot in any manner abridge, then the sovereignty of the state in regard to them has been entirely destroyed, and the *Slaughter-House Cases* and *United States* v. *Cruikshank* are all wrong, and should be overruled.

It was said in [*Minor* v. *Happersett*, 21 Wall. 162, 22 L. ed. 627,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1831195061&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) that the amendment did not add to the privileges and immunities of a citizen; it simply furnished an additional guaranty for the protection of such as he already had. And in [*Re Kemmler*, 136 U. S. 436, 448, 34 L. ed. 519, 524,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1890180023&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_780_448&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_448) [10 Sup. Ct. Rep. 930,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1890180023&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))it was stated by the present Chief Justice that--

‘The Fourteenth Amendment did not radically change the whole theory of the relations of the state and Federal governments to each other, and of both governments to the people. The same person may be at the same time a citizen of the United States and a citizen of a state. Protection to life, liberty, and property rests primarily with the states, and the amendment furnishes an additional guaranty against any encroachment by the states upon those fundamental rights which belong to citizenship, and which the state governments were created to secure. The privileges and immunities of citizens of the United States, as distinguished from the privileges and immunities of citizens of the states, are indeed protected by it; but those are privileges and immunities arising out of the nature and essential character of the national government, and granted or secured by the Constitution of the United States. [*United States* v. *Cruikshank*, 92 U. S. 542, 23 L. ed. 588;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1800134839&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [*Slaughter-House Cases*, 16 Wall. 36, 21 L. ed. 394.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1872196552&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))’

In Cooley's Constitutional Limitations, 4th ed. p. 497, marg. page 397, the author says.

**\*594** ‘Although the precise meaning of ‘privileges and immunities' is not very definitely settled as yet, it appears to be conceded that the Constitution secures in each state to the citizens of all other states the right to remove to and carry on business therein; the right by the usual modes to acquire and hold property, and to protect and defend the same in the law; the right to the usual remedles for the collection of debts and the enforcement of other personal rights, and the right to be exempt, in property and person, from taxes or burdens which the property or persons of citizens of the same state are not subject to.’

There is no intimation here that among the privileges or immunities of a citizen of the United States are the right of trial by jury in a state court for a state offense, and the right to be exempt from any trial for an infamous crime, unless upon presentment by a grand jury. And yet if these were such privileges and immunities, they would be among the first that would occur to anyone when enumerating or defining them. Nor would these rights come under the description  **\*\*454** given by the Chief Justice in the [*Kemmler Case*, 136 U. S. 436, 448, 34 L. ed. 519, 524,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1890180023&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_780_448&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_448) [10 Sup. Ct. Rep. 930.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1890180023&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) Such privileges or immunities do not arise out of the nature or essential character of the national government.

In [*Walker* v. *Sauvinet*, 92 U. S. 90, 23 L. ed. 678,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1800138707&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) it was held that a trial by jury in suits at common law in the state courts was not a privilege or immunity belonging to a person as a citizen of the United States, and protected, therefore, by the Fourteenth Amendment. The action was tried without a jury by virtue of an act of the legislature of the state of Louisiana. The plaintiff in error objected to such a trial, alleging that he had a constitutional right to a trial by jury, and that the statute was void to the extent that it deprived him of that right. The objection was overruled. Mr. Chief Justice Waite, in delivering the opinion of the court, said:

‘By article 7 of the Amendments it is provided that ‘in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.’ This, as has been many times decided, relates only to trials in the courts of the United States.  **\*595** [*Edwards* v. *Elliott*, 21 Wall. 557,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1874195152&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))[22 L. ed. 492.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1874194328&pubNum=470&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) The states, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the state courts is not therefore a privilege or immunity of national citizenship, which the states are forbidden by the Fourteenth Amendment to abridge. A state cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the state courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. ([*Den ex dem. Murray* v. *Hoboken Land & Improv. Co*. 18 How. 280,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1855193065&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [15 L. ed. 372.)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1855193065&pubNum=470&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) Due process of law is process due according to the law of the land. This process in the states is regulated by the law of the state. Our power over that law is only to determine whether it is in conflict with the supreme law of the land,-that is to say, with the Constitution and laws of the United States made in pursuance thereof,-or with any treaty made under the authority of the United States.'

This case shows that the Fourteenth Amendment in forbidding a state to abridge the privileges or immunities of citizens of the United States does not include among them the right of trial by jury in a civil case, in a state court, although the right to such a trial in the Federal courts is specially secured to all persons in the cases mentioned in the Seventh Amendment.

Is any one of the rights secured to the individual by the Fifth or by the Sixth Amendment any more a privilege or immunity of a citizen of the United States than are those secured by the Seventh? In none are they privileges or immunities granted and belonging to the individual as a citizen of the United States, but they are secured to all persons as against the Federal government, entirely irrespective of such citizenship. As the individual does not enjoy them as a privilege of citizenship of the United States, therefore, when the Fourteenth Amendment prohibits the abridgment by the states of those privileges or immunities which he enjoys as such citizen, it is not correct or reasonable to say that it covers and extends to  **\*596** certain rights which he does not enjoy by reason of his citizenship, but simply because those rights exist in favor of all individuals as against Federal governmental powers. The nature or character of the right of trial by jury is the same in a criminal prosecution as in a civil action, and in neither case does it spring from nor is it founded upon the citizenship of the individual as a citizen of the United States, and if not, then it cannot be said that in either case it is a privilege or immunity which alone belongs to him as such citizen.

So it was held in the oyster planting case ([*McCready* v. *Virginia*, 94 U. S. 391, 24 L. ed. 248),](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1876153328&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) that the right which the people of that state acquired to appropriate its tide waters and the beds therein for taking and cultivating fish was but a regulation of the use, by the people, of their common property, and the right thus acquired did not come from their citizenship alone, but from their citizenship and property combined. It was therefore a property right, and not a mere privilege or immunity of citizenship, and for that reason the citizen of one state was not invested by the Constitution of the United States with any interest in the common property of the citizen of another state.

This was a decision under another section of the Constitution (section 2d of Article Fourth) from the one under discussion, and it gives to the citizens of each state all privileges and immunities of citizens of the several states; but it is cited for the purpose of showing that where the privilege or immunity does not rest alone upon citizenship a citizen of another state does not participate therein.

In this case the privilege or immunity claimed does not rest upon the individual by virtue of his national citizenship, and hence is not protected by a clause which simply prohibits the abridgment of the privileges or immunites of citizens of the United States. Those are not distinctly privileges or immunities of such citizenship, where everyone has the same as against the Federal government, whether citizen or not.

The Fourteenth Amendment, it must be remembered, did not add to those privileges or immunities. The *Sauvinet Case* is an authority in favor of the contention that the amendment  **\*597** does not preclude the states by their constitutions and laws from altering the rule as to indictment by a grand jury, or as to the number of jurors necessary to compose a petit jury in a criminal case not capital.

The same reasoning is applicable to the case of [*Kennard* v. *Louisiana ex rel. Morgan*, 92 U. S. 480, L. ed. 478,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1800121347&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) although that  **\*\*455** case was decided with special reference to the ‘due process of law’ clause.

In [*Re Kemmler*, 136 U. S. 436, 448, 34 L. ed. 519, 524,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1890180023&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_780_448&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_448) [10 Sup. Ct. Rep. 930,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1890180023&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) it was stated that it was not contended and could not be that the Eighth Amendment to the Federal Constitution was intended to apply to the states. This was said long after the adoption of the Fourteenth Amendment, and also subsequent to the making of the claim that by its adoption the limitations of the preceding amendments had been altered and enlarged so as in effect to make them applicable to proceedings in the state courts.

In [*Presser* v. *Illinois*, 116 U. S. 252, 29 L. ed. 615,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1886180071&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [6 Sup. Ct. Rep. 580,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1886180071&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) it was held that the Second Amendment to the Constitution, in regard to the right of the people to bear arms, is a limitation only on the power of Congress and the national government, and not of the states. It was therein said, however, that as all citizens capable of bearing arms constitute the reserved military force of the national government the states could not prohibit the people from keeping and bearing arms, so as to deprive the United States of their rightful resource for maintaining the public security, and disable the people from performing their duty to the general government.

In [*O'Neil* v. *Vermont*, 144 U. S. 323, 332, 36 L. ed. 450, 456,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1892140090&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_780_332&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_332) [12 Sup. Ct. Rep. 693,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1892140090&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) it was stated that as a general question it has always been ruled that the Eighth Amendment to the Constitution of the United States does not apply to the states.

In [*Thorington* v. *Montgomery*, 147 U. S. 490, 37 L. ed. 252,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1893180009&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [13 Sup. Ct. Rep. 394,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1893180009&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) it was said that the Fifth Amendment to the Constitution operates exclusively in restraint of Federal power, and has no application to the states.

We have cited these cases for the purpose of showing that the privileges and immunities of citizens of the United States do not necessarily include all the rights protected by the first eight amendments to the Federal Constitution against the  **\*598** powers of the Federal government. They were decided subsequently to the adoption of the Fourteenth Amendment, and if the particular clause of that amendment, now under consideration, had the effect claimed for it in this case, it is not too much to say that it would have been asserted and the principles applied in some of them.

It has been held that the last clause of the Seventh Amendment, which provides that no fact tried by a jury shall be otherwise re-examined in any court of the United States than according to the rules of the common law, is not confined to trials by jury in Federal courts, but applies equally to a cause tried before a jury in a state court and brought thence before a Federal court. *The*[*Justices* v. *Murray*, 9 Wall. 274, *sub nom. New York Supreme Court Justices*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1869121130&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) v. [*United States ex rel. Murray*, 19 L. ed. 658;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1869121130&pubNum=470&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [*Chicago, B. & Q. R. Co*. v. *Chicago*, 166 U. S. 226, 41 L. ed. 979,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1897180078&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [17 Sup. Ct. Rep. 581;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1897180078&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [*Capital Traction Co*. v. *Hof*, 174 U. S. 1, 43 L. ed. 873,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1899180133&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [19 Sup. Ct. Rep. 580.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1899180133&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) But these decisions only carry out the idea that the amendment is a restraint upon Federal power, and not upon the power of the state, inasmuch as they declare that the clause restricts the right of the Federal courts to re-examine the facts found by a jury in a state court, as well as in a Federal one.

In [*Missouri* v. *Lewis*, 101 U. S. 22, 25 L. ed. 989,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1879191942&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) it was held that the clause of the Fourteenth Amendment, which prohibits a state from denying to any person the equal protection of the laws, did not thereby prohibit the state from prescribing the jurisdiction of its several courts either as to their territorial limits or the subject-matter, or amount or finality of their respective judgments or decrees; that a state might establish one system of law in one portion of its territory and another system in another, provided it did not encroach upon the proper jurisdiction of the United States, nor abridge the privileges or immunities of citizens of the United States, nor deny to any person within its jurisdiction the equal protection of the laws in the same district, nor deprive him of his rights without due process of law. In the course of the opinion, which was delivered by Mr. Justice Bradley, he said:

‘We might go still further and say, with undoubted truth, that there is nothing in the Constitution to prevent any state from adopting any system of laws or judicature it sees fit for  **\*599** all or any part of its territory. If the state of New York, for example, should see fit to adopt the civil law and its method of procedure for New York city and the surrounding counties, and the common law and its method of procedure for the rest of the state, there is nothing in the Constitution of the United States to prevent its doing so. This would not of itself, within the meaning of the Fourteenth Amendment, be a denial to any person of the equal protection of the laws. If every person residing or being in either portion of the state should be accorded the equal protection of the laws prevailing there, he could not justly complain of a violation of the clause referred to. For, as before said, it has respect to persons and classes of persons. It means that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances. The Fourteenth Amendment does not profess to secure to all persons in the United States the benefit of the same laws and the same remedies. Great diversities in these respects may exist in two states separated only by an imaginary line. On one side of this line there may be a right of trial by jury, and on the other side no such right. Each state prescribes its own modes of judicial proceeding. If diversities of laws and judicial proceedings may exist in the several states without violating the equality clause in the Fourteenth Amendment, there is no solid reason why there may not be such diversities in different parts of the same state. A uniformity which is not essential as regards different states cannot be essential as regards **\*\*456** different parts of a state, provided that in each and all there is no infraction of the constitutional provision. Diversities which are allowable in different states are allowable in different parts of the same state. Where part of a state is thickly settled, and another part has but few inhabitants, it may be desirable to have different systems of judicature for the two portions,-trial by jury in one, for example, and not in the other. Large cities may require a multiplication of courts and a peculiar arrangement of jurisdictions. It would be an unfortunate restriction of the powers of the state government if it could not, in its  **\*600** discretion, provide for these various exigencies. If a Mexican state should be acquired by treaty and added to an adjoining state or part of a state in the United States, and the two should be erected into a new state, it cannot be doubted that such new state might allow the Mexican laws and judicature to continue unchanged in the one portion, and the common law and its corresponding judicature in the other portion. Such an arrangement would not be prohibited by any fair construction of the Fourteenth Amendment. It would not be based on any respect of persons or classes, but on municipal considerations alone, and a regard for the welfare of all classes within the particular territory or jurisdiction.’

Although this case was principally discussed under that clause of the Fourteenth Amendment which prohibits a state from denying to any person within its jurisdiction the equal protection of the laws, yet the application of the amendment with regard to the privileges or immunities of citizens of the United States was also referred to, and if it had been supposed that it secured to a citizen of the United States, when proceeded against under state authority, all the privileges and immunities set forth in the first eight amendments to the Federal Constitution, Mr. Justice Bradley could not, in the course of his opinion in the case, have said that a trial by jury might exist as a right in one state and not exist in another. Trial by jury would in such case have been protected under the Fourteenth Amendment, because it was granted to all persons by Article Six in all criminal prosecutions in the Federal courts, and by Article Seven in civil actions at common law, where the value in controversy should exceed $20. On the contrary, it was stated that great diversity in these respects might exist in two states separated only by an imaginary line, on one side of which there might be a right of trial by jury, and on the other side no such right. Each state, it was said, prescribes its own modes of judicial procedure. The decision of this case was by an unanimous court, and the remarks of the justice are wholly irreconcilable with the existence of a right of trial by jury in a state court, which was guaranteed and protected by the Fourteenth Amendment, notwithstanding the  **\*601** denial of such right by and under the Constitution and laws of the state.

The principle to be deduced from these various cases is that the rights claimed by the plaintiff in error rest with the state governments, and are not protected by the particular clause of the amendment under discussion. What protection may be afforded the individual against state legislation or the procedure in state courts or tribunals, under other clauses of the amendment, we do not now inquire, as what has been heretofore said is restricted to the particular clause of that amendment which is now spoken of,-the privileges or immunities of citizens of the United States.

Counsel for plaintiff in error has cited from the speech of one of the Senators of the United States, made in the Senate when the proposed Fourteenth Amendment was under consideration by that body, wherein he stated that among the privileges and immunities which the committee having the amendment in charge sought to protect against invasion or abridgment by the states were included those set forth in the first eight amendments to the Constitution; and counsel has argued that this court should therefore give that construction to the amendment which was contended for by the Senator in his speech.

What speeches were made by other Senators and by Representatives in the House upon this subject is not stated by counsel, nor does he state what construction was given to it, if any, by other members of Congress. It is clear that what is said in Congress upon such an occasion may or may not express the views of the majority of those who favor the adoption of the measure which may be before that body, and the question whether the proposed amendment itself expresses the meaning which those who spoke in its favor may have assumed that it did, is one to be determined by the language actually therein used, and not by the speeches made regarding it.

What individual Senators or Representatives may have urged in debate, in regard to the meaning to be given to a proposed constitutional amendment, or bill, or resolution, does not furnish a firm ground for its proper construction, nor is it important  **\*602** as explanatory of the grounds upon which the members voted in adopting it. [*United States* v. *Trans-Missouri Freight Asso*. 166 U. S. 290, 318, 41 L. ed. 1007, 1019,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1897180021&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_780_318&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_318) [17 Sup. Ct. Rep. 540;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1897180021&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [*Dunlap* v. *United States*, 173 U. S. 65, 75, 43 L. ed. 616,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1899180012&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_780_75&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_75) [19 Sup. Ct. Rep. 319](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1899180012&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

In the case of a constitutional amendment it is of less materiality than in that of an ordinary bill or resolution. A constitutional amendment must be agreed to, not only by Senators and Representatives, but it must be ratified by the legislatures, or by conventions, in three fourths of the states before such amendment can take effect. The safe way is to read its language in connection with the known condition of affairs out of which the occasion for its adoption may have arisen, and then to construe it, if there be therein any doubtful expressions, in a way, so far as is reasonably possible, to forward the known purpose or object for which the amendment was adopted. This rule  **\*\*457** could not, of course, be so used as to limit the force and effect of an amendment in a manner which the plain and unambiguous language used therein would not justify or permit.

For the reasons stated, we come to the conclusion that the clause under consideration does not affect the validity of the Utah Constitution and legislation.

The remaining question is whether in denying the right of an individual, in all criminal cases not capital, to have a jury composed of twelve jurors, the state deprives him of life, liberty, or property without due process of law.

This question is, as we believe, substantially answered by the reasoning of the opinion in the [*Hurtado Case*, 110 U. S. 516, 535, 28 L. ed. 232, 238,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1884280037&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_780_535&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_535) [4 Sup. Ct. Rep. 111, 292.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1884188680&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_708_292&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_292) The distinct question was there presented whether it was due process of law to prosecute a person charged with murder by an information under the state Constitution and law. It was held that it was, and that the Fourteenth Amendment did not prohibit such a procedure. In our opinion the right to be exempt from prosecution for an infamous crime, except upon a presentment by a grand jury, is of the same nature as the right to a trial by a petit jury of the number fixed by the common law. If the state have the power to abolish the grand jury and the consequent proceeding by indictment, the same course of reasoning **\*603** which establishes that right will and does establish the right to alter the number of the petit jury from that provided by the common law. Many cases upon the subject since the *Hurtado Case* was decided are to be found gathered in [*Hodgson* v. *Vermont*, 168 U. S. 262, 42 L. ed. 461,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1897180198&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))[18 Sup. Ct. Rep. 80;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1897180198&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [*Holden* v. *Hardy*, 169 U. S. 366, 384, 42 L. ed. 780, 788,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1898180104&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_780_384&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_384) [13 Sup. Ct. Rep. 383;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1893180103&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [*Brown* v. *New Jersey*, 175 U. S. 172,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1899180188&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [20 Sup. Ct. Rep. 77, 44 L. ed. 119;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1899180188&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [*Bolln* v. *Nebraska*, 176 U. S. 83,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1900108754&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [20 Sup. Ct. Rep. 287, 44 L. ed. -](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1900108754&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))-.

Trial by jury has never been affirmed to be a necessary requisite of due process of law. In not one of the cases cited and commented upon in the *Hurtado Case* is a trial by jury mentioned as a necessary part of such process.

In [*Re Converse*, 137 U. S. 624, 34 L. ed. 796,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1891180169&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [11 Sup. Ct. Rep. 191,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1891180169&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) it was stated that the Fourteenth Amendment was not designed to interfere with the power of a state to protect the lives, liberty, and property of its citizens, nor with the exercise of that power in the adjudications of the courts of a state in administering process provided by the law of the state.

In [*Caldwell* v. *Texas*, 137 U. S. 692, 34 L. ed. 816,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1891180219&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [11 Sup. Ct. Rep. 224,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1891180219&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) it was held that no state can deprive particular persons or classes of persons of equal and impartial justice under the law, without violating the provisions of the Fourteenth Amendment to the Constitution, and that due process of law, within the meaning of the Constitution, is secured when the laws operate on all alike, and no one is subjected to partial or arbitrary exercise of the powers of government.

In [*Leeper* v. *Texas*, 139 U. S. 462, 467, 35 L. ed. 225, 226,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1891180046&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_780_467&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_467) [11 Sup. Ct. Rep. 577,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1891180046&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) it was said ‘that by the Fourteenth Amendment the powers of states in dealing with crime within their borders are not limited, except that no state can deprive particular persons, or class of persons, of equal and impartial justice under the law; that law in its regular course of administration through courts of justice is due process, and when secured by the law of the state the constitutional requirement is satisfied; and that due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice. [*Hurtado* v. *California*, 110 U. S. 516, 535, 28 L. ed. 232, 238,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1884280037&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_780_535&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_535) [4 Sup. Ct. Rep. 111, 292,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1884188680&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_708_292&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_708_292) and cases cited.’ See also, for statement  **\*604** as to due process of law, the cases of [*Davidson* v. *New Orleans*, 96 U. S. 97, 24 L. ed. 616;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1877152992&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [*Hagar* v. *Reclamation Dist. No. 108*, 111 U. S. 701, 707, 28 L. ed. 569,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1885193222&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_780_707&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_pp_sp_780_707) [4 Sup. Ct. Rep. 663](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1885193222&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

The clause has been held to extend to a proceeding conducted to judgment in a state court under a valid statute of the state, if such judgment resulted in the taking of private property for public use, without compensation made or secured to the owner, under the conditions mentioned in the cases herewith cited. [*Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U. S. 226, 41 L. ed. 985,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1897180078&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [17 Sup. Ct. Rep. 581;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1897180078&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [*Backus* v. *Fort Street Union Depot Co.* 169 U. S. 557, 42 L. ed. 853,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1898187577&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [18 Sup. Ct. Rep. 445](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1898187577&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

It has also been held not to impair the police power of a state. [*Barbier* v. *Connolly*, 113 U. S. 27, 28 L. ed. 923,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1885180130&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [5 Sup. Ct. Rep. 375](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1885180056&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

It appears to us that the questions whether a trial in criminal cases not capital shall be by a jury composed of eight instead of twelve jurors, and whether in case of an infamous crime a person shall only be liable to be tried after presentment or indictment of twelve jurors, and whether in case of an determined by the citizens of each state for themselves, and do not come within the clause of the amendment under consideration, so long as all persons within the jurisdiction of the state are made liable to be proceeded against by the same kind of procedure and to have the same kind of trial, and the equal protection of the laws is secured to them. [*Caldwell* v. *Texas*, 137 U. S. 692, 34 L. ed. 816,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1891180219&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [11 Sup. Ct. Rep. 224;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1891180219&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [*Leeper* v. *Texas*, 139 U. S. 462, 35 L. ed. 225,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1891180046&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [11 Sup. Ct. Rep. 577.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1891180046&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) It is emphatically the case of the people by their organic law providing for their own affairs, and we are of opinion they are much better judges of what they ought to have in these respects than anyone else can be. The reasons given in the learned and most able opinion of Mr. Justice Matthews, in the *Hurtado Case*, for the judgment therein rendered, apply with equal force in regard to a trial by a jury of less than twelve jurors. The right to be  **\*\*458**proceeded against only by indictment, and the right to a trial by twelve jurors, are of the same nature, and are subject to the same judgment, and the people in the several states have the same right to provide by their organic law for the change of both or either. Under this construction of the  **\*605**amendment there can be no just fear that the liberties of the citizen will not be carefully protected by the states respectively. It is a case of self-protection, and the people can be trusted to look out and care for themselves. There is no reason to doubt their willingness or their ability to do so, and when providing in their Constitution and legislation for the manner in which civil or criminal actions shall be tried, it is in entire conformity with the character of the Federal government that they should have the right to decide for themselves what shall be the form and character of the procedure in such trials, whether there shall be an indictment or an information only, whether there shall be a jury of twelve or a lesser number, and whether the verdict must be unanimous or not. These are matters which have no relation to the character of the Federal government. As was stated by Mr. Justice Brewer, in delivering the opinion of the court in [*Brown* v. *New Jersey*, 175 U. S. 172,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1899180188&pubNum=780&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) [20 Sup. Ct. Rep. 77,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1899180188&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) 44 L. ed. --, the state has full control over the procedure in its courts, both in civil and criminal cases, subject only to the qualification that such procedure must not work a denial of fundamental rights or conflict with specific and applicable provisions of the Federal Constitution. The legislation in question is not, in our opinion, open to either of these objections.

Judged by the various cases in this court we think there is no error in this record, and the *judgment of the Supreme Court of Utah must therefore be affirmed*.

For dissenting opinion by Mr. Justice **Harlan**, see [20 Sup.Ct. 494, 44 L.Ed. 597](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1900201391&pubNum=708&originatingDoc=If234ad699cc111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

**Patton v. United States**

50 S.Ct. 253

Supreme Court of the **United** **States**.

**PATTON et al.**

**v.**

**UNITED STATES.**

No. 53.

Argued Feb. 25, **1930**.Decided April 14, **1930**.

## Synopsis

On Certificate from the **United** **States** Circuit Court of Appeals for the Eighth Circuit.

John **Patton** and others were convicted on a charge of conspiracy to bribe a federal prohibition agent, and they appealed to the Circuit Court of Appeals, which certified a question to the Supreme Court ([30 F.(2d) 1015)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1929200467&pubNum=350&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

Question answered.

**Opinion**

**\*286** Mr. Justice SUTHERLAND delivered the opinion of the Court.

The defendants (plaintiffs in error) were indicted in a federal District Court, charged with conspiring to bribe a federal prohibition agent, a crime punishable by imprisonment in a federal penitentiary for a term of year. A jury of twelve men was duly impaneled. The trial began on October 19, 1927, and continued before the jury of twelve until October 26 following, at which time one of the jurors, because of severe illness, became unable to serve further as a juror. Thereupon it was stipulated in open court by the government and counsel for defendants, defendants personally assenting thereto, that the trial should proceed with the remaining eleven jurors. To this stipulation the court consented after stating that the defendants and the government both were entitled to a constitutional jury of twelve, and that the absence of one juror would result in a mistrial unless both sides should waive all objections and agree to a trial before the remaining eleven jurors. Following this statement, the stipulation was renewed in open court by all parties. During the colloquy counsel for defendants stated that he had personally conferred with all counsel and with each of the defendants individually, and it was the desire of all to finish the trial of the case with the eleven jurors  **\*287** if the defendants could waive the presence of the twelfth juror.

The trial was concluded on the following day, and a verdict of guilty was rendered by the eleven jurors. Each of the defendants was sentenced to terms of imprisonmen in the penitentiary on the several counts of the indictment. An appeal was taken to the Circuit Court of Appeals upon the ground that the defendants had no power to waive their constitutional right to a trial by a jury of twelve persons.

The court below ([30 F.(2d) 1015, 1018),](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1929200467&pubNum=350&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_350_1018&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_350_1018) being in doubt as to the law applicable to the situation thus presented, and desiring the instruction of this court, has certified the following question:

‘After the commencement of a trial in a federal court before a jury of twelve men upon an indictment charging a crime, punishment for which may involve a penitentiary sentence, if one juror becomes incapacitated and unable to further proceed with his work as a juror, can defendant or defendants and the government through its official representative in charge of the case consent to the trial proceeding to a finality with 11 jurors, and can defendant or defendants thus waive the right to a trial and verdict by a constitutional jury of 12 men?’

The question thus submitted is one of great importance, in respect of which there are differences of opinion among the various lower federal and state courts; but which this court thus far has not been required definitely to answer. There are, however, statements in some of our former opinions, which, if followed, would require a negative answer. These are referred to and relied upon by the defendants.

The federal Constitution contains two provisions relating to the subject. [Article 3, s 2, cl. 3](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=USCOARTIIIS2CL3&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), provides:

**\*288** ‘The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.’

The Sixth Amendment provides:

‘In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.’

[1](https://1.next.westlaw.com/Document/I2e21ffdc9ca411d9bdd1cfdd544ca3a4/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef000001782988adba74a34ed2%3Fppcid%3D84e449448ef14038b235324860cbaf6e%26Nav%3DCASE%26fragmentIdentifier%3DI2e21ffdc9ca411d9bdd1cfdd544ca3a4%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=100d1226b7a6f44bd760f3be09ec7cd1&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=84e449448ef14038b235324860cbaf6e&originationContext=Smart%20Answer&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F11930121924)Passing for later consideration the question whether these provisions, although varying in language, should receive the same interpretation, and whether taken together or separately the effect is to guarantee a right or establish a tribunal as an indispensable part of the government structure, we first inquire what is embraced by the phrase ‘trial by jury.’ That it means a trial by jury as understood and applied at common law, and includes all the essential elements as they were recognized in this country and England when the Constitution was adopted, is not open to question. Those elements were: (1) That the jury should consist of twelve men, neither more nor less; (2) that the trial should be in the presence and under the superintendence of a judge having power to instruct them as to the law and advise them in respect of the facts; and (3) that the verdict should be unanimous.

As to the first of these requisites, it is enough to cite [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I0fc8a9549cb611d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=4521af7e48904ed68de3af3010bde6f6&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[Thompson v. Utah, 170 **U**. **S**. 343, 350, 18 S. Ct. 620, 622, 42 L. Ed. 1061,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1898180010&pubNum=708&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_708_622&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_622) where this court  **\*289**reversed the conviction of a defendant charged with grand larceny by a jury of eight men, saying:

‘It must consequently be taken that the word ‘jury’ and the words ‘trial by jury’ were placed in the constitution of the **United** **States** with reference to the meaning affixecd to them in the law as it was in this country and in  **\*\*255** England at the time of the adoption of that instrument; and that when Thompson committed the offence of grand larceny in the territory of Utah-which was under the complete jurisdiction of the **United** **States** for all purposes of government and legislation-the supreme law of the land required that he should be tried by a jury composed of not less than twelve persons.'

The second requisite was expressly dealt with in [Capital Traction Company v. Hof, 174 **U**. **S**. 1, 13-16, 19 S. Ct. 580, 585, 43 L. Ed. 873,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1899180133&pubNum=708&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_708_585&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_585) where it is said:

“Trial by jury,' in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of 12 men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of 12 men in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict, if, in his opinion, it is against the law or the evidence. This proposition has been so generally admitted, and so seldom contested, that there has been little occasion for its distinct assertion.'

The third requisite was held essential in [American Publishing Company v. Fisher, 166 **U**. **S**. 464, 468, 17 S. Ct. 618, 619, 41 L. Ed. 1079;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1897180085&pubNum=708&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_708_619&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_619) [Springville v. Thomas, 166 **U**. **S**. 707, 17 S. Ct. 717, 41 L. Ed, 1172;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1897180141&pubNum=708&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) [Maxwell v. Dow, 176 **U**. **S**. 581, 586, 20 S. Ct. 494, 44 L. Ed. 597](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1900201391&pubNum=708&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

**\*290** [2](https://1.next.westlaw.com/Document/I2e21ffdc9ca411d9bdd1cfdd544ca3a4/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef000001782988adba74a34ed2%3Fppcid%3D84e449448ef14038b235324860cbaf6e%26Nav%3DCASE%26fragmentIdentifier%3DI2e21ffdc9ca411d9bdd1cfdd544ca3a4%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=100d1226b7a6f44bd760f3be09ec7cd1&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=84e449448ef14038b235324860cbaf6e&originationContext=Smart%20Answer&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F21930121924)These common law elements are embedded in the constitutional provisions above quoted, and are beyond the authority of the legislative department to destroy or abridge. What was said by Mr. Justice Brewer in American Publishing Company v. Fisher, supra, with respect to the requirement of unanimity, is applicable to the other elements as well:

‘Whatever may be true as to legislation which changes any mere details of a jury trial, it is clear that a statute which destroys this substantial and essential feature thereof is one abridging the right.’

Any such attempt is vain and ineffectual, whatever form it may take. See [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I0e5d32779cb611d9bdd1cfdd544ca3a4&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=4521af7e48904ed68de3af3010bde6f6&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[In re Debs, 158 **U**. **S**. 564, 594, 15 S. Ct. 900, 39 L. Ed. 1092](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1895180153&pubNum=708&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

The foregoing principles, while not furnishing a precise basis for an answer to the question here presented, have the useful effect of disclosing the nature and scope of the problem, since they demonstrate the unassailable integrity of the establishment of trial by jury in all its parts, and make clear that a destruction of one of the essential elements has the effect of abridging the right in contravention of the Constitution. It follows that we must reject in limine the distinction sought to be made between the effect of a complete waiver of a jury and consent to be tried by a less number than twelve, and must treat both forms of waiver as in substance amounting to the same thing. In other words, an affirmative answer to the question certified logically requires the conclusion that a person charged with a crime punishable by imprisonment for a term of years may, consistently with the constitutional provisions already quoted, waive trial by a jury of twelve and consent to a trial by any lesser number, or by the court without a jury.

We are not unmindful of the decisions of some of the state courts holding that it is competent for the defendant to waive the continued presence of a single juror who has become unable to serve, while at the same time denying **\*291** or doubting the validity of a waiver of a considerable number of jurors, or of a jury altogether. See, for example, [State v. Kaufman, 51 Iowa, 578, 580, 2 N. W. 275,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1879003583&pubNum=594&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) [33 Am. Rep. 148,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1879003583&pubNum=3029&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) with which compare [State v. Williams, 195 Iowa, 374, 191 N. W. 790;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1923106125&pubNum=594&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) [Commonwealth ex rel. Ross v. Egan, **281** Pa. 251, 256, 126 A. 488,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1924112842&pubNum=161&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) with which compare [Commonwealth v. Hall, 291 Pa. 341, 140 A. 626, 58 A. L. R. 1023.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1928117447&pubNum=104&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) But in none of these cases are we able to find any persuasive ground for the distinction.

Other state courts, with, we think, better reason, have adopted a contrary view. In [State v. Baer, 103 Ohio St. 585, 134 N. E. 786,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1921118519&pubNum=577&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) a person charged with manslaughter had been convicted by eleven jurors. The trial began with a jury of twelve, but, one of the jurors becoming incapable of service, the trial was concluded with the remaining eleven. In disposing of the case, the state Supreme Court thought it necessary to consider the broad question ([page 589 of 103 Ohio St.,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1921118519&pubNum=633&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) [134 N. E. 786, 788):](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1921118519&pubNum=577&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_577_788&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_577_788) ‘\* \* \* Whether the right of trial by jury, as guaranteed by sections 5 and 10 of the Bill of Rights, can be waived.’ After an extensive review of the authorities and a discussion of the question on principle, the court concluded that, since it was permissible for an accused person to plead guilty and thus waive any trial, to must necessarily be able to waive a jury trial.

In [Jennings v. State, 134 Wis. 307, 309, 114 N. W. 492,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1908007082&pubNum=594&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) [14 L. R. A. (N. S.) 862,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1908007082&pubNum=474&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) where, again, a juror during the trial was excused from service because of illness, and the case was continued and concluded before the remaining eleven, the Supreme Court of Wisconsin also disposed of the case as involving the power of the defendant to waive a jury altogether, saying:

**\*\*256** ‘It seems necessarily to follow that if a person on trial in a criminal case has no power to waive a jury he has no right to be tried by a less number than a common-law jury of 12, and when he puts himself on the county it requires a jury of 12 to comply with the demands of the Constitution. The fact that the jury in  **\*292** the instant case had the required number of 12 up to the stage in the trial when the cause was to be submitted to them under the instructions of the court cannot operate to satisfy the constitutional demand. At this point the trial was incomplete; for the very essential duty of having the jury deliberate upon the evidence and agree upon a verdict respecting defendant's guilt or innocence remained unperformed. Without the verdict of a jury of 12 it cannot be said to be a verdict of the jury required by the Constitution. Such a verdict is illegal and insufficient to support a judgment.’

We deem it unnecessary to cite other cases which deal with the problem from the same point of view.

A constitutional jury means twelve men as though that number had been specifically named; and it follows that, when reduced to eleven, it ceases to be such a jury quite as effectively as though the number had been reduced to a single person. This conclusion seems self evident, and no attempt has been made to overthrow it save by what amounts to little more than a suggestion that by reducing the number of the jury to eleven or ten the infraction of the Constitution is slight, and the courts may be trusted to see that the process of reduction shall not be unduly extended. But the constitutional question cannot thus be settled by the simple process of ascertaining that the infraction assailed is unimportant when compared with similar, but more serious infractions which might be conceived. To uphold the voluntary reduction of a jury from twelve to eleven upon the ground that the reduction-though it destroys the jury of the Constitution-is only a slight reduction, is not to interpret that instrument, but to disregard it. It is not our province to measure the extent to which the Constitution has been contravened and ignore the violation, if, in our opinion, it is not, relatively, as bad as it might have been.

**\*293** [3](https://1.next.westlaw.com/Document/I2e21ffdc9ca411d9bdd1cfdd544ca3a4/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef000001782988adba74a34ed2%3Fppcid%3D84e449448ef14038b235324860cbaf6e%26Nav%3DCASE%26fragmentIdentifier%3DI2e21ffdc9ca411d9bdd1cfdd544ca3a4%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=100d1226b7a6f44bd760f3be09ec7cd1&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=84e449448ef14038b235324860cbaf6e&originationContext=Smart%20Answer&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F31930121924)We come, then, to the crucial inquiry: Is the effect of the constitutional provisions in respect of trial by jury to establish a tribunal as a part of the frame of government, or only to guarantee to the accused the right to such a trial? If the former, the question certified by the lower court must, without more, be answered in the negative.

Defendants strongly rely upon the language of this court in [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I0fc8a9549cb611d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=4521af7e48904ed68de3af3010bde6f6&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[Thompson v. Utah, supra, at page 353](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1898180010&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) of 170 **U**. **S**., [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I0fc8a9549cb611d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=4521af7e48904ed68de3af3010bde6f6&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[18 S. Ct. 620, 624, 42 L. Ed. 1061](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1898180010&pubNum=708&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_708_624&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_624):

‘It is said that the accused did not object, until after verdict, to a trial jury composed of eight persons, and therefore he should not be heard to say that his trial by such a jury was in violation of his constitutional rights. It is sufficient to say that it was not in the power of one accused of felony, by consent expressly given or by his silence, to authorize a jury of only eight persons to pass upon the question of his guilt. The law in force when this crime was committed did not permit any tribunal to deprive him of his liberty, except one constituted of a court and a jury of twelve persons.’

But this statement, though positive in form, is not authoritative. The case involved the validity of a statute dispensing with the common-law jury of twelve, and providing for trial by a jury of eight. There was no contention that the defendant Thompson had consented to the trial, but only that he had not objected until after verdict. The effect of an express consent on his part to a trial by a jury of eight was not involved-indeed he had been silent only under constraint of the statute-and what the court said in respect of that matter is, obviously, an obiter dictum.

Defendants also cite as supporting their contention two decisions of federal Circuit Courts of Appeal, namely, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I071a5147543711d9a99c85a9e6023ffa&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=4521af7e48904ed68de3af3010bde6f6&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[Low v. **United** **States** (C. C. A.) 169 F. 86, 92;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1909100957&pubNum=5297&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))and [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I073ef041543711d9a99c85a9e6023ffa&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=4521af7e48904ed68de3af3010bde6f6&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[Dickinson v. **United** **States** (C. C. A.) 159 F. 801](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1908102454&pubNum=5297&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

**\*294** In the first of these cases the opinion, rendered by Judge Lurton, afterwards a justice of this court, definitely holds that the waiver of trial of a crime by jury involves setting aside the tribunal constituted by law for that purpose and the substitution by consent of one unknown to the law, and that this cannot be done by consent of the accused and the district attorney. ‘Undoubtedly,’ the opinion concludes, ‘the accused has a right to waive everything which pertains to form and much which is of the structure of a trial. But he may not waive that which concerns both himself and the public, nor any matter which involves fundamentally the jurisdiction of the court. The jurisdiction of the court to pronounce a judgment or conviction for crime, when there has been a plea of not guilty, rests upon the foundation of a verdict by a jury. Without that basis the judgment is void.’ This is strong language from a judge whose opinion is entitled to great respect.

In the second case, involving the completion of a trial by consent with a jury of eleven persons, substantially the same was held; but in a scholarly and thoughtful dissenting opinion, Judge Aldrich reviews the common-law practice upon the subject antedating the Constitution, and in the course of his opinion, after referring to article 3, s 2, and the Sixth Amendment, says pages 813-814, 820-821 of 159 F.):

**\*\*257** ‘The aim of the constitutional safeguards in question is a full, fair, and public trial, and one which shall reasonably and in all substantial ways safeguard the interests of the state and the life and liberty of accused parties. Whether the idea is expressed in words or not, as is done in some of the bills of rights and constitutions, a free and fair trial only means a trial as free and fair as the lot of humanity will admit.

‘All will doubtless agree, at least the unquestioned authority is that way, that these protective provisions of  **\*295** the Constitution are not so imperative that an accused shall be tried by jury when he desires to plead guilty; or that his trial, in the event of trial, shall be held invalid for want of due process of law, based upon the ground that he was not confronted with his witnesses when he had waived that constitutional right and consented to the use of depositions; or because he had not had compulsory process for obtaining witnesses in his favor when he had waived that; or because he had not had the assistance of counsel when he had intelligently refused such constitutional privilege and insisted upon the right to go to trial without counsel; or upon the ground that he had not had a speedy trial when he had petitioned the court for delay; or that his trial was not public when he had consented to, or silently acquiesced in, a trial in a courthouse with a capacity of holding only 12 members of the public rather than 1200.

‘Beyond question, the right of an accused in a case like this to have 12 jurors throughout is so far absolute as a constitutional right that he may have it by claiming it, or even by withholding consent to proceed without that number, and doubtless, under a constitutional government like ours, the interests of the community so far enter into any incidental departure from that number, in the course of the trial, as to require the discretionary approval of the court, and that the proper representative of the government should join the accused in consent. \* \* \*

‘It is probable that the history and debates of the constitutional convention will not be found to sustain the idea that the constitutional safeguards in question were in any sense established as something necessary to protect the state or the community from the supposed danger that accused parties would waive away the interest which the government has in their liberties, and go to jail.

**\*296** ‘There is not now, and never was, any practical danger of that. Such a theory, at least in its application to modern American conditions, is based more upon useless fiction than upon reason. And when the idea of giving countenance to the right of waiver, as something necessary to a reasonable protection of the rights and liberties of accused, and as something intended to be practical and useful in the administration of the rights of the parties, has been characterized, as involving innovation ‘highly dangerous,’ it would, as said by Judge Seevers in [State v. Kaufman, 51 Iowa, 578, 581, 2 N. W. 275, 277,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1879003583&pubNum=594&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_594_277&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_594_277) [33 Am. Rep. 148,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1879003583&pubNum=3029&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) ‘have been much more convincing and satisfactory if we had been informed why it would be highly dangerous.’ \* \* \*

‘Traced to its English origin, it would probably be found, so far as the right of waiver was there withheld from accused parties, that in a very large sense the reason for it was that conviction of crime, under the old English system, operated to outlaw and to attaint the blood and to work a forfeiture of official titles of inheritance, thus affecting the rights of third parties.

‘In every substantial sense our constitutional provisions in respect to jury trials in criminal cases are for the protection of the interests of the accused, and as such they may, in a limited and guarded measure, be waived by the party sought to be benefited.’

The record of English and colonial jurisprudence antedating the Constitution will be searched in vain for evidence that trial by jury in criminal cases was regarded as a part of the structure of government, as distinguished from a right or privilege of the accused. On the contrary, it uniformly was regarded as a valuable privilege bestowed upon the person accused of crime for the purpose of safeguarding him against the oppressive power of the King and the arbitrary or partial judgment of the  **\*297** court. Thus, Blackstone, who held trial by jury both in civil and criminal cases in such esteem that he called it ‘the glory of the English law,’ nevertheless looked upon it as a ‘privilege,’ albeit ‘the most transcendent privilege which any subject can enjoy.’ Book III, p. 379. And Judge Story, writing at a time when the adoption of the Constitution was still in the memory of men then living, speaking of trial by jury in criminal cases, said:

‘When our more immediate ancestors removed to America, they brought this great privilege with them, as their birthright and inheritance, as a part of that admirable common law which had fenced round and interposed barriers on every side against the approaches of arbitrary power. It is now incorporated into all our State constitutions as a fundamental right, and the Constitution of the **United** **States** would have been justly obnoxious to the most conclusive objection if it has not recognized and confirmed it in the most solemn terms.’ 2 Story on the Constitution, s 1779.

In the light of the foregoing it is reasonable to conclude that the framers of the Constitution simply were intent upon preserving the  **\*\*258** right of trial by jury primarily for the protection of the accused. If not, and their intention went beyond this and included the purpose of establishing the jury for the trial of crimes as an integral and inseparable part of the court, instead of one of its instrumentalities, it is strange that nothing to that effect appears in contemporaneous literature or in any of the debates or innumerable discussions of the time. This is all the more remarkable when we recall the minute scrutiny to which every provision of the proposed Constitution was subjected. The reasonable inference is that the concern of the framers of the Constitution was to make clear that the right of trial by jury should remain inviolable, to which end no language was deemed too imperative. That this was the purpose of the third article is rendered  **\*298** highly probable by a consideration of the form of expression used in the Sixth Amendment:

‘In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. \* \* \*’

[4](https://1.next.westlaw.com/Document/I2e21ffdc9ca411d9bdd1cfdd544ca3a4/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef000001782988adba74a34ed2%3Fppcid%3D84e449448ef14038b235324860cbaf6e%26Nav%3DCASE%26fragmentIdentifier%3DI2e21ffdc9ca411d9bdd1cfdd544ca3a4%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=100d1226b7a6f44bd760f3be09ec7cd1&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=84e449448ef14038b235324860cbaf6e&originationContext=Smart%20Answer&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F41930121924)This provision, which deals with trial by jury clearly in terms of privilege, although occurring later than that in respect of jury trials contained in the original Constitution, is not to be regarded as modifying or altering the earlier provision; and there is no reason for thinking such was within its purpose. The first ten amendments and the original Constitution were substantially contemporaneous and should be construed in pari materia. So construed, the latter provision fairly may be regarded as reflecting the meaning of the former. In other words, the two provisions mean substantially the same thing; and this is the effect of the holding of this court in [Callan v. Wilson, 127 **U**. **S**. 540, 549, 8 S. Ct. 1301, 1303, 32 L. Ed. 223,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1888180191&pubNum=708&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_708_1303&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_1303) where it is said:

‘And we do not think that the amendment was intended to supplant that part of the third article which relates to trial by jury. There is no necessary conflict between them.’

Upon this view of the constitutional provisions we conclude that article 3, s 2, is not jurisdictional, but was meant to confer a right upon the accused which he may forego at his election. To deny his power to do so is to convert a privilege into an imperative requirement.

[5](https://1.next.westlaw.com/Document/I2e21ffdc9ca411d9bdd1cfdd544ca3a4/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef000001782988adba74a34ed2%3Fppcid%3D84e449448ef14038b235324860cbaf6e%26Nav%3DCASE%26fragmentIdentifier%3DI2e21ffdc9ca411d9bdd1cfdd544ca3a4%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=100d1226b7a6f44bd760f3be09ec7cd1&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=84e449448ef14038b235324860cbaf6e&originationContext=Smart%20Answer&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F51930121924)But the question remains whether the court is empowered to try the case without a jury; that is to say, whether Congress has vested jurisdiction to that end. We think it has, although some of the state, as well as some of the federal, decisions suggest a different conclusion.

By the [Constitution, art. 3, s 1](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000165&cite=OKCNART3S1&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), the judicial power of the **United** **States** is vested in the Supreme Court and such inferior courts as Congress may from time to **\*299** time ordain and establish. In pursuance of that authority, Congress, at an early day, established the District and Circuit Courts, and by section 24 of the Judicial Code ([U. S. Code, tit. 28, s 41](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=28USCAS41&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))(2), [28 USCA s 41](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=28USCAS41&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))(2), the Circuit Courts having been abolished, expressly conferred upon the District Courts jurisdiction ‘of all crimes and offenses cognizable under the authority of the **United** **States**.’

This is a broad and comprehensive grant, and gives the courts named power to try every criminal case cognizable under the authority of the **United** **States**, subject to the controlling provisions of the Constitution. In the absence of a valid consent, the District Court cannot proceed except with a jury, not because a jury is necessary to its jurisdiction, but because the accused is entitled by the terms of the Constitution to that mode of trial. Since, however, the right to a jury trial may be waived, it would be unreasonable to leave the court powerless to give effect to the waiver and itself dispose of the case. We are of opinion that the court has authority in the exercise of a sound discretion to accept the waiver, and, as a necessary corollary, to proceed to the trial and determination of the case with a reduced number or without a jury; and that jurisdiction to that end is vested by the foregoing statutory provisions. The power of waiver being established, this is the clear import of the decision of this court in [Schick v. **United** **States**, 195 **U**. **S**. 65, 70-71, 24 S. Ct. 826, 828, 49 L. Ed. 99, 1 Ann. Cas. 585](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1904100343&pubNum=708&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_708_828&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_828):

‘By s 563, Rev. Stat. (superseded by s 24, Judicial Code) the district courts are given jurisdiction ‘of all crimes and offenses cogniable under the authority of the **United** **States**, committed within their respective districts, or upon the high seas, the punishment of which is not capital.’ There is no act of Congress requiring that the trial of all offenses shall be by jury, and a court is fully organized and competent for the transaction of business without the presence of a jury.'

**\*300** See, also, Ex parte [Belt, 159 **U**. **S**. 95, 15 S. Ct. 987, 40 L. Ed. 88;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1895180132&pubNum=708&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and [Riddle v. Dyche, 262 **U**. **S**. 333, 43 S. Ct. 555, 67 L. Ed. 1009,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1923120471&pubNum=708&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) both of which are out of harmony with the notion that the presence of a jury is a constitutional prerequisite to the jurisdiction of the court in a criminal case. The first of these cases involved the validity of an act of Congress authorizing waiver of a jury in criminal cases in the District of Columbia. The Court of Appeals of that District upheld the statute in [Belt v. **United** **States**, 4 App. D. C. 25.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1834134310&pubNum=153&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) Leave was asked of this court to file a petition for writ of habeas corpus. Upon this application, the qustion to be answered was ([page 97 of 159 **U**. **S**., 15 S. Ct. 987, 40 L. Ed. 88)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1895180132&pubNum=708&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)):

‘Does the ground of this application go to the jurisdiction or authority of the supreme  **\*\*259** court of the District, or, rather, is it not an allegation of mere error? If the latter, it cannot be reviewed in this proceeding. [In re Schneider, 148 **U**. **S**. 162, 13 S. Ct. 572,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1893138341&pubNum=708&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) [37 L. Ed. 404,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1893180082&pubNum=470&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and cases cited.’

After reviewing authorities, it was held that the Supreme Court of the District had jurisdiction to determine the validity of the act which authorized the waiver, and that its action could not be reviewed on habeas corpus.

In the second case, Riddle, on habeas corpus, assailed a conviction in a federal District Court upon the ground that the jury was composed of only eleven men. This court held that the trial court had jurisdiction, and a record showing upon its face that a lawful jury had been impaneled, sworn, and charged could not be collaterally impeached. The remedy was by writ of error.

This conclusion in respect of the jurisdiction of the courts, notwithstanding the peremptory words of the third article of the Constitution, is fortified by a consideration of certain provisions of the Judiciary Act of 1789 (1 Stat. 73). That act was passed shortly after the organization of the government under the Constitution, and on the day preceding the proposal of the first ten amendments by the first Congress. Among the members of that Congress were many who had participated in the  **\*301** convention which framed the Constitution, and the act has always been considered, in relation to that instrument, as a contemporaneous exposition of the highest authority. [Capital Traction Company v. Hof, supra, pages 9, 10,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1899180133&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) of 174 **U**. **S**., [19 S. Ct. 580, 43 L. Ed. 873,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1899180133&pubNum=708&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and cases cited. Section 9 of that act provides that ‘the trial of issues in (of) fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.’ Section 12 provides that ‘the trial of issues in (of) fact in the circuit courts shall, in all suits, except those of equity, and of admiralty, and maritime jurisdiction, be by jury.’

It will be observed that this language is mandatory in form, and is precisely the same as that of [article 3, s 2, of the Constitution](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000165&cite=OKCNART3S2&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)). It is fair to assume that the framers of the statute, in using the words of the Constitution, intended they should have the same meaning; and if the purpose of the latter was jurisdictional, it is not easy to avoid the conclusion that the purpose of the former was the same. But this court had always held, beginning at an early day, that, notwithstanding the imperative language of the statute, it was competent for the parties to waive a trial by jury. The early cases are collected in a foot note to [Kearney v. Case, 12 Wall. 275, **281**, 20 L. Ed. 395,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1870151221&pubNum=780&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_780_281&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_780_281) following the statement:

‘Undoubtedly both the Judiciary Act and the amendment to the Constitution secured the right to either party in a suit at common law to a trial by jury, and we are also of opinion that the statute of 1789 intended to point out this as the mode of trial in issues of fact in such cases. Numerous decisions, however, had settled that this right to a jury trial might be waived by the parties, and that the judgment of the court in such cases should be valid.’

The Seventh Amendment, which is here referred to, provides, in respect of suits at common law involving a value exceeding $20, that ‘the right of trial  **\*302**by jury shall be preserved’; and it is significant that this language and the positive provision of the statute that ‘the trial of issues in fact \* \* \* shall be by jury’ were regarded as synonymous.

[6](https://1.next.westlaw.com/Document/I2e21ffdc9ca411d9bdd1cfdd544ca3a4/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef000001782988adba74a34ed2%3Fppcid%3D84e449448ef14038b235324860cbaf6e%26Nav%3DCASE%26fragmentIdentifier%3DI2e21ffdc9ca411d9bdd1cfdd544ca3a4%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=100d1226b7a6f44bd760f3be09ec7cd1&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=84e449448ef14038b235324860cbaf6e&originationContext=Smart%20Answer&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F61930121924)Another ground frequently relied upon for denying the power of a person accused of a serious crime to waive trial by jury is that such a proceeding is against public policy. The decisions are conflicting. The leading case in support of the proposition, and one which has influenced other decisions advancing similar views, is [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I0112c09dd85b11d9a489ee624f1f6e1a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=4521af7e48904ed68de3af3010bde6f6&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[Cancemi v. People, 18 N. Y. 128, 137-138.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1858012462&pubNum=596&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_596_137&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_596_137) In that case Cancemi was indicted for the crime of murder. After a jury had been impaneled and sworn, and the trial begun, under a stipulation made by the prisoner and his counsel and counsel for the people, and with the express consent and request of the prisoner, a juror was withdrawn, and a verdict subsequently rendered by the remaining eleven jurors. On appeal a judgment based upon this verdict was reversed. The case was decided in 1858, and the question was regarded by the court as one of first impression. The following excerpt from the opinion indicates the basis of the decision:

‘The state, the public, have an interest in the preservation of the liberties and the lives of the citizens, and will not allow them to be taken away ‘without due process of law’ ([Const. art. 1, s 6)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000165&cite=OKCNART1S6&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), when forfeited, as they may be, as a punishment for crimes. Criminal prosecutions proceed on the assumption of such a forfeiture, which, to sustain them, must be ascertained and declared as the law has prescribed. Blackstone (vol. 4, 189) says: ‘The king has an interest in the preservation of all his subjects.’ \* \* \* Objections to jurors may be waived; the court may be substituted for triers to dispose of challenges to jurors; secondary in place of primary evidence may be received; admissions of facts  **\*303** are allowed; and in similar particulars, as wll as in relation to mere formal proceedings generally, consent will render valid, what without it would be erroneous. A plea of guilty to any indictment, whatever may be the grade of the crime, will be received and  **\*\*260** acted upon if it is made clearly to appear that the nature and effect of it are understood by the accused. in such a case the preliminary investigation of a grand jury, with the admission of the accusation in the indictment, is supposed to be a sufficient safeguard to the public interests. But when issue is joined upon an indictment, the trial must be by the tribunal and in the mode which the constitution and laws provide, without any essential change. The public officer prosecuting for the people had no authority to consent to such a change, nor has the defendant.

‘Applying the above reasoning to the present case, the conclusion necessarilty follows, that the consent of the plaintiff in error to the withdrawal of one juror, and that the remaining eleven might render a verdict, could not lawfully be recognized by the court, at the circuit, and was a nullity. If a deficiency of one juror might be waived, there appears to be no good reason why a deficiency of eleven might not be; and it is difficult to say why, upon the same principle, the entire panel might not be dispensed with, and the trial committed to the court alone. It would be a highly dangerous innovation, in reference to criminal cases, upon the ancient and invaluable institution of trial by jury, and the constitution and laws establishing and securing that mode of trial, for the court to allow of any number short of a full panel of twelve jurors, and we think it ought not to be tolerated.’

Ad decision flatly to the contrary, and one fairly representative of others to the same effect, is [State v. Kaufman, 51 Iowa, 578, 2 N. W. 275,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1879003583&pubNum=594&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) [33 Am. Rep. 148.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1879003583&pubNum=3029&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))The defendant there was indicted  **\*304** for forgery. Upon the trial, one of the jurors, being ill, was discharged with the consent of the defendant, and the trial concluded with the remaining eleven. There was a verdict of guilty. Upon appeal the verdict was upheld. The authorities upon the question are reviewed, and in the course of the opinion the court says at [pages 579-580 of 51 Iowa,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1879003583&pubNum=444&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_444_579&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_444_579) [2 N. W. 275, **276**,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1879003583&pubNum=594&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_594_276&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_594_276) [33 Am. Rep. 148](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1879003583&pubNum=3029&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)):

‘A plea of guilty ordinarily dispenses with a jury trial, and it is thereby waived. This, it seems to **us**, effectually destroys the force of the thought that ‘the state (the public) have an interest in the preservation of the lives and the liberties of the citizens, and will not allow them to be taken away without due process of law.’ The same thought is otherwise expressed by Blackstone, vol. 4, 189, that ‘the king has an interest in the preservation of all his subjects.’

‘It matters not whether the defendant is in fact guilty, the plea of guilty is just as effectual as if such was the case. Reasons other than the fact that he is guilty may induce a defendant to so plead, and thereby the state may be deprived of the services of the citizen, and yet the state never actively interferes in such case, and the right of the defendant to so plead has never been doubted. He must be permitted to judge for himself in this respect. So in the case at bar. The defendant may have consented to be tried by eleven jurors because his witnesses were there present and he might not be able to get them again, or that it was best he should be tried by the jury as thus constituted. Why should he not be permitted to do so? Why hamper him in this respect? Why restrain his liberty or right to do as he believed to be for his interest? Whatever rule is adopted affects not only the defendant, but all others similarly situated, no matter how much they desire to avail themselves of the right to do what the defendant desires to repudiate. We are unwilling to establish such a rule.’

**\*305** Referring to the statement in the Cancemi Case, that it would be a highly dangerous innovation to allow any number short of a full panel of twelve jurors and one not to be tolerated, it is said at [page 581 of 51 Iowa,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1879003583&pubNum=444&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_444_581&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_444_581) [2 N. W. 275, 277,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1879003583&pubNum=594&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_594_277&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_594_277) [33 Am. Rep. 148](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1879003583&pubNum=3029&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)):

‘This would have been much more convincing and satisfactory if we had been informed why it would be ‘highly dangerous' and should ‘not be tolerated,’ or at least something which has a tendency in that direction. For if it be true, as stated, it certainly would not be difficult to give a satisfactory reason in support of the strong language used.'

See, also, [State v. Sackett, 39 Minn. 69, at page 72, 38 N. W. 773, 775,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1888058346&pubNum=594&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_594_775&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_594_775) where the court concludes its discussion of the subject by saying:

‘The wise and beneficient provisions found in the constitution and statutes designed for the welfare and protection of the accused, may be waived, in matters of form and substance, when jurisdiction has been acquired, and within such limits as the trial court, exercising a sound discretion in behalf of those before it, may permit. The defendants, having formally waived a juror, and stipulated to try their case with 11, cannot now claim that there was a fatal irregularity in their trial.’

It is difficult to see why the fact, frequently suggested, that the accused may plead guilty and thus dispense with a trial altogether, does not effectively disclose the fallacy of the public policy contention; for if the state may interpose the claim of public interest between the accused and his desire to waive a jury trial, a fortiori it should be able to interpose a like claim between him and his determination to avoid any form of trial by admitting his guilt. If he be free to decide the question for himself in the latter case, notwithstanding the interest of society in the preservation of his life and liberty, why should he be denied  **\*\*261** the power to do so in the former? It is no answer to say that by pleading guilty there is nothing left for a jury to try, for that simply ignores the question, which is not  **\*306** what is the effect of the plea, the answer to which is fairly obvious, but, in view of the interest of the public in the life and liberty of the accused, can the plea be accepted and acted upon, or must the question of guilt be submitted to a jury at all events? Moreover, the suggestion is wholly beside the point, which is that public policy is not so inconsistent as to permit the accused to dispense with every form of trial by a plea of guilty, and yet forbid him to dispense with a particular form of trial by consent.

The truth is that the theory of public policy embodies a doctrine of vague and variable quality, and, unless deducible in the given circumstances from constitutional or statutory provisions, should be accepted as the basis of a judicial determination, if at all, only with the utmost circumspection. The public policy of one generation may not, under changed conditions, be the public policy of another.

It may be conceded, at least generally, that under the rule of the common law the accused was not permitted to waive trial by jury, as generally he was not permitted to waive any right which was intended for his protection. Nevertheless, in the Colonies such a waiver and trial by the court without a jury was by no means unknown, as the many references contained in the brief of the Solicitor General conclusively show. But this phase of the matter we do not stop to consider, for the rule of the common law, whether exclusive or subject to exceptions, was justified by conditions which no longer exist; and as the Supreme Court of Nevada well said in [Reno Smelting Works v. Stevenson, 20 Nev. 269, 279, 21 P. 317, 320,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1889075662&pubNum=660&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_660_320&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_660_320) [4 L. R. A. 60, 19 Am. St. Rep. 364](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1889075662&pubNum=473&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)):

‘It is contrary to the spirit of the common law itself to apply a rule founded on a particular reason to a case where that reason utterly fails,-cessante ratione legis, cessat ipsa lex.’

**\*307** The maxim seems strikingly apposite to the question here under review. Among other restraints at common law, the accused could not testify in his own behalf; in felonies he was not allowed counsel (IV Sharswood's Blackstone, 355, note 14), the judge in such cases occupying the place of counsel for the prisoner, charged with the responsibility of seeing that the prisoner did not suffer from lack of other counsel (Id.); and conviction of crime worked an attaint and forfeiture of official titles of inheritance, which, as Judge Aldrich points out (quotation supra), constituted in a large sense the reason for withholding holding from accused parties the right of waiver.

These conditions have ceased to exist, and with their disappearance justification for the old rule, no longer rests upon a substantial basis. In this respect we fully agree with what was said by the Supreme Court of Wisconsin in [Hack v. State, 141 Wis. 346, 351-352, 124 N. W. 492, 494,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1910007169&pubNum=594&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_594_494&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_594_494) [45 L. R. A. (N. S.) 664](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1910007169&pubNum=474&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)):

‘The ancient doctrine that the accused could waive nothing was unquestionably founded upon the anxiety of the courts to see that no innocent man should be convicted. It arose in those days when the accused could not testify in his own behalf, was not furnished counsel, and was punished, if convicted, by the death penalty, or some other grievous punishment out of all proportion to the gravity of his crime. Under such circumstances it was well, perhaps, that such a rule should exist and well that every technical requirement should be insisted on, when the state demanded its meed of blood. Such a course raised up a sort of a barrier which the court could utilize when a prosecution was successful which ought not to have been successful, or when a man without money, without counsel, without ability to summon witnesses, and not permitted to tell his own story, has been unjustly convicted but yet under the ordinary principles of waiver  **\*308** as applied to civil matters, had waived every defect in the proceedings.

‘Thanks to the humane policy of the modern criminal law, we have changed all these conditions. The man now charged with crime is furnished the most complete opportunity for making his defense. He may testify in his own behalf; if he be poor, he may have counsel furnished him by the state, and may have his witnesses summoned and paid for by the state; not infrequently he is thus furnished counsel more able than the attorney for the state, in short the modern law has taken as great pains to surround the accused person with the means to effectively make his defense as the ancient law took pains to prevent that consummation. The reasons which in some sense justified the former attitude of the courts have therefore disappeared, save perhaps in capital cases, and the question is, Shall we adhere to the principle based upon conditions no longer existing? No sound reason occurs to **us** why a person accused of a lesser crime or misdemeanor, who comes into court with his attorney, fully advised of all his rights, and furnished with every means of making his defense, should not be held to waive a right or privilege for which he does not ask, just as a party to a civil action waives such a right by not asking for it.’

The view that power to waive a trial by jury in criminal cases should be denied on  **\*\*262** grounds of public policy must be rejected as unsound.

[7](https://1.next.westlaw.com/Document/I2e21ffdc9ca411d9bdd1cfdd544ca3a4/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef000001782988adba74a34ed2%3Fppcid%3D84e449448ef14038b235324860cbaf6e%26Nav%3DCASE%26fragmentIdentifier%3DI2e21ffdc9ca411d9bdd1cfdd544ca3a4%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=100d1226b7a6f44bd760f3be09ec7cd1&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=84e449448ef14038b235324860cbaf6e&originationContext=Smart%20Answer&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F71930121924)It is not denied that a jury trial may be waived in the case of petty offenses, but the contention is that the rule is otherwise in the case of crimes of the magnitude of the one here under consideration. There are decisions to that effect, and also decisions to the contrary. The conflict is marked and direct. Schick v. **United** **States**, supra, is thought to favor the contention. There the prosecution  **\*309** was for a violation of the Oleomargarine Act (24 Stat. 209), punishable by fine only. By agreement is writing a jury was waived and the issue submitted to the court. Judgment was for the **United** **States**. This court held that the offense was a petty one, and sustained the waiver. It was said that the word ‘crimes' in [article 3, s 2, of the Constitution](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000165&cite=OKCNART3S2&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), should be read in the light of the common law, and, so read, it does not include petty offenses; and that neither the constitutional provisions nor any rule of public policy prevented the defendant from waiving a jury trial. The question whether the power of waiver extended to serious offenses was not directly involved, and is not concluded by that decision. Mr. Justice Harlan, in a dissenting opinion, after reviewing the authorities, concluded ([page 83 of 195 **U**. **S**., 24 S. Ct. 826, 833, 49 L. Ed. 99, 1 Ann. Cas. 585)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1904100343&pubNum=708&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_708_833&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_833) that: ‘The grounds upon which the decisions rest are, upon principle, applicable alike in cases of felonies and misdemeanors, although the consequences to the accused may be more evident as well as more serious in the former than in the latter cases.’

Although we reject the general view of the dissenting opinion that a waiver of jury trial is not valid in any criminal case, we accept the foregoing statement as entirely sound. We are unable to find in the decisions any convincing ground for holding that a waiver is effective in misdemeanor cases, but not effective in the case of felonies. In most of the decisions no real attempt is made to establish a distinction, beyond the assertion that public policy favors the power of waiver in the former, but denies it in the latter because of the more serious consequences in the form of punishment which may ensue. But that suggested differentation, in the light of what has now been said, seems to **us** more fanciful than real. The Schick Case, it is true, dealt with a petty offense, but, in view of the conclusions we have already  **\*310** reached and stated, the observations of the court (pages 71, 72 of 195 [**U**. **S**., 24 S. Ct. 826, 828)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1904100343&pubNum=708&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_708_828&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_708_828) have become equally pertinent where a felony is involved:

‘Article six of the amendments, as we have seen, gives the accused a right to a trial by jury. But the same article gives him the further right ‘to be confronted with the witnesses against him \* \* \* and to have the assistance of counsel.’ Is it possible that an accused cannot admit, and be bound by the admission, that a witness not present would testify to certain facts? Can it be that if he does not wish the assistance of counsel, and waives it, the trial is invalid? It seems only necessary to ask these questions to answer them. When there is no constitutional or statutory mandate, and no public policy prohibiting, an accused may waive any privilege which he is given the right to enjoy.'

In [Commonwealth v. Beard, 48 Pa. Super. Ct. 319,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1911030763&pubNum=659&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) the prosecution was for conspiracy, and there, as here, one of the jurors was discharged and the trial concluded with the remaining eleven. Judgment on a verdict of conviction was sustained. The court, after reviewing the conflicting decisions, was unable to find any good reason for differentiating in the matter of waiver between the two classes of crimes. We fully indorse its concluding words upon that subject at pages 323-324:

‘It surely cannot be true that the public is interested in the protection of an accused in proportion to the magnitude of his offending-that its solicitude goes out to the great offender but not to the small-that there is a difference in point of sacredness between constitutional rights when asserted by one charged with a grave crime and when asserted by one charged with a lesser one.

Hence, when it is held in [Schick v. **U**. **S**., 195 **U**. **S**. 65, 24 S. Ct. 826, 49 L. Ed. 99, 1 Ann. Cas. 585,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1904100343&pubNum=708&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) that in trials for the lowest grades of offenses the accused may waive, not only the continued presence of the full number of jurors required **\*311** to make up a jury, but the right to trial by jury, the only possible conclusion is that the purely theoretical element of public concern, as potential to override the accused's own free choice and render him effectually unfree even before conviction and sentence, cannot be regarded as in reality much of a factor in any case.’

This view of the matter subsequently had the approval of the Supreme Court of the state in [Commonwealth ex rel. Ross v. Egan, **281** Pa. 251, 126 A. 488.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1924112842&pubNum=161&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) After noting the conflict of authority, and that a waiver has been held to be effective in a number of states which are named, it is there said at pages 255, 256, 257 of **281** [Pa., 126 A. 488, 490](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1924112842&pubNum=161&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&fi=co_pp_sp_161_490&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)#co_pp_sp_161_490):

‘A defendant is supposed to understand his rights, and may be aided, if he so desires, by counsel to advise him. There are many legal provisions for his security and benefit which he may dispense with absolutely, as, for instance, his right to plead guilty and submit to sentence without any trial whatsoever. \* \* \*

‘The theory upon which the opposing cases are decided seems to rest on the proposition that society at large is as much interested in an impartial trial of a defendant, who may  **\*\*263** be sentenced to imprisonment, as he himself is, and therefore no permission to waive any right, when charged with a felony, should be accorded to him. There may be reason for applying this rule to capital cases, as has been done in Pennsylvania, but such a principle ought not to be invoked to relieve those charged with lesser offenses, such as larceny (though technically denominated a felony), from the consequences of their own voluntary act, and, where it appears by the record that consent to the course pursued was freely given, the defendant should not be heard thereafter to complain. \* \* \*

**\*312** ‘The solution of the question depends upon the determination whether a trial by less than 12 is an irregularity or a nullity. If the latter be held, no sentence imposed may be sustained, but the contrary is true, if the former and correct conclusion be reached. In the case of misdemeanors, the Superior Court has sustained the sentences where a voluntary waiver appeared. Com. v. Beard, supra. No real justification for a different decision in the case of felonies, not capital, can be supported.’

See, also, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I0b1adb08ce8211d9a489ee624f1f6e1a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=4521af7e48904ed68de3af3010bde6f6&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[Commonwealth v. Rowe, 257 Mass. 172, 174-176, 153 N. E. 537, 48 A. L. R. 762;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1926112782&pubNum=104&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) [State v. Ross, 47 S. D. 188, 192-193, 197 N. W. 234,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1924107956&pubNum=594&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) involving a misdemeanor, but followed in [State v. Tiedeman, 49 S. D. 356, 360, 207 N. W. 153,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1926107922&pubNum=594&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) involving a felony.

[8](https://1.next.westlaw.com/Document/I2e21ffdc9ca411d9bdd1cfdd544ca3a4/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef000001782988adba74a34ed2%3Fppcid%3D84e449448ef14038b235324860cbaf6e%26Nav%3DCASE%26fragmentIdentifier%3DI2e21ffdc9ca411d9bdd1cfdd544ca3a4%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=100d1226b7a6f44bd760f3be09ec7cd1&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=84e449448ef14038b235324860cbaf6e&originationContext=Smart%20Answer&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F81930121924)[9](https://1.next.westlaw.com/Document/I2e21ffdc9ca411d9bdd1cfdd544ca3a4/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef000001782988adba74a34ed2%3Fppcid%3D84e449448ef14038b235324860cbaf6e%26Nav%3DCASE%26fragmentIdentifier%3DI2e21ffdc9ca411d9bdd1cfdd544ca3a4%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=100d1226b7a6f44bd760f3be09ec7cd1&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=84e449448ef14038b235324860cbaf6e&originationContext=Smart%20Answer&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F91930121924)In affirming the power of the defendant in any criminal case to waive a trial by a constitutional jury and submit to trial by a jury of less than twelve persons, or by the court, we do not mean to hold that the waiver must be put into effect at all events. That perhaps sufficiently appears already. Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses. In such cases the value and appropriateness of jury trial have been established by long experience, and are not now to be denied. Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact-finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of  **\*313** trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity.

The question submitted must be answered in the affirmative.

It is so ordered.

Mr. Justice HOLMES, Mr. Justice BRANDEIS, and Mr. Justice STONE concur in the result.

The CHIEF JUSTICE took no part in the consideration or decision of this case.

Mr. Justice SANFORD participated in the consideration and agreed to a disposition of the case in accordance with this opinion.

# Duncan v. Louisiana

#### United States Supreme Court 391 U.S. 145 (1968)

#### Rule of Law

**The Sixth Amendment right to a jury trial applies to state court proceedings through the Fourteenth Amendment.**

#### Facts

Gary Duncan (defendant) was convicted of simple battery by a judge in a Louisiana state court. Under Louisiana law, simple battery is a misdemeanor punishable by a maximum sentence of two years imprisonment and a $300 fine. Duncan sought trial by jury, but the Louisiana constitution granted jury trials only in cases in which capital punishment or imprisonment at hard labor could be imposed. Duncan's request was denied, and he was convicted and sentenced to sixty days in prison and a fine of $150. Duncan appealed and brought suit against the State of Louisiana, alleging an infringement of his constitutional right to a jury trial.

#### Issue

Whether the Sixth Amendment right to a jury trial applies to state court proceedings through the Fourteenth Amendment.

#### Holding and Reasoning (White, J.)

Yes. The Fourteenth Amendment guarantees a right to a jury trial in all state criminal cases that would be eligible for trial by jury under the Sixth Amendment if tried in federal court. Many of the first eight Amendments to the Constitution had already been applied to the states by the Fourteenth Amendment. By precedent, the test for holding an amendment applicable to the states through the Fourteenth Amendment is whether the right protected is among those “fundamental principles of liberty and justice that lie at the base of all our civil and political institutions." The right to trial by jury is necessary for criminal defendants to prevent oppression by the government and to provide safeguards against corrupt or overzealous prosecutors or "compliant, biased, or eccentric" judges. The nation, as a whole, has demonstrated a deep deference for the right to a jury trial. Thus, this right meets the standard of a “fundamental principle of liberty and justice" and should be protected by the Due Process Clause and respected by the states. The decision of the lower court is reversed.

#### Concurrence (Fortas, J.)

It is not the Court’s role to dictate the specific form of a jury trial to the states. The right to a jury trial is absolutely necessary for serious offenses, but states should be free to develop their own rules regarding the procedure of those jury trials without interference by federal or historical standards.

#### Concurrence (Black, J.)

The Fourteenth Amendment, as a whole, makes the Bill of Rights applicable to the states. Thus, although the majority bases its reasoning for extending the Sixth Amendment to the states on the Due Process Clause, the Privileges and Immunities Clause can also be used to grant jury trials in state-court proceedings. Additionally, although complete incorporation of the Bill of Rights and all Amendments to the states should be done at one time, the current process of selective incorporation is adequate. This process guards against Supreme Court justices making improper decisions about the scope of the Bill of Rights’ protections. Further, this method has already worked to make many of those Amendments applicable to the states.

#### Dissent (Harlan, J.)

States were historically responsible for governing all criminal proceedings within their borders according to procedures adapted to best suit their needs and populations. The Due Process Clause of the Constitution requires these proceedings to be “fundamentally fair” in all respects. However, the requirement of fundamental fairness does not mean that procedures need to be uniform among state and federal courts. Some procedural rules used in federal courts may be outdated or impractical for certain state-court settings, and the Court should only require uniformity of procedure if it is necessary for promoting basic fairness. The right to trial by jury should not be included in this category of rights, and the judgment of the district court should be affirmed.

***Duncan v. Louisiana*** was an important step in **incorporating the Bill or Rights** against the states.

**Key Terms:**

**Bill of Rights** - The first ten amendments to the U.S. Constitution.

**Right to a Jury Trial** - A constitutional right to a jury trial exists under the Sixth Amendment, in federal and state criminal trials where a defendant faces punishment of greater than six months’ imprisonment, and under the Seventh Amendment, in federal civil cases where a plaintiff seeks money damages.

**Simple Battery** - A battery includes any “offensive touching” without the requirement of pain or physical injury.

# Malloy v. Hogan

#### United States Supreme Court 378 U.S. 1 (1964)

#### Rule of Law

**In state criminal trials, wherever a question arises as to whether a confession is involuntary, the self-incrimination**

# Timbs v. Indiana

#### United States Supreme Court 139 S. Ct. 682 (2019)

#### Rule of Law

**The Fourteenth Amendment’s Due Process Clause incorporates to the states those constitutional protections fundamental to ordered liberty and deeply rooted in history and tradition.**

#### Facts

When Tyson Timbs (defendant) was charged with dealing drugs, police seized the $42,000 Land Rover he had recently purchased with life insurance proceeds from his father’s death, claiming it had been used to transport heroin. The trial court refused to order forfeiture of the vehicle to the state on the ground that it would be grossly disproportionate to the maximum $10,000 fine that Timbs’s drug conviction carried. The appellate court affirmed, but the Indiana Supreme Court reversed. Timbs appealed to the United States Supreme Court, arguing that the forfeiture violated the Eighth Amendment’s Excessive Fines Clause.

#### Issue

Does the Fourteenth Amendment’s Due Process Clause incorporate to the states those constitutional protections fundamental to ordered liberty and deeply rooted in history and tradition?

#### Holding and Reasoning (Ginsburg, J.)

Yes. The Fourteenth Amendment’s Due Process Clause incorporates to the states those constitutional protections fundamental to ordered liberty and deeply rooted in history and tradition. The Eighth Amendment’s Excessive Fines Clause provides that “excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.” Protecting against excessive fines is deeply rooted in Anglo-American law because it undermines other constitutional rights. The proscription traces back to the Magna Carta, which required economic sanctions to be proportionate to wrongful conduct and not so great as to deprive the wrongdoer of his or her livelihood. English Stuart kings imposed fines disproportionate to penal retributive and deterrent goals because fines provided revenue, while other punishments cost money. When England ousted the Stuart kings, the English Bill of Rights reiterated the Magna Carta’s prohibition of excessive bail, fines, and cruel and unusual punishments. Colonists reiterated the proscriptions in the Virginia Declaration of Rights’ Eighth Amendment, which Congress used almost verbatim in the constitutional Eighth Amendment. When the states ratified the Fourteenth Amendment in 1868, 35 of 37 states, accounting for over 90 percent of the American population, already had state laws prohibiting excessive fines. Today, all 50 state constitutions prohibit excessive fines either directly or proportionally. That makes the historical and rational argument that the Fourteenth Amendment’s Due Process Clause incorporated Eighth Amendment protections against the states overwhelming. In sum, protection against excessive fines is both fundamental to ordered liberty and deeply rooted in history and tradition. Therefore, the Eighth Amendment is incorporated and applies against the states. The court accordingly vacates the forfeiture of Timbs’s Land Rover as an excessive fine imposed by the state of Indiana and remands.

#### Concurrence (Thomas, J.)

The Fourteenth Amendment’s Due Process Clause does not incorporate substantive rights unrelated to due process. Instead, the Fourteenth Amendment’s Privileges and Immunities Clause incorporates Eighth Amendment protections against excessive fines because it is a privilege or immunity held by American citizens.

**Key Terms:**

**Fourteenth Amendment** - Provides that all persons born or naturalized in the United States are U.S. citizens. Also provides that no state shall: (1) abridge the privileges or immunities of a U.S. citizen; (2) deprive any person of life, liberty, or property, without due process of law; or (3) deny equal protection of the laws to anyone within its jurisdiction.

**Eighth Amendment** - Prohibits the imposition of excessive bail, excessive fines, or cruel and unusual punishments on criminal defendants.

**Incorporation** - A doctrine through which certain substantive protections of the Constitution are applicable to states.

# United States v. Booker

#### United States Supreme Court 543 U.S. 220 (2005)

#### Rule of Law

**(1) The enhancement of a sentence under the Federal Sentencing Guidelines based on judicial findings of fact by a preponderance of the evidence violates the Sixth Amendment.  
(2) The United States Sentencing Guidelines are not mandatory.**

#### Facts

The United States (plaintiff) charged Booker (defendant) with drug possession with intent to distribute in violation of 21 U.S.C. § 841(a)(1). Under the statute, the conviction carried a penalty of ten years to life in prison. A jury found Booker guilty. Under the Federal Sentencing Guidelines, Booker should have been sentenced to between 210 and 262 months in prison. In a post-trial hearing, the judge found by a preponderance of the evidence that Booker possessed more drugs and was guilty of obstruction of justice. The judge sentenced Booker to 30 years in prison, and Booker appealed. The United States Court of Appeals for the First Circuit held that the sentence violated the Sixth Amendment, vacated the district court's judgment, and remanded the case for resentencing. The United States Supreme Court granted certiorari to consider whether the judge’s application of the guidelines violated the Sixth Amendment and whether the United States Sentencing Guidelines were mandatory.

#### Issue

(1) Does the enhancement of a sentence under the United States Sentencing Guidelines based on judicial findings of fact by a preponderance of the evidence violate the Sixth Amendment?  
(2) Are the United States Sentencing Guidelines mandatory?

#### Holding and Reasoning (Stevens, J. and Breyer, J.)

(1) Yes. The enhancement of a sentence under the Federal Sentencing Guidelines based on judicial findings of fact by a preponderance of the evidence violates the Sixth Amendment. Under the Sixth Amendment, a defendant cannot be found guilty of a crime unless the prosecution proves every element beyond a reasonable doubt. Further, the Sixth Amendment entitles a defendant to have a jury make this finding for each element of a crime. Any fact other than previous convictions that results in a sentence greater than the statutory maximum must be proven beyond a reasonable doubt to a jury. Further, the application of a sentencing plan like the guidelines was held invalid in *Blakely v. Washington*, 542 U.S. 296 (2004). Sentence enhancements based on facts not proven to a jury are suspect. After the shift away from determinate sentencing, judges base sentence enhancements on findings of fact related to the defendant’s behavior. This shifts authority from juries to judges to impose sentences based on facts not brought up at trial or proven beyond a reasonable doubt. Such sentence enhancements threaten the right to a jury trial. *Blakely* applies to the guidelines. The right to a trial by jury must be preserved even if the efficiency of judicial findings of fact is lost. Here, Booker's enhanced sentence was based upon the judge's finding by a preponderance of the evidence that Booker possessed more drugs and was guilty of obstruction of justice. The enhanced sentence violates the Sixth Amendment because the prosecution did not prove those facts beyond a reasonable doubt at trial.  
(2) No. The United States Sentencing Guidelines are not mandatory. The section of the federal sentencing statute that makes the guidelines mandatory conflicts with the Court’s Sixth Amendment holding. The Court thus severs the provision to render the guidelines advisory. However, a strong connection should exist between the sentence imposed and a defendant’s actual conduct. Such a connection is essential to Congress’s goal of increasing sentencing uniformity. Here, the ruling of the court of appeals is affirmed and the case is remanded to the district court to impose a proper sentence for Booker in accordance with the Court's opinions. The district court should assure a strong connection exists between the sentence imposed and Booker's actual possession of the drugs.

#### Dissent (Scalia, J.)

The Court creates a reasonableness standard that will bring about a wide variety of different standards that vary from court to court and judge to judge.

#### Dissent (Stevens, J.)

Courts presume all acts of Congress are valid. However, a facial challenge of an act of Congress can succeed if (1) the act is entirely or nearly unconstitutional in all of its applications or (2) an invalid portion cannot be severed from the remainder of the act. First, courts can constitutionally apply the guidelines in their entirety in most federal cases. Second, Justice Breyer's majority opinion does not adhere to traditional severability principles. Instead, Justice Breyer allows the Court to invalidate any part an act if it finds that Congress would have preferred a different method of administering the statute. The Court should instead follow existing precedent and first declare a part of an act unconstitutional. Only at that point can the Court inquire whether the remainder of the statute remains valid.

**Key Terms:**

**Right to Trial by Jury Clause** - Guarantee contained in the Sixth Amendment that any criminal defendant is entitled to have his case heard by an unbiased, local jury

**Determinate Sentencing -** A sentence for a set period of time based upon statute.

# Crawford v. Washington

#### United States Supreme Court 541 U.S. 36 (2004)

#### Rule of Law

**Testimonial statements of witnesses not present at trial are admissible only where the declarant is unavailable and the defendant had a prior opportunity for cross examination.**

#### Facts

Crawford (defendant) was charged with assault and attempted murder after stabbing a man who allegedly tried to rape his wife, Sylvia. At trial, the prosecution sought to introduce into evidence a recorded statement by Sylvia describing the stabbing to police. The trial court allowed the tape to be played for the jury and convicted Crawford. Sylvia was unavailable to testify at trial because of the state marital privilege. The Washington Court of Appeals reversed, holding that the taped statement violated Crawford’s Sixth Amendment confrontation right and did not bear any guarantees of trustworthiness as were required under *Ohio v. Roberts*, 448 U.S. 56 (1980). The Washington Supreme Court reversed, agreeing with the trial court that the statement bore guarantees of trustworthiness and reinstating the conviction. The United States Supreme Court granted certiorari.

#### Issue

Is a recorded statement to the police by an unavailable witness admissible at trial?

#### Holding and Reasoning (Scalia, J.)

No. The Confrontation Clause of the Sixth Amendment provides that a defendant has the right to confront the witnesses providing “testimonial” statements against him with a reasonable opportunity for cross examination. Testimonial statements consist of in-court testimony and its functional equivalent—statements that the declarant would reasonably expect to be used by the prosecution. Although the Confrontation Clause on its face negates almost every hearsay exception, hearsay may still be admissible under the clause if the declarant is unavailable and the defendant had a prior opportunity for cross examination. In this way, the court modifies the reliability test laid out in *Ohio v. Roberts*, 448 U.S. 56 (1980). Although the point of the Confrontation Clause is to ensure that evidence is reliable, this is a procedural, not a substantive guarantee. It cannot be done away with simply because the court determines that the evidence is reliable. In addition, reliability is an amorphous concept, depending on myriad factors, which produces judicial unreliability and indeed has allowed admission of testimonial statements the Confrontation Clause clearly means to exclude. As a result, the reliability test laid out in *Ohio v. Roberts* (1980) is overruled in favor of the standard outlined by the Court: testimonial statements of unavailable witnesses are admissible only where the defendant had a prior opportunity for cross examination. In this case, Sylvia’s taped statement against Crawford is testimonial because it was made to law enforcement officials in an interrogation and Sylvia knew or should have known that the statement was going to be used at the subsequent trial. Thus, because Sylvia is unavailable at trial due to her marital privilege, and because Crawford did not have an opportunity to cross examine the statement, its admission would be a violation of the Confrontation Clause. As a result, the statement is inadmissible, the judgment of the Washington Supreme Court is reversed, and the case is remanded.

**Key Terms:**

**Testimonial Statement -** Statement that has the primary purpose of proving occurrences potentially relevant to a later criminal prosecution.

**Hearsay -** An out-of-court statement offered to prove the truth of the matter asserted in the statement.

# Teague v. Lane

#### United States Supreme Court 489 U.S. 288 (1989)

#### Rule of Law

**Generally, the law prevailing at the time of a criminal defendant's conviction will apply on collateral review, but a new constitutional rule of criminal procedure can be applied retroactively only if (1) the new rule gives constitutional protection to a primary, private individual action or (2) the new rule is necessary to the fundamental fairness of the criminal justice system.**

#### Facts

Teague (defendant), and African American was convicted of attempted murder, armed robbery, and aggravated battery by an all-white jury. The prosecution used all of its peremptory challenges to exclude African Americans from sitting on the jury. On appeal, Teague argued that his right to be tried by a jury representing a cross-section of the community was violated. Teague lost all of his state appeals. He then filed a petition for a writ of habeas corpus in federal court. Teague argued that a new rule should be adopted and that the fair-cross-section requirement of the Sixth Amendment ought to apply to the petit jury and not only the pool of potential jurors.

#### Issue

Should a new rule, that the fair-cross-section of the community requirement of the Sixth Amendment be applied to the petit jury, be applied retroactively?

#### Holding and Reasoning (O’Connor, J.)

No. A new rule, that the fair-cross-section of the community requirement of the Sixth Amendment be applied to the petit jury, should not be applied retroactively. Justice Harlan helps to guide the Court’s opinion today. Whether or not a new rule should be applied retroactively for cases on collateral review depends on the purpose for which the writ of habeas corpus is made available. A petition for habeas corpus serves a deterrent effect, adding an additional incentive for the lower courts to abide by constitutional standards. Because this deterrent function exists regardless of which law applies, and because there are so many constitutional issues that may be raised in a habeas corpus petition, the general rule is that the law prevailing at the time a conviction becomes final will govern. This rule also recognizes the need for finality and comity in the criminal legal system. In effect, Justice Harlan identified two exceptions to this general rule: a new rule should apply retroactively to all defendants on collateral review if the new rule gives constitutional protection to individual private conduct, or the new rule is necessary to the fundamental fairness of the criminal justice system. In this case, neither exception applies. Applying the fair-cross-section requirement to the petit jury would afford no constitutional protection to a primary individual activity. In addition, the absence of a fair-cross-section on the jury does not diminish the likelihood of an accurate conviction or violate the fundamental fairness of the trial process. In addition, the Court is reluctant to adopt Teague’s rule precisely because the rule will not be applied retroactively. If adopted, the new rule would apply to Teague’s case but not to the other cases already involved in collateral review. Treating similarly situated defendants differently is not consistent with the administration of justice. Therefore, habeas corpus cannot be used as a means by which to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to the defendant in the case and to all similarly situated defendants on collateral review.

#### Concurrence (Stevens, J.)

Typically, in a criminal appeal, the reviewing court will decide first whether an error occurred and then whether it was harmless or requires reversal. A similar approach should be applied when a new constitutional question is raised on collateral appeal: the court should first decide whether the defendant's rights were violated and then move on to whether relief should be granted. Only then should the court decide whether a new rule of procedure should apply retroactively, focusing primarily on the potential unfairness. The plurality opinion worked backward, first deciding a new rule will not have retroactive effect "without ever deciding whether there is such a rule."

#### Dissent (Brennan, J.)

The plurality’s holding will wrongly prevent federal courts from hearing a number of constitutional challenges on collateral review. The need to treat similarly situated defendants the same does not outweigh the need for courts to consider new constitutional questions. The plurality simplifies the issue when it explains that a new rule is one not derived from precedent. Most cases are not clear-cut, and precedent is open to interpretation as evidenced by the dissenting opinions of many Supreme Court cases. Precedent shows that habeas corpus petitions address many different constitutional challenges. However, the Court’s desire to treat similar cases alike will now limit the scope of this powerful tool.

**Key Terms:**

**Petit Jury -** A trial jury that has the job of hearing testimony, seeing evidence, and using that information to determine issues of fact and reach conclusions about them, such as a verdict in a criminal case. Contrast with a grand jury, which investigates alleged crimes and indicts suspected criminals.

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

# Batson v. Kentucky

#### United States Supreme Court 476 U.S. 79 (1986)

#### Rule of Law

**The Equal Protection Clause of the Fourteenth Amendment prohibits prosecutors from using peremptory challenges to remove prospective jurors based on their race.**

**Swain v. Alabama**

85 S.Ct. 824

Supreme Court of the United States

**Robert SWAIN, Petitioner,**

**v.**

**STATE OF ALABAMA.**

No. 64.

Argued Dec. 8, 1964.Decided March 8, **1965**.

**Synopsis**

Defendant was convicted, in the Circuit Court, Talladega County, for rape, and he appealed. The [**Alabama** Supreme Court, 275 **Ala**. 508, 156 So.2d 368,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1963131488&pubNum=735&originatingDoc=I0a41058b9bf011d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed, and certiorari was granted. The Supreme Court, Mr. Justice White, held that since defense counsel also participate in peremptory challenge process mere showing that Negroes have not served during specified period of time does not, absent sufficient showing of prosecutors' participation, give rise to inference of systematic discrimination on part of State by exercise of peremptory challenges.

Affirmed.

Mr. Justice Goldberg, the Chief Justice, and Mr. Justice Douglas dissented.

# Peña-Rodriguez v. Colorado

#### United States Supreme Court 137 S. Ct. 855 (2017)

#### Rule of Law

**If a juror makes a clear statement showing reliance on racial bias or animus to convict a defendant, an exception to the no-impeachment rule allows jurors to testify about jury deliberations to determine whether racial bias deprived the defendant of an impartial jury.**

**Marks v. United States**

97 S.Ct. 990

Supreme Court of the **United** **States**

**Stanley MARKS et al., Petitioners**

**v.**

**UNITED STATES.**

No. 75-708.

Argued Nov. 1-2, 1976.Decided March 1, **1977**.

## Synopsis

Defendants were convicted in the **United** **States** District Court for the Eastern District of Kentucky, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I9cab5ed0550e11d9bf30d7fdf51b6bd4&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=4e7db442038c47d5b2f7f8389555fc8f&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[364 F.Supp. 1022,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1973106686&pubNum=345&originatingDoc=Ic1e1e87c9c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) of, inter alia, transporting obscene materials in violation of a federal statute and the Court of Appeals for the Sixth Circuit, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ib5955596909511d98e8fb00d6c6a02dd&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=4e7db442038c47d5b2f7f8389555fc8f&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[520 F.2d 913,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1975111935&pubNum=350&originatingDoc=Ic1e1e87c9c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed. Defendants' petition for writ of certiorari was granted. The Supreme Court, Mr. Justice Powell, held that the due process clause of the Fifth Amendment precluded retroactive application of the standards articulated in Miller v. California for isolating hard core pornography from expression protected by the First Amendment, to the extent that those standards imposed criminal liability for conduct not punishable under the standards announced in Memoirs v. Massachusetts and thus, defendants were entitled to jury instructions requiring the jury to acquit unless it found that the materials involved were utterly without redeeming social value; however, any constitutional principle announced in Miller that would serve to benefit defendants had to be applied in their case.

Reversed and remanded.

Mr. Justice Brennan filed an opinion concurring in part and dissenting in part in which Mr. Justice Stewart and Mr. Justice Marshall joined.

Mr. Justice Stevens filed an opinion concurring in part and dissenting in part.

**Williams v. Florida**

#### United States Supreme Court 399 U.S. 78 (1970)

**Rule of Law**

**(1) Requiring a criminal defendant to give notice of an alibi defense and disclose his alibi witnesses to the state prior to trial does not violate the Fifth and Fourteenth Amendments.**

**(2) The Sixth Amendment does not require trial by a jury of exactly 12 people.**

# Taylor v. Louisiana

#### United States Supreme Court 419 U.S. 522 (1975)

#### Rule of Law

**The Sixth and Fourteenth Amendments demand that venires, panels and lists from which petit juries are drawn represent a fair cross section of the community.**

# \*\*SINGER v. UNITED STATES\*\*

#### United States Supreme Court 380 U.S. 24 (1965)

#### Rule of Law

**A criminal defendant does not have a constitutional right to waive the right to a jury trial in favor of a bench trial.**

#### Facts

Singer (defendant) was charged by the United States government (plaintiff) in federal district court with 30 counts of mail fraud. At the start of the scheduled jury trial, Singer offered to waive his right to a jury trial in order to save time. Rule 23(a) of the Federal Rules of Criminal Procedure (FRCP) allows a defendant to waive the right to a jury trial with the approval of the court and the consent of the government. The trial court was willing to approve the waiver, but the government refused to consent. Singer was convicted by a jury on 29 of the 30 counts. Singer appealed, challenging FRCP 23(a) on the basis that Article III, Section 2 of the United States Constitution and the Sixth Amendment guarantee not only the right to trial by jury, but also the right to waive a jury trial in favor of a judge trial. The court of appeals affirmed. The United States Supreme Court granted certiorari.

#### Issue

Does a criminal defendant have a constitutional right to waive the right to a jury trial in favor of a bench trial?

#### Holding and Reasoning (Warren, C.J.)

No. Nothing in the common law or the United States Constitution grants a defendant the absolute right to demand a bench trial when a jury trial is required by law. Prior to the drafting of the United States Constitution, English common law gave no indication that a defendant had the right to demand a judge trial. Although some American colonies permitted a defendant to waive the jury-trial right, there was no general recognition by the colonies of the right to be tried by a judge instead of a jury. Article III, Section 2 of the U.S. Constitution directs that trials of all crimes shall be by jury. The intent of the framers of the U.S. Constitution was to protect defendants from government oppression, which is perhaps why there is no mention of a right to waive the jury-trial requirement. This Court examined Article III, Section 2 and the Sixth Amendment in *Patton v. United States*, 281 U.S. 276 (1930), and determined that the defendants in federal cases could waive the jury-trial right, but only with the consent of the government and the approval of the court. The only trial right guaranteed by the Constitution is the right to a trial by an impartial jury. Requiring the consent of the government for a jury waiver is proper, because the government also has an interest in trying cases by the method that the Constitution directs is most fair. The result of a lack of consent or court approval is a trial by an impartial jury, which the Constitution guarantees. FRCP 23(a) is constitutional, because requiring a jury trial against the wishes of a defendant does not violate fair-trial or due-process rights. The government is not compelled to provide any reason for failure to consent to a jury waiver under FRCP 23(a). There may be a future case where a defendant presents a compelling reason to demand a judge trial where a jury trial is required. In this case, however, Singer failed to demand a judge trial and only requested the waiver to save time. This is not a compelling reason to require a judge trial. Accordingly, the judgment of the court of appeals is affirmed.

**Key Terms:**

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

**Right to a Jury Trial -** A constitutional right to a jury trial exists under the Sixth Amendment, in federal and state criminal trials where a defendant faces punishment of greater than six months’ imprisonment, and under the Seventh Amendment, in federal civil cases where a plaintiff seeks money damages.

# Article II, Section 2, Clause 3 of the United States Constitution - Directs that the trial of all federal crimes, except impeachment, shall be by jury.

# Patton v. United States

50 S.Ct. 253

Supreme Court of the **United** **States**.

**PATTON et al.**

**v.**

**UNITED STATES.**

No. 53.

Argued Feb. 25, **1930**.Decided April 14, **1930**.

## Synopsis

On Certificate from the **United** **States** Circuit Court of Appeals for the Eighth Circuit.

John **Patton** and others were convicted on a charge of conspiracy to bribe a federal prohibition agent, and they appealed to the Circuit Court of Appeals, which certified a question to the Supreme Court ([30 F.(2d) 1015)](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1929200467&pubNum=350&originatingDoc=I2e21ffdc9ca411d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

Question answered.

# \*\*TAYLOR v. LOUISIANA\*\*

#### United States Supreme Court 419 U.S. 522 (1975)

#### Rule of Law

**The Sixth and Fourteenth Amendments demand that venires, panels and lists from which petit juries are drawn represent a fair cross section of the community.**

#### Facts

Taylor (defendant) was indicted for aggravated kidnapping. Taylor petitioned the trial court to squash the petit jury venire. At the time, Louisiana had a statute that excluded women from jury service unless she filed a written statement expressing that she wanted to be subject to jury service. In the relevant judicial district, 53 percent of the people eligible for jury service were women. Statistics indicate that very few women actually filed such written declarations and few women actually sat on juries. Taylor claimed that the systematic exclusion of women from the venire deprived him of his constitutional right to a jury constituting a fair cross-section of the community.

#### Issue

Does a statute that systematically excludes women from jury service violate the Sixth and Fourteenth Amendments?

#### Holding and Reasoning (White, J.)

Yes. The Sixth and Fourteenth Amendments demand that a jury be selected from a fair cross section of the community and a statute that systematically excludes women from jury service violates this requirement. The jury plays an important role in US society. It protects the defendant from the overzealous prosecutor and the potential bias of one individual, the judge. Furthermore, public involvement in the justice system contributes to public confidence in the system. A jury cannot effectively perform these important functions if large groups of the community are excluded. *Duncan v. Louisiana*, 391 U.S. 145 (1968), held that the Sixth Amendment jury requirement is incorporated to the states through the Fourteenth Amendment. Prior cases such as *Glasser v. United States*, 315 U.S. 60 (1942), and *Ballard v. United States*, 329 U.S. 187 (1946), make it clear that a jury must be drawn from a fair cross section of the community. Furthermore, federal legislation reflects the importance of the fair cross section requirement. Systematically excluding women from jury selection violates this fair cross section requirement. Women are distinct from men and must be included in order for the venire to be representative of the community. It is no longer an acceptable argument that women play such a distinctive role in society that it is a special hardship for all women to sit on a jury. Instead, the case by case analysis that is used with men can be used with women too. Therefore, the Louisiana statute is unconstitutional.

#### Dissent (Rehnquist, J.)

The Court fails to explain why the exclusion of women from the venire prevents a jury from carrying out its important societal function. It also fails to explain why the exclusion of women from a venire is different than the exclusion of other groups, such as lawyers and doctors, who are not expected to sit on a jury. Furthermore, the Court’s opinion is wholly unnecessary because Taylor never claims any prejudice or bias.

**Key Terms:**

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

**Petit Jury -** A trial jury that has the job of hearing testimony, seeing evidence, and using that information to determine issues of fact and reach conclusions about them, such as a verdict in a criminal case. Contrast with a grand jury, which investigates alleged crimes and indicts suspected criminals.

**Venire -** The group of prospective jurors that the jury is then chosen from.

# United States v. Ballard

#### United States Supreme Court 322 U.S. 78 (1944)

#### Rule of Law

**Under the First Amendment, the judiciary may only inquire into whether a person sincerely holds religious beliefs, not whether those beliefs are factual.**

#### Facts

Guy W. Ballard, his wife Edna W. Ballard, and their son Donald Ballard (defendants) were indicted and convicted by the United States government for using, and conspiring to use, the mails to defraud. The indictment charged a scheme to defraud by organizing and promoting the “I Am” religious movement through the mail. The Ballards solicited funds and membership in the I Am movement by making false claims about their supernatural abilities to heal ailments and diseases. The indictment also alleged that the Ballards knew these statements were false. At trial, the district court refused to submit to the jury any questions regarding the truth or falsity of the religious beliefs or doctrines of the Ballards. Rather, the jury was instructed to convict the Ballards if it found they did not have a sincere belief in their religious doctrines. The Ballards were convicted, but the court of appeals reversed. The United States Supreme Court granted certiorari.

#### Issue

Whether, under the First Amendment, an indictment for fraud can question the truth of defendants’ religious beliefs.

#### Holding and Reasoning (Douglas, J.)

No. The First Amendment prohibits inquiring into the truth or reasonableness of a particular religious belief. The First Amendment not only prevents the establishment of a particular religion, but also prohibits any governmental restriction on the free exercise of religion. Thus, the First Amendment embraces two concepts—freedom to believe and freedom to act. The freedom to believe is absolute, while the freedom to act is not. As part of showing the requisite respect for the freedom of individuals to believe, the judiciary may not attempt to establish the truth or reasonableness of a particular religious belief. Any conviction on these grounds could not be sustained. This same principle applies to protect the more “obscure” religious beliefs held by the Ballards. Thus, the district court ruled properly when it withheld from the jury all questions concerning the truth or falsity of the religious beliefs or doctrines of the Ballards.

#### Dissent (Jackson, J.)

The trial judge’s instruction to the jury that they could not inquire whether the statements by the Ballards were untrue, but could inquire whether defendants knew them to be untrue does not comport with the Constitution’s traditional notions of religious freedoms. Significant difficulty exists in attempting to separate the issue of what is believed from what is believable. Additionally, it is impossible for the government to prove the Ballards knew a belief to be false when the government itself cannot prove that these beliefs were false. For the court to engage in such an inquiry in the judicial process raises a profound threat of religious persecution of individuals such as the Ballards. Thus, the indictment should be dismissed and the business of judicial review of other people’s faiths should be avoided entirely.

**Key Terms:**

**Establishment Clause -** The provision of the First Amendment of the United States Constitution that prohibits the government from making laws that establish or favor a religion, or no religion.

**Free Exercise Clause -** The accompanying clause with the Establishment Clause of the First Amendment to the United States Constitution which states, in part, “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof.”

**Hoyt v. Florida**

81 S.Ct. 382

Supreme Court of the United States

**Gwendolyn HOYT, appellant,**

**v.**

**STATE OF FLORIDA.**

No. 126, Misc.

January 9, 1961

## Synopsis

Appeal from the Supreme Court of Florida.

Facts and opinion, [Fla., 119 So.2d 691](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1960127812&pubNum=735&originatingDoc=I6554ad749be311d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

## Attorneys and Law Firms

Herbert B. Ehrmann and C. J. Hardee, Jr., for appellant.

Richard W. Ervin, Atty. Gen. of Florida, and George R. Georgieff, Asst. Atty. Gen., for appellee.

## Opinion

The motion for leave to proceed iin forma pauperis is granted. In this case probable jurisdiction is noted. The case is transferred to the appellate docket and placed on the summary calendar.

# \*\*TURNER v. MURRAY\*\*

#### United States Supreme Court 476 U.S. 28 (1986)

#### Rule of Law

**A capital defendant charged with an interracial crime is entitled to have potential jurors informed of the victim’s race and asked about racial bias during *voir dire*.**

#### Facts

Willie Turner (defendant) attempted to rob a jewelry store in Virginia. Turner demanded that the owner, W. Jack Smith, place money and jewelry into bags. Smith obeyed but triggered a silent alarm. When an officer arrived, Turner acquired the officer’s gun and shot and killed Smith. A grand jury indicted Turner on charges of capital murder. Turner proposed *voir dire* questions to the trial judge, including one question asking whether the fact that Turner was black and Smith was white affected the jury’s ability to make an impartial decision in the case. The judge rejected the question, and the jurors during *voir dire*remained unaware that Smith was white. The jury convicted Turner. In order to consider the death penalty under Virginia law, the jury was required to find that Turner was likely to commit future violent crimes or that Turner’s crime involved an outrageous depravity of mind. The jury was also required to consider any mitigating evidence offered by Turner. After the capital-sentencing hearing, during which Turner presented evidence of mental disturbance as a mitigating factor, the jury recommended the death penalty. Turner appealed the sentence, arguing that the trial judge had violated his constitutional right to a fair and impartial jury by declining to ask the proposed question during *voir dire*. The court disagreed with Turner, citing the United States Supreme Court’s decision in *Ristaino v. Ross*, 424 U.S. 589 (1976), which stated that a trial judge’s refusal to question jurors about potential racial biases was not unconstitutional unless there were special circumstances present. Turner petitioned for federal habeas corpus. The district court denied the petition, and the Court of Appeals for the Fourth Circuit affirmed.

#### Issue

Is a capital defendant charged with an interracial crime entitled to have potential jurors informed of the victim’s race and asked about racial bias during *voir dire*?

#### Holding and Reasoning (White, J.)

Yes. A capital defendant charged with an interracial crime is entitled to have potential jurors informed of the victim’s race and asked about racial bias during *voir dire*. Capital cases present special circumstances warranting questions on the issue of racial bias during *voir dire*. Under *Ristaino*, the simple fact that a defendant and a victim are of different races is not a special factor. However, capital cases present a unique situation, because the jury in such cases must make a very subjective individualized decision about whether the particular defendant deserves to be put to death. Because of this broad discretion, there is a special concern that racial prejudice may be present but go unnoticed. Therefore, a capital defendant involved in an interracial offense must have a chance to question prospective jurors about racial biases during *voir dire*. Here, a juror who had preconceptions about black individuals being violent may have unfairly factored this belief into his or her decision of whether Turner’s crime involved any aggravating factors. Such a juror may have also been less receptive to Turner’s evidence and may have preferred the death penalty due to subconscious bias. Because the *voir dire* in this case was constitutionally deficient, Turner’s death sentence should be vacated. However, Turner is not entitled to a new trial on the issue of guilt, because the special factors present in the sentencing phase were not present in the guilt phase. Accordingly, the judgment of the court of appeals is reversed, and the case is remanded.

#### Concurrence/Dissent (Brennan, J.)

A racially biased juror cannot fairly make a determination during the guilt phase of a trial or during a capital-sentencing proceeding. Therefore, both Turner’s death sentence and conviction should be reversed to guarantee Turner’s constitutional right to an impartial jury.

#### Dissent (Powell, J.)

[Information not provided in casebook excerpt.]

#### Dissent (Marshall, J.)

[Information not provided in casebook excerpt.]

**Key Terms:**

**Voir Dire** - French meaning “to speak the truth,” the process by which the judge or an attorney questions a potential juror to assess the person’s suitability for sitting on the jury. Voir dire also may be used to qualify a witness as an expert during trial, or to explore certain aspects of a witness’s testimony out of the jury’s presence.

**Right to Trial by Jury Clause** - Guarantee contained in the Sixth Amendment that any criminal defendant is entitled to have his case heard by an unbiased, local jury.

# Ristaino v. Ross

#### United States Supreme Court 424 U.S. 589 (1976)

#### Rule of Law

**Constitutional due process does not require that prospective jurors in a case be questioned concerning their possible racial prejudice.**

#### Facts

The African-American Ross (defendant) was charged with having committed violent acts against a white security guard. During *voir dire*, he wanted the trial court to ask questions designed to elicit possible prejudice on the part of the potential jurors. The court refused and this decision was affirmed on appeal. The United States Supreme Court was reviewing a decision by the federal court of appeals that granted habeas corpus relief on the basis of *Ham v. South Carolina*, 409 U.S. 524 (1973), holding that due process required a judge to investigate possible racial prejudice in potential jurors.

#### Issue

Does constitutional due process require that prospective jurors in a case be questioned concerning their possible racial prejudice?

#### Holding and Reasoning (Powell, J.)

No. Constitutional due process does not require that prospective jurors in a case be questioned concerning their possible racial prejudice. In *Ham*, we recognized that certain cases may demand inquiry into jurors’ possible prejudice. In that case, for example, an African-American civil rights activist claimed that he was being unfairly “framed” by law enforcement for possession of marijuana. Racial issues were inextricably associated with that trial, for the defendant was a crusader for the rights of black Americans and enjoyed a certain reputation in his community. The facts of that case also suggested that racial animus might intensify during the trial. The circumstances in *Ham* thus required the need to look into jurors’ potential racial prejudice. In *Ham*, we did not, however, announce a general rule that is to be applied in all cases. The circumstances requiring specific questions directed to prejudice in *Ham* are simply not present in this case. The fact that the security guard was white and the defendant black is not enough to suggest that potential racial animus might be present. Nor does the fact that the victim was a security guard necessarily require the same probing questions as in *Ham*. In short, we do not find that possible racial prejudice might distort the outcome in this case, as it might have in *Ham*. Ross himself could not indicate possible racial facts that might play a damaging role in the trial. We feel that the trial court judge acted responsibly and within the Constitution by allowing general questions during *voir dire*. For this reason, we reverse the court of appeals’ affirmance of the writ of habeas corpus.

#### Dissent (Marshall, J.)

The court today does harm to the promises it made in *Ham*, and for that reason I dissent.

**Key Terms:**

**Voir Dire** - French meaning “to speak the truth,” the process by which the judge or an attorney questions a potential juror to assess the person’s suitability for sitting on the jury. Voir dire also may be used to qualify a witness as an expert during trial, or to explore certain aspects of a witness’s testimony out of the jury’s presence.

# Ham v. South Carolina

#### United States Supreme Court 409 U.S. 524 (1973)

#### Rule of Law

**When the defendant makes a timely request, a judge must interrogate potential jurors about any racial prejudice they may harbor.**

#### Facts

Ham (defendant) was convicted of marijuana possession. Ham was a bearded African American and worked as a civil rights activist. At his trial, Ham argued that the police were out to get him and that he had been framed for the drug charge. Before trial, Ham requested that during voir dire the judge ask the potential jurors two questions inquiring into whether they had any prejudice against African Americans, and one question inquiring into any prejudice they may have against people with beards. The trial judge denied the request and asked the potential jurors three general questions about biases or prejudices they may hold. Ham claims that in so doing, the trial court violated his constitutional rights. The state supreme court disagreed with Ham. The United States Supreme Court granted certiorari.

#### Issue

Are a defendant’s rights violated where the judge fails to question potential jurors as to possible racial prejudices they may have?

#### Holding and Reasoning (Rehnquist, J.)

Yes. Precedence and the purpose and language of the Fourteenth Amendment require an inquiry into possible racial prejudices held by potential jurors. Relying on precedent, *Aldridge v. United States*, 283 U.S. 308 (1931), held that the essential demands of fairness require a judge to question potential jurors about racial prejudice when the defendant makes such a request. Furthermore, the purpose of the Due Process Clause of the Fourteenth Amendment was twofold. First, it was intended to ensure these “essential demands of fairness.” And second, it was intended to prohibit states from discriminating on the basis of race. Therefore, the Fourteenth Amendment demands that the judge in this case question potential jurors about racial prejudice. The judge failed to do so and the judgment of the state supreme court must therefore be reversed.

#### Concurrence/Dissent (Douglas, J.)

The Court is right to hold the judge had a constitutional obligation to inquire into racial prejudice on voir dire. However, the Court is wrong to reason that prejudice against people with beards cannot be distinguished from the many similar prejudices that jurors may harbor. The Court should have recognized a constitutional violation where the judge failed to ask the jurors about prejudice against beards.

**Key Terms:**

**Voir Dire** - French meaning “to speak the truth,” the process by which the judge or an attorney questions a potential juror to assess the person’s suitability for sitting on the jury. Voir dire also may be used to qualify a witness as an expert during trial, or to explore certain aspects of a witness’s testimony out of the jury’s presence.

# \*\*LOCKHART v. MCCREE\*\*

#### United States Supreme Court 476 U.S. 162 (1986)

#### Rule of Law

**The Constitution does not prohibit removing for cause prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of the trial.**

#### Facts

McCree (defendant) was charged with capital felony murder. During voir dire, the trial court removed, over McCree’s objection, prospective jurors who stated that they were opposed to the death penalty and could not vote in favor of imposing it. McCree was convicted. The jury chose not to impose the death penalty and sentenced McCree to life in prison. The court of appeals affirmed the conviction. McCree filed a petition for habeas corpus, claiming that the trial court’s removal of prospective jurors who opposed the death penalty violated his constitutional right to a trial by an impartial jury. The district court granted McCree’s petition. The United States Court of Appeals for the Eighth Circuit affirmed. The United States Supreme Court granted certiorari.

#### Issue

Does the Constitution prohibit removing for cause prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of the trial?

#### Holding and Reasoning (Rehnquist, J.)

No. The Constitution does not prohibit the removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of the trial. The district court’s finding in this case that removal of anti-death-penalty prospective jurors resulted in juries more apt to convict was based on flawed evidence. Nevertheless, even if the evidence was valid, the removals were still constitutional. A defendant is entitled under the Sixth Amendment to a jury that represents a fair cross-section of the community, but the lower courts often seek to apply that requirement too broadly. The government, just as the defendant, is entitled to a certain number of juror removals for cause and peremptory challenges during voir dire. The fair-cross-section requirement generally does not invalidate these removals and challenges. Indeed, adopting a requirement that every petit jury reflect a fair cross-section of the community would be unworkable. However, even if the fair-cross-section requirement did extend to petit juries, the removals in this case would not violate the requirement. The fair-cross-section requirement exists to prevent the intentional exclusion of a distinctive group of people, such as African Americans or women. Defining characteristics of such groups are unrelated to their members’ ability to be impartial jurors and are not within their control. In contrast, individuals who oppose the death penalty to such an extent that they could not impartially impose the penalty do not comprise such a distinctive group. The government seeks to exclude these individuals as a means to constitute an impartial jury, not as a means to exclude these individuals because of their death-penalty viewpoint, per se. Additionally, in this case, it is important that the exclusion of the jurors at issue occurred prior to the guilt phase of trial. The exclusion thus was not specifically geared toward sentencing but was related to the jury’s traditional role of pre-guilt phase fact-finding. In conclusion, the trial court’s removal of anti-death-penalty prospective jurors did not violate McCree’s constitutional right to a trial by an impartial jury. The judgment of the court of appeals is reversed.

#### Dissent (Marshall, J.)

The removal for cause of prospective jurors that would not impose the death penalty results in a jury that is statistically more likely to convict. Statistics also reveal that such removal results in juries that are composed of proportionally less African Americans and women. The overall result is an advantage for the prosecution in the guilt phase of capital trials. This advantage violates a defendant’s right to a fair trial before an impartial jury.

**Key Terms:**

**Right to a Jury Trial -** A constitutional right to a jury trial exists under the Sixth Amendment, in federal and state criminal trials where a defendant faces punishment of greater than six months’ imprisonment, and under the Seventh Amendment, in federal civil cases where a plaintiff seeks money damages.

**Voir Dire** - French meaning “to speak the truth,” the process by which the judge or an attorney questions a potential juror to assess the person’s suitability for sitting on the jury. Voir dire also may be used to qualify a witness as an expert during trial, or to explore certain aspects of a witness’s testimony out of the jury’s presence.

**Petit Jury -** A trial jury that has the job of hearing testimony, seeing evidence, and using that information to determine issues of fact and reach conclusions about them, such as a verdict in a criminal case. Contrast with a grand jury, which investigates alleged crimes and indicts suspected criminals.

# Witherspoon v. Illinois

#### United States Supreme Court 391 U.S. 510 (1968)

#### Rule of Law

**Courts may not exclude jurors solely because of conscientious objections to the death penalty.**

#### Facts

Witherspoon (defendant) was prosecuted for capital murder. At the time, an Illinois statute allowed the prosecution (plaintiff) to challenge for cause “any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same.” That gave the prosecution unlimited challenges against jurors who expressed any reservations about the death penalty. Early in the jury selection process, the judge said, “Let’s get these conscientious objectors out of the way, without wasting any time on them.” The prosecution eliminated nearly half the prospective jurors as a result, with 47 removed in rapid succession solely because of their views on the death penalty. Only five of those explicitly stated they could never impose it. Six said they did not believe in the death penalty but were not asked whether they could nonetheless impose it before the judge removed them. The judge questioned at length only one juror, who twice said she would not “like to be responsible” for putting someone to death before the judge told her to “step aside.” The resulting jury convicted Witherspoon and sentenced him to death. The Illinois courts denied post-conviction relief, but the Supreme Court granted review.

#### Issue

May courts exclude jurors solely because of conscientious objections to the death penalty?

#### Holding and Reasoning (Stewart, J.)

No. Courts may not exclude jurors solely because of conscientious objections to the death penalty. The Sixth and Fourteenth Amendments protect the right to trial by impartial jury. A juror opposed to the death penalty is just as able to decide whether it is the proper sentence in a particular case as one who favors it. But a jury composed exclusively of jurors who favor the death penalty cannot. A jury must represent the community’s conscience when deciding between life or death. Less than half of Americans believe in the death penalty. That means a hanging jury of only those who favor it represents a dwindling minority. If the prosecution removed only those jurors who said they could not make an impartial decision because of their views on the death penalty, or who would not even consider it, the resulting jury might arguably be neutral. But removing anyone with religious, conscientious, or principled objections to the death penalty left a jury uncommonly willing to impose it. Prior Supreme Court cases recognize that states may not entrust determining guilt or innocence to tribunals organized to convict. Therefore, a state may not entrust that determination to juries organized to return a death sentence. Imposing the death penalty by a hanging jury is unconstitutional. Here, Witherspoon did not successfully show using statistics that a jury not opposed to the death penalty is necessarily more likely to convict. However, the procedure the trial court used left a jury unusually likely to sentence him to death. Therefore, executing Witherspoon would deprive him of life without due process of law. The Court accordingly reverses Witherspoon’s sentence.

#### Concurrence/Dissent (Douglas, J.)

The right to an impartial jury means a jury that represents a cross-section of the community. Excluding those opposed to the death penalty eliminates a significant section. Drawing a distinction between those who opposed the death penalty but are nonetheless able to impose it, and those who cannot, makes no sense. The accused should have the benefit of more lenient and merciful views in the community. Witherspoon did not have an impartial jury. The Court should reverse his conviction as well as his sentence.

#### Dissent (White, J.)

The basis of the majority’s reasoning is infirm. Legislatures may impose certain penalties, including death, on all people convicted of certain crimes. The Illinois legislature has decided that penalty should be imposed by a group of people that does not include those with conscientious or religious objections to the death penalty. Otherwise, juries would virtually never impose it. The people of Illinois, represented by its legislature, have enacted a law to make the death penalty possible. The court should restrain its dislike for capital punishment and leave those decisions up to the legislatures with authority over them.

#### Dissent (Black, J.)

Witherspoon shot and killed a police officer. He had competent defense counsel, who still had three peremptory strikes left to challenge jurors when the judge empaneled the jury. Another competent attorney represented him on appeal but never alleged the jury was impartial. The Illinois statute allowing removal of those with conscientious or religious scruples against the death penalty is designed to identify those unlikely to ever impose it, because having scruples is connoted with having deep personal or religious convictions. It does not necessarily make someone less likely to convict. The majority draws a semantic distinction between those who conscientiously object to the death penalty and those who would automatically reject it in any case. The constitution requires impartial juries. Forcing courts to accept biased jurors, regardless of the source or type of bias, violates that mandate.

**Key Terms:**

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

**Fourteenth Amendment Due Process** **Clause** - The provision set forth at Amendment XIV, Section 1 of the United States Constitution prohibiting states from depriving any person of life, liberty, or property by means that are arbitrary or fundamentally unfair.

**Capital Punishment -** Punishment of death imposed by the government for a serious crime.

**Gray v. Mississippi**

107 S.Ct. 2045

Supreme Court of the United States

**David Randolph GRAY, Petitioner**

**v.**

**MISSISSIPPI.**

No. 85-5454.

Argued Nov. 12, 1986.Decided May 18, 1987.

## Synopsis

Defendant was convicted in the Circuit Court, Harrison County, Mississippi, of capital murder and sentenced to death, and he appealed. The [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ia81c19600eba11d998cacb08b39c0d39&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[Mississippi Supreme Court, 472 So.2d 409,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985131682&pubNum=735&originatingDoc=Id4c2ef789c1d11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed, and defendant petitioned for certiorari. The Supreme Court, Justice Blackmun, held that exclusion of juror for cause, in capital prosecution, who was not irrevocably committed to vote against death penalty regardless of facts and circumstances that might emerge in course of proceedings, was reversible constitutional error which could not be subjected to harmless-error review.

Reversed in part and remanded.

Justice Powell filed opinion concurring in part and concurring in judgment.

Justice Scalia dissented and filed opinion in which Chief Justice Rehnquist, and Justices White and O'Connor, joined.

**Davis v. Georgia**

97 S.Ct. 399

Supreme Court of the United States

**Curfew DAVIS**

**v.**

**State of GEORGIA.**

No. 76-5403.

Dec. 6, 1976.

**Synopsis**

Defendant was convicted before the Superior Court, Troup County, of murder and sentenced to death, and he appealed. The Supreme Court of [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I6a8e452704a311da9439b076ef9ec4de&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[Georgia, 236 Ga. 804, 225 S.E.2d 241,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1976144022&pubNum=711&originatingDoc=Ic83d2a809be811d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed. On petition for certiorari, the Supreme Court of the United States held that unless venireman is irrevocably committed before trial has begun to vote against death penalty regardless of facts and circumstances that might emerge in course of proceedings, he may not be excluded and, if venireman is improperly excluded even though not so committed, any subsequently imposed death penalty cannot stand.

Motion for leave to proceed in forma pauperis and petition for certiorari granted, judgment reversed and case remanded.

Mr. Justice Rehnquist, filed dissenting opinion in which Mr. Chief Justice Burger and Mr. Justice Blackmun joined.

Opinions following remand, [238 Ga. 295, 232 S.E.2d 565,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977113639&pubNum=711&originatingDoc=Ic83d2a809be811d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) and [247 S.E.2d 45](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1978132788&pubNum=711&originatingDoc=Ic83d2a809be811d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

**Morgan v. Illinois**

112 S.Ct. 2222

Supreme Court of the United States

**Derrick MORGAN, Petitioner**

**v.**

**ILLINOIS.**

No. 91-5118.

Argued Jan. 21, 1992.Decided June 15, 1992.

**Synopsis**

Defendant was convicted by a jury in the Circuit Court, Cook County, Arthur J. Cieslik, J., of murder, and was sentenced to death. On direct appeal, the Supreme Court, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I5d4cb902d45811d9a489ee624f1f6e1a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[142 Ill.2d 410, 154 Ill.Dec. 534, 568 N.E.2d 755,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991042704&pubNum=578&originatingDoc=I72e865f59c9a11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))affirmed. The defendant petitioned for certiorari. The Supreme Court, Justice [White](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0257944001&originatingDoc=I72e865f59c9a11d991d0cc6b54f12d4d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I72e865f59c9a11d991d0cc6b54f12d4d), held that: (1) due process required that jury undertaking capital sentencing must be impartial and indifferent; (2) capital defendant may challenge for cause any prospective juror who would automatically vote to impose death if defendant were convicted of capital offense; (3) on voir dire, trial court was required, at defendant's request, to inquire into prospective jurors' views on capital punishment to identify unqualified jurors, as part of the guarantee of defendant's right to impartial jury; (4) trial court's general fairness and “follow the law” questions were not enough to detect those in venire who would automatically impose death; and (5) jurors who are unalterably in favor of or opposed to the death penalty in every case are unable to follow the law, and should be disqualified.

Reversed and remanded.

Justice [Scalia](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254763301&originatingDoc=I72e865f59c9a11d991d0cc6b54f12d4d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I72e865f59c9a11d991d0cc6b54f12d4d) filed a dissenting opinion in which Chief Justice [Rehnquist](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0238463201&originatingDoc=I72e865f59c9a11d991d0cc6b54f12d4d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I72e865f59c9a11d991d0cc6b54f12d4d) and Justice [Thomas](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I72e865f59c9a11d991d0cc6b54f12d4d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I72e865f59c9a11d991d0cc6b54f12d4d) joined.

# Taylor v. Louisiana

#### United States Supreme Court 419 U.S. 522 (1975)

#### Rule of Law

**The Sixth and Fourteenth Amendments demand that venires, panels and lists from which petit juries are drawn represent a fair cross section of the community.**

**Uttecht v. Brown**

127 S.Ct. 2218

Supreme Court of the United States

**Jeffrey UTTECHT, Superintendent, Washington State Penitentiary, Petitioner,**

**v.**

**Cal Coburn BROWN.**

No. 06–413.

Argued April 17, 2007.Decided June 4, 2007.

**Synopsis**

**Background:** Following affirmance on appeal of defendant's state conviction for aggravated murder in the first degree and imposition of the death penalty, [132 Wash.2d 529, 940 P.2d 546,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997156009&pubNum=661&originatingDoc=I71a57397125911dc962ef0ed15906072&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) defendant filed petition for writ of habeas corpus. The United States District Court for the Western District of Washington, [John C. Coughenour](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0172015901&originatingDoc=I71a57397125911dc962ef0ed15906072&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I71a57397125911dc962ef0ed15906072), Chief Judge, denied petition, and appeal was taken. The Court of Appeals for the Ninth Circuit, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I62d32446ffbc11daaaf9821ce89a3430&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[451 F.3d 946,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2009383397&pubNum=506&originatingDoc=I71a57397125911dc962ef0ed15906072&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) reversed and remanded. State petitioned for certiorari which was granted.

**Holdings:** The Supreme Court, Justice [Kennedy](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0243105201&originatingDoc=I71a57397125911dc962ef0ed15906072&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I71a57397125911dc962ef0ed15906072), held that:

[1](https://1.next.westlaw.com/Document/I71a57397125911dc962ef0ed15906072/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_anchor_F52012395952) there is no requirement in a case involving the [*Witherspoon*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1968131210&originatingDoc=I71a57397125911dc962ef0ed15906072&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))*–*[*Witt*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985104035&originatingDoc=I71a57397125911dc962ef0ed15906072&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) rule regarding excusal for cause of a juror who is substantially impaired in the ability to impose the death penalty under a state-law framework that a state appellate court make particular reference to the excusal of each juror, and

[2](https://1.next.westlaw.com/Document/I71a57397125911dc962ef0ed15906072/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_anchor_F62012395952) state trial court acted well within its discretion in granting state's motion to excuse juror for cause on ground he could not be impartial in deciding whether to impose a death sentence.

Reversed and remanded.

Justice [Stevens](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0156277701&originatingDoc=I71a57397125911dc962ef0ed15906072&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I71a57397125911dc962ef0ed15906072) filed a dissenting opinion in which Justices [Souter](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0263202201&originatingDoc=I71a57397125911dc962ef0ed15906072&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I71a57397125911dc962ef0ed15906072), [Ginsburg](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I71a57397125911dc962ef0ed15906072&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I71a57397125911dc962ef0ed15906072), and [Breyer](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I71a57397125911dc962ef0ed15906072&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I71a57397125911dc962ef0ed15906072) joined.

Justice [Breyer](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I71a57397125911dc962ef0ed15906072&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I71a57397125911dc962ef0ed15906072) filed dissenting opinion in which Justice [Souter](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0263202201&originatingDoc=I71a57397125911dc962ef0ed15906072&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I71a57397125911dc962ef0ed15906072) joined

**Adams v. Texas**

100 S.Ct. 2521

Supreme Court of the United States

**Randall Dale ADAMS, Petitioner,**

**v.**

**State of TEXAS.**

No. 79-5175.

Argued March 24, 1980.Decided June 25, 1980.

**Synopsis**

Defendant was convicted in Criminal District Court, No. 2, Dallas County, Texas, of capital murder, and he appealed. The Court of Criminal Appeals of [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ia98f31d7ec6b11d983e7e9deff98dc6f&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[Texas, 577 S.W.2d 717,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979106707&pubNum=713&originatingDoc=Ic1d4c9039c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed, and certiorari was granted. The Supreme Court, Mr. Justice White, held that: (1) *Witherspoon* doctrine, limiting state's power to exclude jurors based on views concerning death penalty, is applicable to bifurcated procedure employed by Texas in capital cases whereby jury considers punishment in the subsequent penalty proceeding after finding defendant guilty and merely gives answers to statutory questions which in turn determine the sentence pronounced by the trial judge; (2) *Witherspoon*and Texas statute under which prospective juror is disqualified unless he states under oath that mandatory penalty of death or imprisonment for life “will not affect his deliberations on any issue of fact” cannot coexist as separate and independent bases for excluding jurors insofar as the statute is used to exclude jurors on broader grounds than permitted by *Witherspoon* ; and (3) exclusion of jurors in the instant case was impermissible where statutory test could, and did, exclude jurors who stated that they would be “affected” by possibility of death penalty but who apparently meant only that the potentially lethal consequences of their decision would invest their deliberations with greater seriousness and gravity or would involve them emotionally, or who were unable positively to state whether or not their deliberations would be in any way “affected.”

Judgment of Texas Court of Criminal Appeals reversed to extent that it sustained imposition of death penalty.

Mr. Chief Justice Burger concurred in the judgment.

Mr. Justice Brennan filed a concurring opinion.

Mr. Justice Marshall filed opinion concurring in the judgment.

Mr. Justice Rehnquist filed a dissenting opinion.

Opinion after remand, [624 S.W.2d 568](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981141363&pubNum=713&originatingDoc=Ic1d4c9039c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

# \*\*BATSON v. KENTUCKY\*\*

#### United States Supreme Court 476 U.S. 79 (1986)

#### Rule of Law

**The Equal Protection Clause of the Fourteenth Amendment prohibits prosecutors from using peremptory challenges to remove prospective jurors based on their race.**

#### Facts

James Batson (defendant), an African American, was indicted for burglary and receipt of stolen goods. During voir dire, the prosecutor used his peremptory challenges to strike all the African Americans on the venire. As a result, the jury was made up entirely of white jurors. Batson moved to discharge the jury before it was sworn, claiming that the removal of all the African Americans violated his rights under the Equal Protection Clause of the Fourteenth Amendment. The trial judge denied the request, and Batson was convicted on both counts. The Kentucky Supreme Court affirmed Batson's conviction, and the United States Supreme Court granted certiorari.

#### Issue

Does the Equal Protection Clause of the Fourteenth Amendment prohibit prosecutors from using peremptory challenges to remove prospective jurors based on their race?

#### Holding and Reasoning (Powell, J.)

Yes. The Equal Protection Clause is violated where the prosecution excludes African American veniremen from the jury based on nothing more than a presumed bias in favor of an African American defendant. Therefore, when the defendant makes a prima facie showing of discrimination during the peremptory challenge, the prosecution may be compelled to articulate a neutral explanation for why it challenges a particular veniremen. The right to peremptory challenges is not a constitutional one, so there is no real difficulty in limiting its reach. Furthermore, the holding in *Swain v. Alabama*, 380 U.S. 202 (1965), has already established that peremptory challenges are subject to the principles of equal protection. Cases since *Swain* have established the standard for proving a prima facie case of purposeful discrimination. First, the defendant must show that he is a member of a specific racial group and that the prosecution has exercised its peremptory challenges to remove the veniremen who are of the same racial group. Then the defendant may rely on the fact that peremptory challenges are a practice that allows people to discriminate. Finally, the defendant must show that in light of all the surrounding circumstances, the prosecutor used the practice to exclude veniremen on account of their race. This inquiry need only involve evidence of the prosecutor’s peremptory challenges at the defendant’s own trial and need not establish a pattern of racial discrimination in prior cases. Once the defendant makes this prima facie showing, the burden shifts to the prosecution to justify its challenges with a neutral explanation. In this case, Batson made a timely objection to the prosecutor’s use of peremptory challenges. The judge did not ask the prosecution to explain its objection, so the case must be remanded. Accordingly, the conviction is reversed.

#### Concurrence (Marshall, J.)

The Court’s holding is correct but is only a first step towards ending racial discrimination in jury selection. To accomplish this goal, peremptory challenges, for both the defense and the prosecution, must be eliminated entirely. The rule established by the Court is not sufficient to end discrimination because it enables defendants to challenge blatant examples of discrimination, but not the more subtle kinds. Furthermore, it is difficult for a court to assess a prosecutor’s motives and decide what neutral explanations are acceptable. Finally, the prosecutor or the judge could harbor conscious or unconscious racism. This could justify a seemingly neutral explanation for excluding a potential juror, but the objectionable characteristic could be something the prosecutor never would have noticed with a white venireman.

#### Concurrence (White, J.)

The practice of using peremptory challenges to exclude African Americans from juries in cases with African American defendants remains widespread, so the Court's decision correctly allows an inquiry into prosecutors' use of peremptory challenges. However, the Court's decision should not be given retroactive effect on criminal cases in which the trial began prior to the announcement of the decision.

#### Dissent (Burger, C.J.)

Peremptory challenges have been used as part of the jury process in this country for nearly 200 years, and they are part of a common-law tradition spanning several centuries. Despite that history, the Court has decided to set aside the use of peremptory challenges on equal-protection grounds, even though Batson expressly declined to make an equal-protection argument before the Kentucky Supreme Court or this Court. The state has a substantial, and perhaps even compelling, interest in using peremptory challenges to ensure the fairness of jury trials, and the Court is wrong to limit their use.

#### Dissent (Rehnquist, J.)

The Court misapplies the Equal Protection Clause because there is nothing unequal about the state excluding African Americans from jury when the defendant is African American. This technique is applied across the board and when a defendant falls into another group or class, the state excludes potential jurors having membership in that particular group. Group affiliations have long been recognized as a legitimate basis for exercising peremptory challenges.

**Key Terms:**

**Peremptory Challenge -** During voir dire, the defense and the prosecution may each reject a certain number of potential jurors without having to give any reason.

**Venire -** The group of prospective jurors that the jury is then chosen from.

**Swain v. Alabama**

85 S.Ct. 824

Supreme Court of the United States

**Robert SWAIN, Petitioner,**

**v.**

**STATE OF ALABAMA.**

No. 64.

Argued Dec. 8, 1964.Decided March 8, **1965**.

**Synopsis**

Defendant was convicted, in the Circuit Court, Talladega County, for rape, and he appealed. The [**Alabama** Supreme Court, 275 **Ala**. 508, 156 So.2d 368,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1963131488&pubNum=735&originatingDoc=I0a41058b9bf011d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed, and certiorari was granted. The Supreme Court, Mr. Justice White, held that since defense counsel also participate in peremptory challenge process mere showing that Negroes have not served during specified period of time does not, absent sufficient showing of prosecutors' participation, give rise to inference of systematic discrimination on part of State by exercise of peremptory challenges.

Affirmed.

Mr. Justice Goldberg, the Chief Justice, and Mr. Justice Douglas dissented.

**Holland v. Illinois**

110 S.Ct. 803

Supreme Court of the United States

**Daniel HOLLAND, Petitioner**

**v.**

**ILLINOIS.**

No. 88–5050.

Argued Oct. 11, 1989.Decided Jan. 22, 1990.Rehearing Denied March 19, 1990.See [494 U.S. 1050, 110 S.Ct. 1514](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&pubNum=708&cite=110SCT1514&originatingDoc=Ieeebfdd09c8f11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

**Synopsis**

Defendant was convicted in the Circuit Court, Cook County, [Edward M. Fiala, Jr.](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0164816301&originatingDoc=Ieeebfdd09c8f11d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ieeebfdd09c8f11d993e6d35cc61aab4a), J., of rape, deviate sexual assault, aggravated kidnapping, and armed robbery, and he appealed. The [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I8d43dc96d38b11d9bf60c1d57ebc853e&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[Illinois Appellate Court, 147 Ill.App.3d 323, 100 Ill.Dec. 868, 497 N.E.2d 1230,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986144279&pubNum=578&originatingDoc=Ieeebfdd09c8f11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) reversed and remanded, and state petitioned for leave to appeal. The Illinois Supreme Court, [Thomas J. Moran](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0273545701&originatingDoc=Ieeebfdd09c8f11d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ieeebfdd09c8f11d993e6d35cc61aab4a), J., [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I1959d019d34911d9bf60c1d57ebc853e&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[121 Ill.2d 136, 117 Ill.Dec. 109, 520 N.E.2d 270,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1987159734&pubNum=578&originatingDoc=Ieeebfdd09c8f11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) reversed Appellate Court's decision and affirmed defendant's convictions, and defendant petitioned for certiorari. The Supreme Court, Justice [Scalia](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254763301&originatingDoc=Ieeebfdd09c8f11d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ieeebfdd09c8f11d993e6d35cc61aab4a) held that: (1) white defendant had standing to object, on “fair cross section” grounds, to prosecutor's use of peremptory challenges to exclude blacks from jury, but (2) Sixth Amendment's fair cross section requirement does not prevent either side from exercising its peremptory strikes in order to exclude cognizable racial or other groups from jury which is finally impaneled.

Affirmed.

Justice [Kennedy](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0243105201&originatingDoc=Ieeebfdd09c8f11d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ieeebfdd09c8f11d993e6d35cc61aab4a) concurred and filed opinion.

Justice [Marshall](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0336250901&originatingDoc=Ieeebfdd09c8f11d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ieeebfdd09c8f11d993e6d35cc61aab4a) dissented and filed opinion in which Justices Brennan and [Blackmun](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0264439801&originatingDoc=Ieeebfdd09c8f11d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ieeebfdd09c8f11d993e6d35cc61aab4a) joined.

Justice [Stevens](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0156277701&originatingDoc=Ieeebfdd09c8f11d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ieeebfdd09c8f11d993e6d35cc61aab4a) dissented and filed opinion.

**Post- Baton Developments:**

# Flowers v. Mississippi

#### United States Supreme Court 139 S. Ct. 2228 (2019)

#### Rule of Law

**Racially discriminatory peremptory strikes are unconstitutional.**

#### Facts

Curtis Flowers (defendant), who is Black, was tried six times for murders that took place in 1996. The first and second juries convicted, but the Mississippi Supreme Court reversed because of prosecutorial misconduct. During the third trial, the prosecutor used peremptory challenges to strike all Black prospective jurors, and the appellate court reversed for that reason. In the fourth and fifth trials, the prosecutor struck all but five and three Black jurors respectively, resulting in hung juries. In the sixth trial, in an evident attempt to find pretextual reasons to strike Black jurors, the prosecutor asked them dramatically more questions than White jurors and struck all but one Black juror. At least one struck prospective Black juror was similarly situated to White jurors who remained. The jury convicted, and Flowers appealed. All told, the prosecution used peremptory challenges to strike 41 of 42 Black prospective jurors it could have struck over six trials. But the Mississippi Supreme Court found nondiscriminatory grounds for the prosecution’s challenges and affirmed. Flowers appealed.

#### Issue

Are racially discriminatory peremptory strikes unconstitutional?

#### Holding and Reasoning (Kavanaugh, J.)

Yes. Racially discriminatory peremptory strikes are unconstitutional. The Supreme Court found selecting a jury in a racially discriminatory manner unconstitutional in *Batson v. Kentucky*, 476 U.S. 79 (1986). Under *Batson,*once the accused shows peremptory strikes used in an apparently racially discriminatory manner, the prosecution must offer race-neutral reasons to support them. Four *Batson* principles apply here. First, a party may show deliberate discrimination in jury selection based solely on the prosecution’s use of peremptory strikes at trial, without showing a history of discriminatory strikes. Second, a prosecutor may not challenge Black jurors based on the assumption that they would favor someone of the same race. Third, each prospective juror removed because of race is a constitutional violation, even if the prosecution removes all minorities equally. Fourth, the defense’s ability to remove jurors based on race does not effectively balance out the prosecution doing so, because in criminal cases the accused’s race is often a small minority of the population, meaning the prosecution may effectively remove all jurors of that race, but the defense cannot remove all White jurors. Courts evaluate a variety of factors to determine if a *Batson*violation occurred, including the proportions of minorities struck, disparate questioning, comparing White jurors who remained to minority jurors who were struck, and the prosecution’s history of and explanations for strikes. The trial court stands in the best position to determine whether attorneys use peremptory strikes in a discriminatory manner. Here, four factors weigh heavily toward finding a *Batson*violation: (1) Flowers’s six-trial history, (2) the prosecutor striking five of six Black potential jurors at the last trial, (3) dramatically disparate questioning depending on the prospective juror’s race, and (4) striking one Black prospective juror in a substantially similar situation as White jurors not struck. In sum, the prosecutor struck 41 of the 42 prospective Black jurors who could be struck over the course of six trials. The prosecutor allowed one Black juror to remain on the sixth jury, but the record suggests that may have been an attempt to obscure an otherwise consistent pattern of removing all Black jurors. The prosecution asked prospective Black jurors many more questions, evidently seeking pretextual reasons to discharge them. Moreover, the prosecution struck one Black juror with apparently discriminatory intent. Under those circumstances as a whole, the trial court erred in accepting the prosecution’s nondiscriminatory explanations for each strike. The Court accordingly reverses Flowers’s conviction and remands for further proceedings.

#### Concurrence (Alito, J.)

This case is highly unusual. In the sixth trial, the prosecution offered a reason for striking five of six prospective Black jurors that would be concerning and highly suspect in a larger jurisdiction. Considering all the circumstances together, Flowers’s conviction cannot stand.

#### Dissent (Thomas, J.)

The majority reverses Flowers’s conviction essentially because the prosecution struck one prospective Black juror who was like White jurors selected. Forty-nine of 50 other peremptory strikes in Flowers’s trials were arguably race-neutral. Flowers did not establish racial discrimination in jury selection for the sixth trial, and the first five trials are irrelevant. Equal protection principles should not apply to limit a party’s absolute discretion in striking individual jurors.

**Key Terms:**

**Peremptory Challenge -** During voir dire, the defense and the prosecution may each reject a certain number of potential jurors without having to give any reason.

**Peremptory Strike -** A party’s right to remove a potential juror without giving a reason. Each party normally has a specified number of peremptory strikes to use during jury selection and an unlimited number of challenges for cause which are used when the party believes the potential juror cannot be impartial.

**Batson Challenge** - A challenge to the other party’s use of peremptory challenges sanctioned in *Batson v. Kentucky*, 476 U.S. 79 (1986), whereby one party alleges that the other has used its peremptory challenges on the basis of race or some other prohibited, discriminatory factor. Once the party makes a prima facie showing of discrimination, the other party must articulate a nondiscriminatory reason for its peremptory challenges.

**Foster v. Chatman**

136 S.Ct. 1737

Supreme Court of the United States

**Timothy Tyrone FOSTER, Petitioner**

**v.**

**Bruce CHATMAN, Warden.**

No. 14–8349.

Argued Nov. 2, 2015.Decided May 23, 2016.

## Synopsis

**Background:** Following affirmance of his capital murder conviction and death sentence, [258 Ga. 736, 374 S.E.2d 188](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1988153131&pubNum=0000711&originatingDoc=If542d6ac209611e6b86bd602cb8781fa&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), petitioner sought state habeas relief. The Superior Court, Butts County, denied relief. Petitioner sought certificate of probable cause. The Georgia Supreme Court declined to issue certificate. Certiorari was granted.

**Holdings:** The Supreme Court, Chief Justice [Roberts](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0258116001&originatingDoc=If542d6ac209611e6b86bd602cb8781fa&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=If542d6ac209611e6b86bd602cb8781fa), held that:

[1](https://1.next.westlaw.com/Document/If542d6ac209611e6b86bd602cb8781fa/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_anchor_F42038892556) Georgia Supreme Court's order did not rest on adequate and independent state law ground, and

[2](https://1.next.westlaw.com/Document/If542d6ac209611e6b86bd602cb8781fa/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_anchor_F152038892556) strikes of two black prospective jurors violated petitioner's constitutional rights under Batson.

Reversed and remanded.

Justice [Alito](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=If542d6ac209611e6b86bd602cb8781fa&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=If542d6ac209611e6b86bd602cb8781fa) concurred in the judgment and filed opinion.

Justice [Thomas](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=If542d6ac209611e6b86bd602cb8781fa&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=If542d6ac209611e6b86bd602cb8781fa) dissented and filed opinion.

# Snyder v. Louisiana

#### United States Supreme Court 552 U.S. 472 (2008)

#### Rule of Law

**A peremptory strike based on race requires reversal of a conviction.**

#### Facts

Allen Snyder (defendant) was charged with first-degree murder. During jury selection, 5 of 36 prospective jurors were eliminated through the prosecution’s use of peremptory strikes. The prosecution used a peremptory strike against one prospective juror, Jeffrey Brooks, in part because the prosecution felt Brooks’ concern about missing school might make him choose a lesser verdict in order to avoid the penalty phase of the trial. The jury convicted Snyder of first-degree murder and sentenced him to death. Snyder appealed, arguing that the prosecution’s use of its peremptory strikes, including the strike against Brooks, was based on race. The Louisiana Supreme Court rejected his claim.

#### Issue

Does a peremptory strike based on race require reversal of a conviction?

#### Holding and Reasoning (Alito, J.)

Yes. Under *Batson v. Kentucky*, 476 U.S. 79 (1986), there is a three-part test to determine whether a peremptory challenge is race-based. The defendant must first make a prima facie case that the peremptory challenge was race-based. If the defendant makes that showing, the prosecution must show that there was a race-neutral reason for striking the juror. The trial court is then tasked with determining whether the defendant has demonstrated purposeful discrimination. Here, the prosecution’s peremptory strike of Brooks on grounds that he was too concerned about missing school is defective, as over 50 prospective jurors expressed similar concerns, at least one of whom expressed more pressing concerns than Brooks. Moreover, even if Brooks did favor a speedy resolution, he might as likely have favored a finding of first-degree murder if the other jurors were also inclined towards that finding. Because this Court can infer from the prosecution’s explanation for its peremptory strike that discriminatory intent existed, the judgment of the Louisiana Supreme Court is reversed, and the matter is remanded for further proceedings.

#### Dissent (Thomas, J.)

The Court improperly second-guesses the trial court’s credibility determinations rather than deferring to the trial court’s judgment.

**Key Terms:**

**Peremptory Strike -** A party’s right to remove a potential juror without giving a reason. Each party normally has a specified number of peremptory strikes to use during jury selection and an unlimited number of challenges for cause which are used when the party believes the potential juror cannot be impartial.

# Miller-El v. Dretke

#### United States Supreme Court  545 U.S. 231 (2005)

#### Rule of Law

**Even where a prosecutor accused of dismissing jurors based on race provides a race-neutral reason for his peremptory strikes, the court must grant a defendant relief where the evidence shows that the race-neutral reasons are pretextual.**

#### Facts

Miller-El was tried for capital murder. During jury selection, Miller-El objected to the prosecution’s use of peremptory strikes to dismiss ten black prospective jurors. He argued the strikes were impermissibly based on race and requested that a new jury be selected. The trial court denied his request and held that the evidence put forth was not enough to grant Miller-El relief under the current standard because he did not show systematic discrimination. Miller-El was convicted and sentenced to death. While his case was being appealed, the standard for granting relief for discrimination during jury selection was changed by the decision in *Batson v. Kentucky*, 476 U.S. 79 (1986). Under *Batson*, the proof of systematic discrimination requirement was replaced by a requirement of proof that the prosecutor was racially biased during jury selection. In light of this change, the appellate court remanded Miller-El’s case to the trial court. The trial court held that Miller-El did not establish that the prosecutor used peremptory strikes to dismiss jurors based on race because the prosecutor gave acceptable race-neutral reasons for the strikes. The appellate court affirmed that judgment. Miller-El petitioned for habeas corpus relief in federal district court but was denied. The appellate court denied a certificate of appealability. The Supreme Court granted certiorari and reversed the appellate court to allow an appeal. The appellate court granted a certificate of appealability but rejected Miller-El’s claim that the prosecutor was racially biased during jury selection. The Supreme Court granted certiorari again.

#### Issue

Must the court grant a defendant relief where the evidence shows that a prosecutor’s race-neutral reasons for using peremptory strikes are pretextual?

#### Holding and Reasoning (Souter, J.)

Yes. In *Batson*, the Court held that a defendant could establish a claim of racially biased jury selection based on the prosecutor’s behavior during jury selection and the surrounding facts. The prosecutor is allowed to give his race-neutral reason for striking a juror and the court then determines the plausibility of the prosecutor’s reason taking into account the surrounding facts. The prosecutor used peremptory strikes to eliminate 10 of the 20 black venire members during jury selection for Miller-El’s case. The prosecutor argues that he used peremptory strikes against the black members because they made comments showing disfavor toward the death penalty. However, this reason seems implausible because several white venire members made similar or even stronger comments showing disfavor for the death penalty, but were not struck from the venire. Other evidence also points to discrimination in the selection of Miller-El’s jury. A jury shuffle, which rearranges the order in which members are called in for voir dire, can be requested by either side. If a member is not reached by the end of the week, he is dismissed. The prosecution requested a jury shuffle only when a large number of blacks were at the front of the line for questioning. The manner of questioning that blacks received compared to that whites received also leads to an inference that the prosecution was aiming to keep blacks off Miller-El’s jury. Also, it is widely known that the prosecutor’s office has a history of discrimination in the jury selection process. The evidence overwhelmingly points to the conclusion that the prosecutor was racially biased during the jury selection process. The appellate court’s judgment is therefore reversed. The case is remanded with instructions to enter judgment for Miller-El on his *Batson* claim and provide him with appropriate relief.

#### Concurrence (Breyer, J.)

The decision in this case is correct. However, *Batson’s* burden shifting framework is difficult to apply and does little to deter discriminatory use of peremptory challenges. *Batson’s* framework and the jury system’s inclusion of peremptory challenges should be reconsidered.

#### Dissent (Thomas, J.)

Miller-El’s evidence is not sufficient to grant him relief. The majority’s comparison of black venire members who were struck and whites who were allowed to serve is not compelling because it does not account for a number of reasons other than race that may have motivated the prosecutor’s use of a peremptory strike. The evidence offered regarding different lines of questioning and jury shuffles showing discrimination is simply speculative. Miller-El’s burden of proof was not met here.

**Key Terms:**

**Peremptory Strike -** A party’s right to remove a potential juror without giving a reason. Each party normally has a specified number of peremptory strikes to use during jury selection and an unlimited number of challenges for cause which are used when the party believes the potential juror cannot be impartial.

**Pretext -** A sham or superficial explanation used to cover up the actual reason or motivation.

# Hernandez v. New York

#### United States Supreme Court 500 U.S. 352 (1991)

#### Rule of Law

**A prosecutor’s use of peremptory challenges in a manner that disproportionately impacts potential jurors of a particular race does not violate the Fourteenth Amendment’s Equal Protection Clause if the prosecution can offer a sufficient race-neutral explanation for the challenges.**

#### Facts

A New York (defendant) court convicted Dionisio Hernandez (plaintiff) of attempted murder and possession of a weapon. During jury selection, the prosecutor used peremptory challenges to strike several Spanish speaking Latino jurors from the panel. Hernandez’s defense attorney objected to the peremptory strikes. The prosecutor then explained why he did not want those particular jurors on the panel. Some of the witnesses would be Spanish speaking, and an interpreter would translate their testimony. The prosecutor asked the Latino jurors if they would accept the interpreter’s translation of the testimony, and the jurors responded only that they would try. The prosecutor said he worried that the Spanish speaking jurors would unduly impact the other jurors. Hernandez appealed, arguing that the prosecutor’s use of peremptory challenges disproportionately impacted Latino jurors in violation of the Fourteenth Amendment’s Equal Protection Clause. The case ultimately wound up before the United States Supreme Court.

#### Issue

Does a prosecutor’s use of peremptory challenges in a manner that disproportionately impacts potential jurors of a particular race violate the Fourteenth Amendment’s Equal Protection Clause?

#### Holding and Reasoning (Kennedy, J.)

Yes. A prosecutor’s use of peremptory challenges in a manner that disproportionately impacts potential jurors of a particular race does not violate the Fourteenth Amendment’s Equal Protection Clause if the prosecution can offer a sufficient race-neutral explanation for the challenges. Disproportionate impact may be evidence of discriminatory intent, but it is not dispositive. While the strikes in Hernandez’s case disproportionately impacted Latino jurors, that disproportionate impact is not, in itself, a violation of the Equal Protection Clause. The trial court must determine that the prosecutor intended to discriminate against jurors of a particular race in order to establish an equal protection violation. The prosecutor in Hernandez’s case provided a sufficiently race-neutral explanation for excluding Spanish speaking jurors who would not say that they would accept the interpreter’s translation of witness testimony. The prosecutor divided potential jurors into two categories: those whose conduct suggested they would have trouble accepting the translator’s rendition and those whose conduct did not. It might be different if the prosecutor had said he excluded the jurors because he did not want any Spanish speaking person on the panel. The defense did not prove that the prosecutor intended to discriminate against Latino jurors, and Hernandez has not established that the peremptory strikes violated the Equal Protection Clause. However, the “decision today does not imply that exclusion of bilinguals from jury service is wise, or even that it is constitutional in all cases.”

#### Concurrence (O’Connor, J.)

The majority’s opinion includes language that is irrelevant to the rule of law and will encourage defendants to make jury-selection challenges based on the languages that the prospective jurors speak.

#### Dissent (Blackmun, J.)

The prosecutor in Hernandez’s case did not provide a sufficiently race-neutral explanation for the peremptory strikes.

#### Dissent (Stevens, J.)

Using peremptory challenges in a way that disproportionately impacts jurors of a particular race is evidence of discriminatory intent. The prosecutor’s concern that the Spanish speaking Latino jurors would not be able to accept the translator’s rendition can be addressed by less drastic measures than excluding all Spanish speaking Latinos. The Equal Protection Clause is meaningless if the prosecutor’s explanation–even though itself not facially discriminatory–is allowed to suffice. *See Batson v. Kentucky*, 476 U.S. 79 (1986). The defendant should not have to provide additional evidence of a prosecutor’s motivations. Moreover, the prosecutor in Hernandez’s case did not provide a sufficiently race-neutral explanation for the peremptory strikes.

**Key Terms:**

**Peremptory Challenge -** During voir dire, the defense and the prosecution may each reject a certain number of potential jurors without having to give any reason.

**Batson Challenge** - A challenge to the other party’s use of peremptory challenges sanctioned in *Batson v. Kentucky*, 476 U.S. 79 (1986), whereby one party alleges that the other has used its peremptory challenges on the basis of race or some other prohibited, discriminatory factor. Once the party makes a prima facie showing of discrimination, the other party must articulate a nondiscriminatory reason for its peremptory challenges.

**Powers v. Ohio**

111 S.Ct. 1364

Supreme Court of the United States

**Larry Joe POWERS, Petitioner,**

**v.**

**OHIO.**

No. 89-5011.

Argued Oct. 9, 1990.Decided April 1, 1991.

**Synopsis**

Defendant was convicted of murder, aggravated murder, and attempted aggravated murder, each with firearm specifications. The Ohio Court of Appeals for Franklin County affirmed. The [Ohio Supreme Court, 42 Ohio St.3d 702, 536 N.E.2d 1172,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&pubNum=578&cite=536NE2D1172&originatingDoc=I86300d2e9c9011d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) dismissed the appeal. Certiorari was granted. The Supreme Court, Justice [Kennedy](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0243105201&originatingDoc=I86300d2e9c9011d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I86300d2e9c9011d993e6d35cc61aab4a), held that under equal protection clause, criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not defendant and excluded jurors share same race.

Reversed and remanded.

Justice [Scalia](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254763301&originatingDoc=I86300d2e9c9011d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I86300d2e9c9011d993e6d35cc61aab4a) filed a dissenting opinion in which Chief Justice [Rehnquist](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0238463201&originatingDoc=I86300d2e9c9011d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I86300d2e9c9011d993e6d35cc61aab4a) joined.

# J.E.B. v. Alabama ex rel. T.B.

#### United States Supreme Court 511 U.S. 127 (1994)

#### Rule of Law

**The Equal Protection Clause of the Fourteenth Amendment prohibits peremptory challenges based on gender.**

#### Facts

The state of Alabama (defendant), on behalf of the single mother of a minor child, filed a paternity suit against J.E.B. (plaintiff). During voir dire, the state used nine of its ten peremptory strikes to exclude male jurors, which resulted in an entirely female jury. J.E.B. objected, arguing that the state’s use of peremptory challenges based on gender were prohibited by the Equal Protection Clause of the Fourteenth Amendment, and that the United States Supreme Court decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), holding that peremptory strikes based on race were in violation of equal protection, applied to exclusions based on gender as well. The court denied J.E.B.’s objection, and the jury found that J.E.B. was the child’s father and ordered him to pay child support. The court of appeals affirmed, and the United States Supreme Court granted certiorari.

#### Issue

Does the Equal Protection Clause of the Fourteenth Amendment prohibit peremptory challenges based on gender?

#### Holding and Reasoning (Blackmun, J.)

Yes. The Equal Protection Clause of the Fourteenth Amendment prohibits peremptory challenges based on gender. There is a long history in this country of excluding women from juries. In this case, the state argues that its peremptory strikes were justified, because female jurors might be predisposed to sympathize with a single mother attempting to receive child support, while male jurors may be more likely to sympathize with a man who was the subject of a paternity challenge. This reliance on stereotypes is exactly the type of thing that equal protection seeks to avoid. When state actors engage in this type of discrimination, the effect is that the state seems to legitimize discrimination, and the efficacy of the court system comes into question. Discrimination in jury selection harms the litigants, the community, and the individuals who were not selected for jury duty based on impermissible factors. It leads to distrust of the legal system, and it must not be tolerated.

#### Concurrence (O’Connor, J.)

This court’s holding should be limited to the government’s use of peremptory strikes. If this decision applies to all litigants, it will increase the amount of litigation surrounding jury selection, and, most importantly, erode the role of peremptory challenges. Peremptory challenges are an important and well-established tradition, and they play a key role in ensuring that litigants try their cases in front of fair and unbiased juries. By further constitutionalizing jury selection, this court is forcing litigants to articulate the intangible reasons why they utilize their peremptory challenges, and may result in a less, not more, fair jury.

#### Dissent (Scalia, J.)

The court’s decision seems to be more about proving that the court does not harbor bias based on sex than about equal protection. This holding ignores the long tradition of litigants’ use of peremptory challenges as an essential part of ensuring fair trials, and renders peremptory challenges basically useless. The constitution does not sanction disregarding tradition.

**Key Terms:**

**Peremptory Challenge -** During voir dire, the defense and the prosecution may each reject a certain number of potential jurors without having to give any reason.

**Georgia v. McCollum**

112 S.Ct. 2348

Supreme Court of the United States

**GEORGIA, Petitioner**

**v.**

[**Thomas McCOLLUM**](https://1.next.westlaw.com/Search/Results.html?query=advanced%3a+OAID(5019191386)&saveJuris=False&contentType=BUSINESS-INVESTIGATOR&startIndex=1&contextData=(sc.Default)&categoryPageUrl=Home%2fCompanyInvestigator&originationContext=document&transitionType=DocumentItem)**, William Joseph McCollum and Ella Hampton McCollum.**

No. 91–372.

Argued Feb. 26, 1992.Decided June 18, 1992.

**Synopsis**

State filed motion to prohibit defendants from using peremptory strikes in racially discriminatory manner in criminal case. The Georgia Superior Court, Dougherty County, Asa D. Kelley, Jr., J., denied motion, and [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I4c84a228033d11da9439b076ef9ec4de&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[State appealed. The Supreme Court, 261 Ga. 473, 405 S.E.2d 688](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991124667&pubNum=0000711&originatingDoc=Ia09646d49c9a11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), affirmed. Certiorari was granted. The Supreme Court, Justice [Blackmun](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0264439801&originatingDoc=Ia09646d49c9a11d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ia09646d49c9a11d993e6d35cc61aab4a), held that: (1) equal protection clause prohibited defendant from engaging in purposeful discrimination on ground of race; (2) defendant's exercise of peremptory challenges was state action for purposes of equal protection clause; and (3) state had standing.

Reversed and remanded.

Chief Justice [Rehnquist](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0238463201&originatingDoc=Ia09646d49c9a11d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ia09646d49c9a11d993e6d35cc61aab4a) concurred and filed opinion.

Justice [Thomas](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=Ia09646d49c9a11d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ia09646d49c9a11d993e6d35cc61aab4a) concurred in judgment and filed opinion.

Justice [O'Connor](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0209675601&originatingDoc=Ia09646d49c9a11d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ia09646d49c9a11d993e6d35cc61aab4a) and Justice [Scalia](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254763301&originatingDoc=Ia09646d49c9a11d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ia09646d49c9a11d993e6d35cc61aab4a) dissented and filed opinions.

# Edmonson v. Leesville Concrete Co.

#### United States Supreme Court 500 U.S. 614 (1991)

#### Rule of Law

**A private litigant in a civil case may not use peremptory challenges to exclude jurors on account of their race because the exercise or peremptory challenges invokes state action.**

#### Facts

Thaddeus Edmonson (plaintiff) was a construction worker injured on the job while working for Leesville Concrete Co. (defendant). Edmonson sued Leesville Concrete Co. for negligence in federal district court. Edmonson invoked his Seventh Amendment right to a jury trial. During voir dire, Leesville used two of its three statutorily-permitted peremptory challenges to remove African American persons from the prospective jury. Edmonson, an African American, requested that the court require Leesville to articulate a race-neutral reason for its peremptory challenges. The court denied the request on the grounds that the case was a civil proceeding. The result was a jury composed of eleven Caucasian people and one African American person. The jury rendered a verdict for Edmonson for $90,000, but reduced it to $18,000 because it found Edmonson eighty percent at fault. Edmonson appealed, and the Fifth Circuit Court of Appeals affirmed. The United States Supreme Court granted certiorari.

#### Issue

May a private litigant in a civil case use peremptory challenges to exclude jurors on account of their race?

#### Holding and Reasoning (Kennedy, J.)

No. Leesville’s actions can be overturned based on the Fourteenth Amendment’s prohibition of race-based discrimination if there is a finding of state action. The *Lugar v. Edmonson Oil*,457 U.S. 922(1982), two-step analysis shows that Leesville acted pursuant to state authority. Firstly, the act of exercising peremptory challenges has its source in state authority. A peremptory challenge means nothing outside of a court of law, which in this case is provided for by the state. Additionally, peremptory challenges are only exercised based on statutory authority provided by the government. Secondly, Leesville can be deemed to be a government actor in this situation. According to precedent, state action has been found when private parties make “extensive use of state procedures with the overt, significant assistance of state officials.” In the present case, a private party cannot exercise peremptory challenges without the overt, significant assistance of the court. The judge in the case, who is clearly a state actor, enforced Leesville’s discriminatory peremptory challenges and effected the final and practical denial of the excluded jurors’ opportunity to serve on the jury. Thus, Leesville acted pursuant to state authority, and the discriminatory peremptory challenges are thus prohibited by the Fourteenth Amendment. The decision of the court of appeals is reversed.

#### Dissent (O’Connor, J.)

The majority’s conclusion that the actions of Leesville, a private litigant, are transformed into state action simply because they occurred in a courtroom setting is disputed. The state provides the forum, but this does not constitutionally oblige the state to become responsible for all discriminatory acts that occur within the forum. Regardless of the majority’s desire to eradicate racial discrimination in the courtroom, the Constitution’s protections do not sweep that broadly. A peremptory challenge by a private litigant is fundamentally a matter of private choice and not state action.

#### Dissent (Scalia, J.)

The majority’s decision, while seeking to help assure racial diversity, can actually work to harm minority defendants by preventing them from using race-based peremptory challenges to keep minorities on the jury. The majority’s decision will increase the workload of the already-burdened state and federal courts, and the focus on preventing constitutional wrongs in peremptory challenges will ultimately detract from the merits of the underlying litigation. The majority’s decision is more problematic than helpful.

**Key Terms:**

**Peremptory Challenge -** During voir dire, the defense and the prosecution may each reject a certain number of potential jurors without having to give any reason.

# \*\*PEÑA-RODRIGUEZ v. COLORADO\*\*

#### United States Supreme Court 137 S. Ct. 855 (2017)

#### Rule of Law

**If a juror makes a clear statement showing reliance on racial bias or animus to convict a defendant, an exception to the no-impeachment rule allows jurors to testify about jury deliberations to determine whether racial bias deprived the defendant of an impartial jury.**

#### Facts

After the jury convicted Miguel Peña-Rodriguez (defendant), the judge discharged the jurors. Two stayed behind to speak with defense counsel in private. The jurors reported that another juror, H.C., made racist statements during deliberations showing that racial animus motivated H.C. to convict. The jurors said H.C. encouraged other jurors to convict for the same reasons. The trial court acknowledged that H.C.’s comments showed bias but denied a new trial because Colorado’s evidence rules do not allow the introduction of jury deliberations to challenge a verdict. After the Colorado appellate courts affirmed, the United States Supreme Court granted review.

#### Issue

If a juror makes a clear statement showing reliance on racial bias or animus to convict a defendant, does an exception to the no-impeachment rule allow jurors to testify about jury deliberations to determine whether racial bias deprived the defendant of an impartial jury?

#### Holding and Reasoning (Kennedy, J.)

Yes. The Sixth Amendment guarantees the right to trial by an impartial jury. Courts protect jurors from improper influence and jury verdicts from impeachment by making deliberations private and prohibiting juror testimony about them. The English common-law Mansfield Rule prohibited jurors from testifying about anything within jury deliberations. Some American jurisdictions adopted the more flexible Iowa rule allowing jurors to testify about objective facts and events from deliberations, but not their own subjective thoughts and opinions. The Supreme Court adopted a broader no-impeachment rule under Federal Rule of Evidence 606(b), which prohibits jurors from testifying about deliberations except for prejudicial outside information improperly presented to the jury, improper outside influences, or mistakes filling out verdict forms. The Colorado rule closely tracks the federal rule, and most states have a similar one. The no-impeachment rule provides stability and finality and prevents litigants from harassing jurors about what happened during deliberations to overturn a verdict. The Supreme Court has rejected additional exceptions to the no-impeachment rule in three cases, involving jurors who reached a verdict by playing a game of chance, jurors inebriated during trial, and juror bias favoring one party in a civil case. Those types of misconduct do not threaten the integrity of the jury system like racial bias. The safeguards of voir dire and thorough jury instructions are inadequate to prevent racial bias from undermining the jury system’s integrity. After the Civil War, all-white juries consistently refused to punish whites, while unduly punishing blacks. Congress intended the Fourteenth Amendment to eliminate discrimination from official sources. It was essential to protect the right to a fair trial and equal protection of the laws. This Court has consistently struck down excluding jurors because of race. Seventeen jurisdictions recognize a racial-bias exception to the no-impeachment rule. When a juror clearly relied on racial bias or animus to convict a defendant, the Sixth Amendment requires allowing jury testimony about jury deliberations to determine whether racial bias deprived the defendant of an impartial jury. Here, two jurors repeated statements showing that racial animus motivated H.C. to convict. H.C. also encouraged other jurors to convict for racist reasons. The two jurors came forward of their own accord and reported it out of concern that it injected improper racial considerations into deliberations. The Court must act to protect individual constitutional rights and the integrity of the jury system. Accordingly, the Court reverses the judgment below and remands for a new trial.

#### Dissent (Alito, J.)

The vast majority of American jurisdictions adopted strict no-impeachment rules with limited exceptions to protect verdict finality and protect juries from outside influences. The Court-appointed Advisory Committee spent seven years drafting and refining the current Federal Rule of Evidence 606(b). The three precedential Supreme Court decisions rejecting other exceptions to the no-impeachment rule are indistinguishable from the case here. The procedural protections of voir dire and carefully crafted jury instructions adequately prevent undue influence and expose juror bias. The Court’s ruling here treats racial bias disparately from other types of impartiality that are no less troublesome. Post-verdict scrutiny of juror conduct will inhibit jury room discussions and encourage litigants to pester jurors after trial, seeking grounds to attack unfavorable verdicts. The integrity of the jury process may not endure it.

#### Dissent (Thomas, J.)

The majority of states adopted the common-law no-impeachment rule. When the Sixth and Fourteenth Amendments were ratified, courts understood that rule to mean defendants have no right to impeach a verdict with jury testimony. Therefore, those amendments do not provide a constitutional basis for an exception for juror racial bias.

**Key Terms:**

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

**Federal Rule of Evidence 606(b) -** Rule of evidence in federal courts that generally disallows testimony about anything said during jury deliberations or the thoughts or emotions of any juror during the deliberations process, unless that testimony relates to exposure to extraneous prejudicial information.

**No-Impeachment Rule -** A rule that prohibits jurors from testifying about jury deliberations, with some exceptions. Exceptions, which vary slightly between jurisdictions, generally include testifying about outside prejudicial information improperly presented to the jury, improper outside influence, mistakes on verdict forms, and reliance on racial bias or animus to convict

# Duncan v. Louisiana

#### United States Supreme Court 391 U.S. 145 (1968)

#### Rule of Law

**The Sixth Amendment right to a jury trial applies to state court proceedings through the Fourteenth Amendment.**

# Vaise v Delaval: 1785

The court refused to receive affidavits from two jurors indicating that they had decided on their verdict by tossing a coin to resolve the issue. The rationale was that this was to protect them against self-incrimination for what he described as a very high misdemeanour. The court cannot receive an affidavit from a juror as to the nature of the juror’s deliberations.   
**References:**(1785) 1 TR11   
**Judges:**Lord Mansfield

**McDonald v. Pless**

35 S.Ct. 783

Supreme Court of the United States.

**D. J. McDONALD and United States Fidelity & Guaranty Company, Petitioners,**

**v.**

**J. W. PLESS and J. W. Winbourne, Partners, etc., as Pless & Winbourne.**

No. 283.

Argued May 13, 1915.Decided June 14, 1915.

**Synopsis**

ON WRIT of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit to review a judgment which affirmed a judgment of the District Court for the Western District of North Carolina in favor of plaintiff in an action for legal services. Affirmed.

See same case below, [124 C. C. A. 131, 206 Fed. 263](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1913101019&pubNum=348&originatingDoc=Ied4d81929cba11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

The facts are stated in the opinion.

# Tanner v. United States

#### United States Supreme Court 483 U.S. 107 (1987)

#### Rule of Law

**A juror may not testify about evidence of jurors’ alcohol and drug use during a trial.**

#### Facts

Conover and Tanner (defendants) were convicted of mail fraud and conspiracy. After the conviction, one of the jurors called Tanner’s attorney and informed him that several of the jurors drank alcohol during lunch breaks and often slept through the afternoons of the trial. Tanner filed a motion for a new trial and an evidentiary hearing at which he could interview the jurors. The district court heard arguments on the issue and then denied the motion. Subsequently, a second juror similarly told Tanner’s attorney that a number of the jurors drank, a few smoked marijuana, and two did cocaine during the trial. Tanner filed another motion for a new trial and the district court again denied the motion. The United States Court of Appeals for the Eleventh Circuit affirmed. The United States Supreme Court granted certiorari.

#### Issue

Is post-verdict evidence of jurors’ alcohol and drug use during a trial admissible if it is provided by a juror?

#### Holding and Reasoning (O’Connor, J.)

No. Rule 606(b) provides that a juror may only testify to a matter occurring during the jury’s deliberations that had an effect on the jury’s verdict if it constituted an improper extraneous influence. Evidence of jurors’ drug and alcohol abuse does not qualify as such an extraneous influence as the substances are voluntarily ingested by the jurors themselves. In addition, the legislative history of Rule 606 indicates that intoxication was specifically and intentionally excluded from consideration as an outside influence. Post-verdict inquiries into a jury’s state of mind would surely open the door to an investigation into the personal matters of all jurors in the hopes of finding some form of misconduct to invalidate the verdict. Such public scrutiny of juries cannot be permitted. As a result, the district court was correct in denying Tanner’s motion for an evidentiary hearing at which he could interview jurors. Tanner’s only allegation of true jury misconduct is that some jurors fell asleep during the trial. Drinking a bit of alcohol during a recess or consuming drugs during the trial do not automatically render a jury incompetent. Misconduct of jurors does not automatically translate to incompetence. In addition, Tanner had an opportunity to present non-juror evidence of such misconduct to the district court, but failed to do so convincingly. Indeed, the district court judge even stated that he did not notice members of the jury falling asleep during the trial. As a result, the district court was correct in denying Tanner’s motion to call jurors as witnesses and denying his motion for a new trial. Finally, this holding does not violate Tanner’s Sixth Amendment right to a fair trial before an impartial and competent jury. Tanner’s right to a competent jury is protected in voir dire, and also throughout the trial through observations of the jury by both parties and court personnel. Accordingly, because of the inadmissibility of the jurors’ testimony and the lack of non-juror evidence, the decisions of the lower courts are affirmed.

#### Concurrence/Dissent (Marshall, J.)

The majority opinion in this matter misconstrues both Rule 606(b), but also the common law distinction between internal and external influences on a juror. First, Rule 606(b) was only designed to, and in practice only serves to, prevent jurors from testifying to the contents of their deliberations. This is a reasonable step designed to prevent harassment of jurors after a trial is concluded. However, it was never designed to prevent jurors from testifying to events that happened apart from deliberations. The majority improperly uses the rule for that purpose in this case. Additionally, the use of drugs and alcohol is fundamentally an external influence on a jury and not an internal one.

#### Key Terms:

# Rule 606(b) of the Federal Rules of Evidence - Provides that a juror may not testify as to any matter that occurred during the jury’s deliberations that had an effect on the jury’s verdict, except for improper extraneous influences.

# Impeach a Verdict - The practice of a juror testifying in a way that would have the effect of reversing the verdict handed down by the jury.

# Warger v. Shauers

#### United States Supreme Court 574 U.S. \_\_\_ (2014)

#### Rule of Law

**Under Federal Rule of Evidence 606(b), evidence of juror deliberations is only admissible to prove an outside influence, extraneous information, or mistake.**

#### Facts

Gregory Warger (plaintiff) was in a car accident caused by Randy Shauers (defendant). Warger’s leg had to be amputated as a result, and Warger brought suit against Shauers for negligence. One the jurors, Regina Whipple, stated during *voir dire* that she was able to be an impartial juror on cases involving a car accident. The jury found in favor of Shauers. Subsequently, one of the jurors signed an affidavit stating that Whipple had said during jury deliberations that her daughter had previously caused a car accident in which a person had died. According to the affidavit, Whipple said that if someone had sued her daughter, it would have “ruined her life.” Warger filed a motion for a new trial based on the juror’s affidavit about Whipple’s statements. The district court denied Warger’s motion under Federal Rule of Evidence (FRE) 606(b). The United States Court of Appeals for the Eighth Circuit affirmed. The United States Supreme Court granted certiorari.

#### Issue

Under Federal Rule of Evidence 606(b), is evidence of juror deliberations admissible for a purpose other than to prove an outside influence, extraneous information, or mistake?

#### Holding and Reasoning (Sotomayor, J.)

No. Under FRE 606(b), evidence of juror deliberations is inadmissible unless it is evidence of outside influence on a juror, extraneous information brought to the jury’s attention, or a mistake on the verdict form. This inadmissibility encompasses any evidence of juror dishonesty during *voir dire*. The mere fact that a juror lies during *voir dire* and is nonetheless empaneled does not render a trial unfair under the Sixth Amendment. A defendant’s right to a fair trial by a jury is protected by *voir dire*. Permitting a court to inquire into the specifics of jury deliberations would chill deliberations and jeopardize the finality of jury verdicts. In this case, the lower courts properly found that the juror’s affidavit about Whipple’s statements was inadmissible under FRE 606(b). The evidence of jury deliberations presented by the affidavit is barred under FRE 606(b). Whipple’s statements about her daughter do not fall under one of the exceptions listed in FRE 606(b). Whipple was not subject to outside influence, and the information that Whipple discussed was internal rather than extraneous. Her daughter’s car accident generally affected Whipple’s own feelings toward negligence for accidents, but did not provide any extraneous information regarding the crash between Warger and Shauers. Finally, there was no mistake on the verdict form. Therefore, the juror’s affidavit about Whipple’s statements was not admissible evidence. The judgment of the court of appeals is affirmed.

# Key Terms:

**Federal Rule of Evidence 606(b) -** Rule of evidence in federal courts that generally disallows testimony about anything said during jury deliberations or the thoughts or emotions of any juror during the deliberations process, unless that testimony relates to exposure to extraneous prejudicial information.

**Voir Dire** - French meaning “to speak the truth,” the process by which the judge or an attorney questions a potential juror to assess the person’s suitability for sitting on the jury. Voir dire also may be used to qualify a witness as an expert during trial, or to explore certain aspects of a witness’s testimony out of the jury’s presence.

**Deliberation -** The process at the close of evidence in a trial and following the court’s instructions as to the law during which the jury convenes to determine its verdict, and in certain criminal cases, the sentence to be imposed on the defendant.

**Webster v. Reid**

52 U.S. 437

Supreme Court of the United States.

**JOSEPH WEBSTER, PLAINTIFF IN ERROR,**

**v.**

**HUGH T. REID.**

December Term, 1850

**\*\*1** Where a judgment was rendered by the Supreme Court for Iowa Territory and the record certified to this court by the Supreme Court of the State of Iowa, after her admission into the Union, and the subject-matter is within the jurisdiction of this court, it will take jurisdiction over the case.

Where the legislature of the Territory of Iowa directed that suits might be instituted against ‘the Owners of the Half-breed Lands lying in Lee County,’ notice thereof being given through the newspapers, and judgments were recovered in suits so instituted, these judgments were nullities.

There was no personal notice to individuals, nor an attachment or other proceeding against the land, until after the judgments.

The law moreover directed that the court should decide without the intervention of a jury to determine matters of fact. This was inconsistent with the Constitution of the United States.

The court below erred in not permitting evidence to be offered to show that the judgments were fraudulent. It erred also in not allowing the defendant to give his title in evidence.

The defendant ought also to have been allowed to give evidence that the judgments had not been obtained in conformity with the law which required certain preliminary steps to be taken.

# McLaughlin v. Florida

#### United States Supreme Court 379 U.S. 184 (1964)

#### Rule of Law

**A statute prohibiting cohabitation between unmarried people of different races unconstitutionally violates the Equal Protection Clause.**

#### Facts

A Florida criminal statute prohibited cohabitation between an unmarried black person and an unmarried white person. McLaughlin (defendant) was convicted of violating the statute. The Supreme Court of Florida affirmed the conviction. McLaughlin appealed, arguing that the statute was an unconstitutional violation of equal protection. The United States Supreme Court granted certiorari. The State of Florida (the state) argued that the law helped to prevent premarital promiscuity and was ancillary, or necessary, to Florida’s ban on interracial marriage.

#### Issue

Does a statute prohibiting cohabitation between unmarried people of different races unconstitutionally violate the Equal Protection Clause?

#### Holding and Reasoning (White, J.)

Yes. A statute prohibiting cohabitation between unmarried people of different races unconstitutionally violates the Equal Protection Clause. Such a law treats an unmarried interracial couple differently than an unmarried non-interracial couple. While the law in this case may help to prevent premarital promiscuity, as argued by the state, there is no purpose to the classification based on race. Specifically, there is no evidence that an interracial couple is more apt to engage in premarital promiscuity than a couple of the same race. Additionally, even assuming that Florida’s ban on interracial marriage is constitutional, a ban on premarital interracial cohabitation is not necessary for such a ban on marriage. Even if a law is facially constitutional, there are constitutional limitations on how that law may be enforced. For the reasons already stated, the ban on premarital interracial cohabitation is an unconstitutional method of enforcing the ban on interracial marriage. The Florida law violates McLaughlin’s right to equal protection and is unconstitutional. McLaughlin’s conviction is reversed.

#### Concurrence (Stewart, J.)

The majority implies that it is possible for there to be an overriding statutory purpose of the interracial-cohabitation law. There can be no such purpose for a law that criminalizes an act based solely on a person’s skin color.

#### Concurrence (Harlan, J.)

The majority is correct in finding that the interracial cohabitation law is not a necessary ancillary to Florida’s prohibition on marriage for interracial couples. However, importantly, necessity—not simply reasonableness—is the proper standard.

# Key Terms:

**Equal Protection -** A constitutional right guaranteeing that one class of people will enjoy the same protection of the laws as another.

**Cohabitation -** The act of two or more persons living together in the same dwelling.

**Rose v. Mitchell**

99 S.Ct. 2993

Supreme Court of the United States

**Jim ROSE, Warden, Petitioner,**

**v.**

**James E. MITCHELL and James Nichols, Jr.**

No. 77–1701.

Argued Jan. 16, 1979.Decided July 2, 1979.

## Synopsis

State prisoners filed pro se petitions for writs of habeas corpus alleging racial discrimination in selection of grand jury foreman. The United States District Court for the Western District of Tennessee dismissed the petitions, and petitioners appealed. The United States Court of Appeals for the Sixth Circuit, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I4f045c32914f11d98e8fb00d6c6a02dd&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[570 F.2d 129,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1978102521&pubNum=350&originatingDoc=Ic1df77609c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) reversed and remanded with directions, and certiorari was granted. The Supreme Court, Mr. Justice Blackmun, held that: (1) racial discrimination in selection of grand jury is a valid ground for setting aside criminal conviction even where defendant has been found guilty beyond a reasonable doubt by a properly constituted petit jury at a trial on the merits that was free from other constitutional error; (2) such claims are cognizable on federal habeas corpus, but (3) plaintiffs in the instant case failed to make out a prima facie case of discrimination in selection of grand jury foreman.

Judgment of Court of Appeals reversed and case remanded.

Mr. Justice Rehnquist filed a statement concurring in part.

Mr. Justice Stewart and Mr. Justice Powell filed separate opinions concurring in the judgment, in which Mr. Justice Rehnquist joined.

Mr. Justice White filed an opinion dissenting in part in which Mr. Justice Stevens joined.

Mr. Justice Stevens filed an opinion dissenting in part.

**Procedural Posture(s):** On Appeal.

# McCleskey v. Kemp

#### United States Supreme Court 481 U.S. 279 (1987)

#### Rule of Law

**A criminal defendant alleging an equal protection violation must prove the existence of a discriminatory purpose and a racially disproportionate and discriminatory effect.**

#### Facts

McCleskey (defendant), an African American man, was convicted of two counts of armed robbery and one count of murdering a Caucasian police officer in Atlanta, Georgia. At trial, the jury recommended that McCleskey be sentenced to death on the murder charge and two consecutive life sentences on the armed robbery charges. The court followed this recommendation and sentenced McCleskey to death. McCleskey filed a petition for a writ of habeas corpus in federal district court, alleging that Georgia’s capital sentencing process was administered in a racially discriminatory manner in violation of the Eighth and Fourteenth Amendments to the United States Constitution. To support his claim, McCleskey offered a statistical study that purported to prove a disparity in the imposition of death sentences in Georgia based on the race of the murder victim and the race of the defendant. For example, the study concluded that in instances where a Caucasian victim was killed by an African American defendant, the defendant was twenty-two times more likely to be sentenced to death than if the victim was also African American. The study also suggested that prosecutors were significantly more likely to seek the death penalty for African American defendants than for Caucasian defendants. The district court denied McCleskey’s claim based on the study, and the court of appeals affirmed. The United States Supreme Court granted certiorari.

#### Issue

Does statistical data that suggests racial motivations enter into capital sentencing determinations constitute an equal protection violation if a jury convicts the defendant?

#### Holding and Reasoning (Powell, J.)

No. A criminal defendant alleging an equal protection violation has the burden of proving the existence of purposeful discrimination and that the purposeful discrimination had a discriminatory effect on him. McCleskey must prove that the decisionmakers in his case acted with a discriminatory purpose. McCleskey offers no evidence to prove this claim, relying entirely on the study results. If the study findings are accepted as evidence, then an equal protection violation would occur in every instance in which an African American defendant is sentenced to death for murdering a Caucasian victim. McCleskey argues that the study proves that the State of Georgia, as a whole, acted with a discriminatory purpose in adopting the capital punishment statute and allowing it to remain in force despite its allegedly discriminatory application. A discriminatory purpose implies that the decisionmaker selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group. McCleskey offers no evidence that the Georgia state legislature enacted the death penalty statute because of an anticipated racially discriminatory effect. The decision of the court of appeals is affirmed.

#### Dissent (Brennan, J.)

The majority simply cannot ignore the overwhelming statistical significance of the death penalty study, which confirms that race plays a major role in determining whether a defendant will be sentenced to death. History confirms that Georgia practices a race-conscious criminal justice system dating back to the Civil War era. Portions of the Georgia capital sentencing system already have been invalidated for furthering racial discrimination three times over the past fifteen years.

#### Dissent (Blackmun, J.)

The majority upholds discriminatory practices pervasive in the Georgia criminal justice system as a whole. Fourteenth Amendment protections against racial discrimination are particularly important for criminal defendants in the courtroom because they are necessary to maintain the appearance of justice and the integrity of the judicial process. Preventing racial discrimination in the criminal justice process was one of the primary concerns of the drafters when enacting the Fourteenth Amendment, as the consequences of allowing racial bias to influence criminal sentencing decisions is particularly harmful.

**Powers v. Ohio**

111 S.Ct. 1364

Supreme Court of the United States

**Larry Joe POWERS, Petitioner,**

**v.**

**OHIO.**

No. 89-5011.

Argued Oct. 9, 1990.Decided April 1, 1991.

**Synopsis**

Defendant was convicted of murder, aggravated murder, and attempted aggravated murder, each with firearm specifications. The Ohio Court of Appeals for Franklin County affirmed. The [Ohio Supreme Court, 42 Ohio St.3d 702, 536 N.E.2d 1172,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&pubNum=578&cite=536NE2D1172&originatingDoc=I86300d2e9c9011d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) dismissed the appeal. Certiorari was granted. The Supreme Court, Justice [Kennedy](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0243105201&originatingDoc=I86300d2e9c9011d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I86300d2e9c9011d993e6d35cc61aab4a), held that under equal protection clause, criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not defendant and excluded jurors share same race.

Reversed and remanded.

Justice [Scalia](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254763301&originatingDoc=I86300d2e9c9011d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I86300d2e9c9011d993e6d35cc61aab4a) filed a dissenting opinion in which Chief Justice [Rehnquist](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0238463201&originatingDoc=I86300d2e9c9011d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I86300d2e9c9011d993e6d35cc61aab4a) joined.

**Rosales-Lopez v. United States**

101 S.Ct. 1629

Supreme Court of the **United** **States**

**Humberto ROSALES-LOPEZ, Petitioner,**

**v.**

**UNITED STATES.**

No. 79-6624.

Argued Jan. 12, **1981**.Decided April 21, **1981**.

**Synopsis**

Defendant, who was of Mexican descent, was convicted before the **United** **States** District Court for the Southern District of California, Howard F. Corcoran, Senior District Judge of the District of Columbia, of participating in a plan by which Mexican aliens were illegally brought into the **United** **States**. The Court of Appeals for the Ninth Circuit affirmed, [617 F.2d 1349.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980112558&pubNum=350&originatingDoc=I17965e459c1f11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) Certiorari was granted. The Supreme Court, in a plurality opinion by Justice White, held that: (1) federal trial courts must make a voir dire inquiry into racial or ethnic prejudice when requested by defendant accused of a violent crime and where the defendant and victim are members of different racial or ethnic groups, and (2) there was no reversible error in denying petitioner's requested voir dire as to possibility of racial or ethnic prejudice, notwithstanding that he had resided with daughter of key Government witness, apparently a Caucasian.

Judgment of Court of Appeals affirmed.

Justice Rehnquist filed an opinion concurring in the result, in which Chief Justice Burger joined.

Justice Stevens filed a dissenting opinion in which Justice Brennan and Justice Marshall joined.

**Shillcutt v. Gagnon**

827 F.2d 1155

United States Court of Appeals,

Seventh Circuit.

**James B. SHILLCUTT, Petitioner-Appellant,**

**v.**

**John R. GAGNON, Respondent-Appellee.**

No. 85–1432.

Argued Sept. 9, 1986.Decided Aug. 27, 1987.

**Synopsis**

Petitioner, convicted in state court of soliciting prostitutes and keeping a place of prostitution, filed petition for writ of habeas corpus, based upon juror's revealing that during final deliberations another juror made alleged racial slur. [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I32e8ff66557711d997e0acd5cbb90d3f&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=26a13e98785149d097d747b8105e1d78&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[The United States District Court for the Eastern District of Wisconsin, Myron L. Gordon, J., 602 F.Supp. 1280](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985111415&pubNum=0000345&originatingDoc=I1798a158953e11d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), denied petition, and petitioner appealed. The Court of Appeals, Grant, Senior District Judge, sitting by designation, held that: (1) juror's statement concerning alleged racial slur was not competent evidence to impeach verdict, and (2) application of no-impeachment rule did not offend fundamental fairness.

Affirmed.

Ripple, Circuit Judge, filed concurring opinion.

**United States v. Henley**

238 F.3d 1111

United States Court of Appeals,

Ninth Circuit.

**UNITED STATES of America, Plaintiff-Appellee,**

**v.**

**Rex HENLEY, Rafael Bustamante, Willie McGowan, and Garey West, Defendants-Appellants.**

Nos. 96-50697, 97-50015, 97-50020 and 97-50060.

Argued and Submitted June 5, 2000Filed Feb. 7, 2001

**Synopsis**

Following defendants' convictions for conspiracy to possess and distribute cocaine and possession with intent to distribute cocaine, defendants moved for a new trial. The United States District Court for the Central District of California, [Gary L. Taylor](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0242789501&originatingDoc=I15f7b4e3799a11d98c82a53fc8ac8757&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I15f7b4e3799a11d98c82a53fc8ac8757), J., denied motion and defendants appealed. The Court of Appeals, [Reinhardt](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0245335801&originatingDoc=I15f7b4e3799a11d98c82a53fc8ac8757&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I15f7b4e3799a11d98c82a53fc8ac8757), Circuit Judge, held that: (1) co-defendant's attempted bribery of juror was, prima facie, jury tampering; (2) juror's statements were not prohibited under rule prohibiting inquiry into mental processes of jurors in connection with verdict; and (3) District Court erred by rejecting defendants' claim that juror was racially biased without making any findings concerning whether juror actually made racist statement.

Reversed and remanded.

**People v. Harlan**

8 P.3d 448

Supreme Court of Colorado,

En Banc.

**The PEOPLE of the State of Colorado, Plaintiff–Appellee,**

**v.**

**Robert Eliot HARLAN, Defendant–Appellant.**

No. 95SA298.

March 27, 2000.As Modified on Denial of Rehearing Sept. 11, 2000.[\*](https://1.next.westlaw.com/Document/I0c2be990f55511d9bf60c1d57ebc853e/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_footnote_B0012000084334)

**Synopsis**

Defendant was convicted in the District Court, Adams County, Philip F. Roan, J., of the kidnap, attempted first degree murder and first degree murder of one victim, and the attempted murder of a second victim. Following a sentencing hearing, the jury sentenced the defendant to death, and the court additionally imposed three 48-year consecutive sentences on the attempted murder and kidnapping verdicts. Defendant appealed. The Supreme Court, [Martinez](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0142238501&originatingDoc=I0c2be990f55511d9bf60c1d57ebc853e&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I0c2be990f55511d9bf60c1d57ebc853e), J., held that: (1) record supported trial court's rulings on defendant's juror challenges for cause; (2) pretrial publicity did not mandate change of venue; (3) instruction on voluntary intoxication was an incorrect statement of law, but the error was harmless; (4) voluntary intoxication, evidence of which is introduced to negate the specific intent element of the charged offense, is not an affirmative defense; (5) failure to instruct jury that “after deliberation” is part of the culpable mental state of first degree murder was harmless error; (6) substantially increasing a risk of harm to the victim is not part of the asportation element of second degree kidnapping; (7) order requiring defendant to provide prosecution with pretrial discovery of three sentencing phase expert witnesses was proper; (8) failure to provide necessary limiting instructions for sentencing aggravators was harmless error; (9) evidence of defendant's prior sexual misconduct was admissible; and (10) death penalty was appropriate and not arbitrary.

Judgment affirmed in part and reversed in part; death sentence affirmed.

**Brewer v. Marshall**

119 F.3d 993

United States Court of Appeals,

First Circuit.

**Joey BREWER, Petitioner, Appellee,**

**v.**

**Clifford MARSHALL, Respondent, Appellant.**

Nos. 96-2321, 97-1207.

Heard April 8, 1997.Decided July 21, 1997.

**Synopsis**

Defendant petitioned for writ of habeas corpus, claiming that state rape conviction was obtained in violation of his due process and equal protection rights. The United States District Court for the District of Massachusetts, [Patti B. Saris](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0136256001&originatingDoc=I6247efdd942611d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I6247efdd942611d9bc61beebb95be672), J., [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I4f377bc1565711d9a99c85a9e6023ffa&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[941 F.Supp. 216,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996212493&pubNum=345&originatingDoc=I6247efdd942611d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) denied relief on defendant's *Brady* claim and ordered evidentiary hearing on *Batson*claim, and Court subsequently granted writ based on *Batson* violation. State appealed. The Court of Appeals, [Lynch](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0207357601&originatingDoc=I6247efdd942611d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I6247efdd942611d9bc61beebb95be672), Circuit Judge, held that: (1) regardless of whether state courts' determination of defendant's claim of racially-motivated jury selection was based on independent and adequate state grounds, prosecutor's exercise of peremptory challenges against black venire members did not compel finding that defendant established prima facie *Batson* claim, and (2) state's failure to disclose identity of victim's boyfriend at earlier time was not *Brady*violation.

Reversed; writ vacated.

# \*\*WILLIAMS v. PENNSYLVANIA\*\*

#### United States Supreme Court 136 S. Ct. 1899 (2016)

#### Rule of Law

**Where a judge has had an earlier significant, personal involvement as a prosecutor in a critical decision in a defendant’s case, the risk of bias is so high that the judge must be recused.**

#### Facts

Terrance Williams was charged with first-degree murder. District Attorney (DA) Ronald Castille approved the case for the death penalty. The jury convicted Williams and sentenced him to death. Williams appealed and the conviction was affirmed. Williams filed a petition for habeas corpus in state court. The state court granted Williams’s habeas corpus petition and stayed his execution. The Commonwealth of Pennsylvania appealed to the Pennsylvania Supreme Court. The Chief Justice of the state supreme court at the time was former DA Castille. Williams filed a motion to recuse Castille from hearing his case. Castille denied the motion and heard the case. The state supreme court reinstated the death penalty on the ground that Williams’s habeas petition was untimely. The United States Supreme Court granted certiorari.

#### Issue

Where a judge has had an earlier significant, personal involvement as a prosecutor in a critical decision in a defendant’s case, is the risk of bias so high that the judge must be recused?

#### Holding and Reasoning (Kennedy, J.)

Yes. Where a judge has had an earlier significant, personal involvement as a prosecutor in a critical decision in a defendant’s case, the risk of bias is so high that the judge must be recused. Due process guarantees a defendant a fair and impartial judge. Because actual bias can be difficult to ascertain, the appropriate standard must be objective, rendering a determination of actual bias unnecessary. The standard asks whether an average judge would be likely to be biased in the same position. Generally, an accuser involved in a critical decision in a case will not pass this test if the accuser is later asked to be an adjudicator of the same case. In this case, the state supreme court decision reinstating Williams’s death sentence must be vacated. Judge Castille approved Williams’s case for the death penalty earlier in his career, when he was serving as a DA. This approval constitutes a significant, personal involvement in a critical decision in Williams’s case. First, a decision of whether to involve the death penalty in a criminal prosecution is a critical decision because it involves, potentially, the life or death of the defendant. Second, there is no question that Castille had a significant, personal involvement in the decision. Without Castille’s approval, the prosecution could not have sought the death penalty. As a result of Castille’s prior involvement in the case as a DA, Castille’s risk of bias was so high that he should have been recused from hearing Williams’s habeas corpus petition. Castille’s failure to recuse himself constituted a violation of Williams’s due process rights under the Fourteenth Amendment. The judgment of the supreme court is vacated and the case is remanded.

#### Dissent (Thomas, J.)

Contrary to the majority’s opinion, Castille has not acted as the accuser and the adjudicator in a single case. Williams’s post-conviction habeas petition was not part of the criminal prosecution that resulted in his death sentence. The habeas petition started a separate proceeding. It was thus not improper for Castille to hear that petition.

#### Dissent (Roberts, C.J.)

The issue in the supreme court habeas corpus case was whether Williams’s petition was timely filed. Castille’s prior participation in Williams’s case is completely unrelated to this issue. There was thus no objective risk of actual bias on the part of Castille. Castille’s participation did not violate Williams’s due process rights.

**Key Terms:**

**Fourteenth Amendment Due Process** **Clause** - The provision set forth at Amendment XIV, Section 1 of the United States Constitution prohibiting states from depriving any person of life, liberty, or property by means that are arbitrary or fundamentally unfair.

**Recusal -** The disqualification of a judge from presiding over a particular case due to prejudice or conflict of interest.

# Caperton v. A.T. Massey Coal Co., Inc.

#### United States Supreme Court 556 US 868 (2009)

#### Rule of Law

**A judge is biased and should recuse himself when a contributor’s influence on his election is so substantial that it would offer a possible temptation to the average judge to lead him not to be impartial.**

#### Facts

Hugh Caperton, Harman Development Corp., Harman Mining Corp., and Sovereign Coal Sales (plaintiffs) sued A.T. Massey Coal Co., Inc. (Massey) (defendant) in West Virginia state court for fraudulent misrepresentation, concealment, and tortious interference with contractual relations. A jury found Massey liable and awarded plaintiffs $50 million. Massey planned to appeal the verdict. Don Blankenship was Massey’s chairman, CEO and president. After the verdict but before the appeal was heard, West Virginia held its 2004 judicial elections. Blankenship supported a challenger to Justice McGraw, Brent Benjamin. Blankenship donated the maximum amount to Benjamin’s campaign, and donated $2.5 million to a 527 organization that supported Benjamin. Blankenship also spent $500,000 individually on direct mailings and letters in support of Benjamin. Blankenship donated more than all other supporters of Benjamin combined. In total, Blankenship spent $1 million more than the total amount spent by the campaign committees of both candidates combined. Benjamin won the election in a close race. The West Virginia Supreme Court then heard Massey’s appeal. Plaintiffs requested that Benjamin recuse himself but he declined. The court reversed the $50 million verdict against Massey. Plaintiffs sought rehearing, and again sought Benjamin’s recusal. The court granted rehearing and in April 2008, the divided court again reversed the jury verdict in a 3-2 decision.

#### Issue

Should a judge recuse himself when a contributor’s influence on his election is so substantial that it would offer a possible temptation to the average judge to lead him not to be impartial?

#### Holding and Reasoning (Kennedy, J.)

Yes. Although not every campaign contribution by a litigant or attorney creates a conflict of interest, there is a serious risk of bias when a person with a personal stake in litigation before the court had a significant and disproportionate influence on placing the judge on the case by contributing to the judge’s election. The factors to be considered are the contribution’s relative size in comparison to the total amount contributed, the total amount spent on the election, and the effect of the contribution on the outcome of the election. It does not matter whether Blankenship’s contributions were the cause of Benjamin’s election. The test is as to whether due process has been violated is whether the contributor’s influence on the election under all the circumstances would offer a possible temptation to the average judge to lead him not to be neutral. Here, although there was no allegation of a quid pro quo agreement between Blankenship and Benjamin, the fact that Blankenship’s enormous financial contributions were made at a time when he had an interest in the outcome of a case to be heard by the court. On these extreme facts, the probability of actual bias rises to an unconstitutional level. Reversed and remanded.

#### Dissent (Roberts, J.)

I disagree that a judge’s failure to recuse himself because of a probability of bias violates the Due Process Clause. A “probability of bias” cannot be defined and provides no useful guidance to judges who are asked to recuse themselves.

**Key Terms:**

**Recuse -** To refuse to be a judge in a lawsuit or appeal because of a conflict of interest or other good reason.

**Due Process -** A constitutional guarantee that a law shall not be unreasonable, arbitrary, or capricious and that individuals will be given notice of legal proceedings conducted fairly with an opportunity for an individual to be heard before the government may impose sanctions on one’s life, liberty, or property.

# Withrow v. Larkin

#### United States Supreme Court 421 U.S. 35 (1975)

#### Rule of Law

**One of the requirements of due process is a neutral decisionmaker.**

#### Facts

Wisconsin state law forbids the practice of medicine without a license from the Examining Board (Board) (defendant). State law also defines and forbids various acts of professional misconduct. The Board, which is composed of practicing physicians, has the authority to warn and reprimand, as well as to suspend or revoke a license. The Board initiated an investigative proceeding against Dr. Larkin (plaintiff), a doctor, to determine whether he had engaged in certain proscribed acts. After going forward with its investigation, the Board sent Larkin a notice that a contested hearing would be held to determine whether he had engaged in the proscribed acts and that the Board would determine whether to suspend his license based on what it learned in the hearing. Larkin sought a restraining order against the hearing. The district court granted Larkin’s request and later granted a preliminary injunction upon determining that the combination of the Board’s prosecutorial and judicial functions violated constitutional guarantees of due process. The United States Supreme Court granted review of the case.

#### Issue

Does vesting an agency with investigative and adjudicatory authority necessarily violate due process?

#### Holding and Reasoning (White, J.)

No. One of the requirements of due process is a neutral decisionmaker. Although there may be a risk of bias when the same entity investigates and adjudicates an issue, there is a strong presumption of honesty and integrity in those serving as administrative adjudicators. The mere exposure to evidence presented in nonadversary investigative procedures is insufficient to impugn the fairness of an administrative adjudicator at a later adversary hearing. Also, while § 5 of the Administrative Procedure Act provides that no employee engaged in investigating or prosecuting may also participate or advise in the adjudicating function, the statute expressly exempts the agency or a member or members of the body comprising the agency from this prohibition. Here, the processes utilized by the Board do not contain an unacceptable risk of bias. Additionally, Larkin has not shown that Board was prejudiced by its investigation or would be unable to reach a fair decision based on the evidence to be presented at the hearing. Accordingly, the lower court erred in entering a restraining order against the Board’s contested hearing and granting the preliminary injunction.

**Key Terms:**

**Procedural Due Process -** The Due Process clause of the United States Constitution requires that the government give an individual notice and an opportunity to be heard before depriving that individual of his life, liberty, or property.

# 5 U.S.C. § 704 - A provision of the Administrative Procedure Act providing for judicial review of final agency action for which there is no other adequate remedy in a court.

**Brady v. United States**

United States Supreme Court  
397 U.S. 742 (1970)

**Rule of Law**

**A defendant’s guilty plea is not invalid under the Fifth Amendment if it is voluntary, knowing, and intelligent and done to avoid the risk of a harsher penalty.**

# In re Murchison

75 S.Ct. 623

Supreme Court of the United States

**In the Matters of Lee Roy MURCHISON and John White, Petitioners.**

No. 405.

Argued April 20, **1955**.Decided May 16, **1955**.

**Synopsis**

Contempt proceedings arising out of witnesses' conduct before a Michigan grand jury. The Reporter's Court of Detroit entered judgments of conviction and defendants appealed. The Supreme Court of Michigan, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Iec764cc3fe8d11d9bf60c1d57ebc853e&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=3e958487bfb34cea84163899d7354359&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[340 Mich. 140, 65 N.W.2d 296](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1954105943&pubNum=595&originatingDoc=I2359a61b9c1e11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Iec764cc7fe8d11d9bf60c1d57ebc853e&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=3e958487bfb34cea84163899d7354359&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[340 Mich. 151, 65 N.W.2d 301,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1954105902&pubNum=595&originatingDoc=I2359a61b9c1e11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed the convictions, and certiorari was granted. The Supreme Court, Mr. Justice Black, held that fact that same judge who had sat as the Michigan ‘judge-grand jury’ before which witnesses had testified presided at contempt hearing wherein witnesses were adjudged in contempt for their conduct before the ‘one-man grand jury’ constituted a violation of due process.

Reversed and remanded with directions.

Mr. Justice Reed, Mr. Justice Minton and Mr. Justice Burton dissented.

# Aetna Life Insurance Company v. Lavoie

#### United States Supreme Court 475 U.S. 813 (1986)

#### Rule of Law

**Under the Due Process Clause, a judge must recuse himself from a case if he has a direct, personal, substantial, and pecuniary interest in the outcome.**

#### Facts

Margaret and Roger Lavoie (plaintiffs) had medical insurance through Aetna Life Insurance Company (Aetna) (defendant). In bad faith, Aetna refused to pay for some of Margaret’s medical expenses. The Lavoies sued Aetna in state trial court, seeking payment and punitive damages. The trial court dismissed the bad-faith claim. The Lavoies appealed to the Alabama Supreme Court, which reversed and remanded the trial court’s dismissal. On remand, the jury awarded the Lavoies $3.5 million in punitive damages, one of the largest punitive-damages awards ever awarded in a bad-faith case. Aetna appealed, and the Alabama Supreme Court affirmed the award in a five-to-four decision. Justice Embry cast the deciding vote. Aetna later learned that Justice Embry had filed an action in a county court in Alabama against Blue Cross-Blue Shield (Blue Cross), alleging a bad-faith failure to pay claims. Aetna filed a motion challenging Justice Embry’s participation in Aetna’s case. The state supreme court unanimously denied Aetna’s motion for recusal. Aetna later obtained a copy of Justice Embry’s deposition transcript in the Blue Cross case and learned that Justice Embry had expressed frustration with insurance companies. Justice Embry had also authored the opinion in Aetna’s case while the Blue Cross case was pending. Aetna moved for leave to file an application for rehearing. The state supreme court denied the motion. Blue Cross then settled its case with Justice Embry and paid him $30,000, which was deposited directly into his personal bank account. Aetna appealed to the United States Supreme Court.

#### Issue

Under the Due Process Clause, must a judge recuse himself from a case if he has a direct, personal, substantial, and pecuniary interest in the outcome?

#### Holding and Reasoning (Burger, C.J.)

Yes. Under the Due Process Clause of the Constitution, a judge must recuse himself from a case if he has a direct, personal, substantial, and pecuniary interest in the outcome of the case. For the judiciary to perform its function in the best possible way, judges must not have even the appearance of bias and must do their best to weigh the scales of justice equally between parties. Here, when Justice Embry cast the deciding vote in Aetna’s case, he had a similar bad-faith case pending against Blue Cross. The decision of the state supreme court in Aetna’s case would be binding on all courts in Alabama, including the county court deciding Justice Embry’s Blue Cross case. The state supreme court also refused to set aside the punitive-damages award, which was extremely large. Justice Embry’s opinion clearly and immediately affected the legal status and settlement value of his Blue Cross case. The $30,000 paid directly to Justice Embry by Blue Cross after the Alabama Supreme Court decided Aetna’s case is sufficient to establish Justice Embry’s substantial interest in the outcome of Aetna’s case. In sum, Justice Embry’s interest in Aetna’s case was direct, personal, substantial, and pecuniary. As a result, Justice Embry’s participation in Aetna’s case violated Aetna’s right to due process. The judgment of the Alabama Supreme Court is vacated and remanded for further proceedings.

**Key Terms:**

**Recuse -** To refuse to be a judge in a lawsuit or appeal because of a conflict of interest or other good reason.

**Due Process -** A constitutional guarantee that a law shall not be unreasonable, arbitrary, or capricious and that individuals will be given notice of legal proceedings conducted fairly with an opportunity for an individual to be heard before the government may impose sanctions on one’s life, liberty, or property.

# Bad Faith Claim - An intentional tort claim brought by an insured against an insurer, which alleges the insurer acted with gross disregard of the insured’s interests, or that it deliberately or recklessly failed to put the insured’s interests on an equal footing with the insurer’s interests in defending or settling a claim brought against the insured.

# Puckett v. United States

129 S.Ct. 1423

Supreme Court of the **United** **States**

**James Benjamin PUCKETT, Petitioner,**

**v.**

**UNITED STATES.**

No. 07–9712.

Argued Jan. 14, **2009**.Decided March 25, **2009**.

## Synopsis

**Background:** Defendant pled guilty to bank robbery and use of a firearm in commission of crime of violence and was convicted and sentenced by the **United** **States** District Court for the Northern District of Texas, [Barefoot Sanders](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0248455501&originatingDoc=I3dd26730192f11deb77d9846f86fae5c&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I3dd26730192f11deb77d9846f86fae5c), J., to 262 months' imprisonment for bank robbery and consecutive 84–month term on gun count. Defendant appealed. The Fifth Circuit Court of Appeals, [Edith H. Jones](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0168836901&originatingDoc=I3dd26730192f11deb77d9846f86fae5c&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I3dd26730192f11deb77d9846f86fae5c), Chief Judge, [505 F.3d 377](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2013807987&pubNum=0000506&originatingDoc=I3dd26730192f11deb77d9846f86fae5c&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)), affirmed. Certiorari was granted.

[**Holding:**](https://1.next.westlaw.com/Document/I3dd26730192f11deb77d9846f86fae5c/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef000001782a433d5774a350e5%3Fppcid%3Daad4b1642a704e768bffe7123bb6ed25%26Nav%3DCASE%26fragmentIdentifier%3DI3dd26730192f11deb77d9846f86fae5c%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=ff1f020b7a05c3d8f32d5763f76ddb37&list=CASE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=aad4b1642a704e768bffe7123bb6ed25&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_F92018428447) The Supreme Court, Justice [Scalia](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254763301&originatingDoc=I3dd26730192f11deb77d9846f86fae5c&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I3dd26730192f11deb77d9846f86fae5c), held that procedurally forfeited error, arising out of government's breach of terms of plea agreement in failing to recommend three-level reduction in defendant's base offense level for acceptance of responsibility due to fact that defendant had engaged in new criminal misconduct prior to sentencing, was subject to “plain error” review.

Affirmed.

Justice [Souter](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0263202201&originatingDoc=I3dd26730192f11deb77d9846f86fae5c&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I3dd26730192f11deb77d9846f86fae5c) dissented and filed opinion, in which Justice [Stevens](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0156277701&originatingDoc=I3dd26730192f11deb77d9846f86fae5c&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I3dd26730192f11deb77d9846f86fae5c) joined.

**Tumey v. Ohio**

47 S.Ct. 437

Supreme Court of the United States.

**TUMEY**

**v.**

**STATE OF OHIO.**

No. 527.

Argued Nov. 29, 30, 1926.Decided March 7, 1927.

## Synopsis

In Error to the Supreme Court of Ohio.

Ed Tumey was convicted before the mayor of the village of North College Hill, Ohio, of unlawfully possessing intoxicating liquor. Judgment of court of common pleas [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Iaaf979cccf2b11d983e7e9deff98dc6f&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[(25 Ohio Nisi Prius (N. S.) 580),](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1925002466&pubNum=2632&originatingDoc=Icdec8a8d9cc211d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) reversing judgment of conviction, was reversed by the Court of Appeals (23 Ohio Law Reporter, 634), and a petition in error as of right to the state Supreme Court was dismissed, for the reason that no debatable constitutional question was involved, and defendant brings error. Judgment reversed, and cause remanded.

# Mayberry v. Pennsylvania

91 S.Ct. 499

Supreme Court of the United States

**Richard MAYBERRY, Petitioner,**

**v.**

**PENNSYLVANIA.**

No. 121.

Argued Dec. 17, 1970.Decided Jan. 20, 1971.

## Synopsis

Defendant was convicted in the Court of Oyer and Terminer of Allegheny County, No. 4672, September, 1965, of criminal contempt for misconduct during his trial on charges of holding hostages in penal institution and prison breach, and he appealed. The Supreme Court of Pennsylvania, Nos. 102—113, March Term, 1967, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ifae1a401340611d986b0aa9c82c164c0&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[434 Pa. 478, 255 A.2d 131,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1969110276&pubNum=162&originatingDoc=I9885e7779c1c11d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed and certiorari was granted. The Supreme Court, Mr. Justice Douglas, held that by reason of due process clause of Fourteenth Amendment a defendant in criminal contempt proceedings should be given public trial before judge other than one reviled by contemnor.

Vacated and remanded.

Mr. Chief Justice Burger and Mr. Justice Harlan concurred and filed opinions; Mr. Justice Black concurred and filed a statement.

# Pennsylvania v. Finley

107 S.Ct. 1990

Supreme Court of the United States

**PENNSYLVANIA, Petitioner**

**v.**

**Dorothy FINLEY.**

No. 85–2099.

Argued March 2, 1987.Decided May 18, 1987.

**Synopsis**

Indigent prisoner petitioned for postconviction relief. The Pennsylvania Court of Common Pleas, Edward J. Blake, J., denied petition. Prisoner appealed. The [Pennsylvania Supreme Court, 497 Pa. 332, 440 A.2d 1183,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1982100298&pubNum=162&originatingDoc=I64e3b6de9c1d11d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) reversed, holding that prisoner was entitled, under state law, to appointed counsel in postconviction proceedings. On remand, the Court of Common Pleas appointed counsel, permitted appointed counsel to withdraw, and dismissed petition for postconviction relief. Prisoner appealed. The [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ifa312d69348211d986b0aa9c82c164c0&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[Pennsylvania Superior Court, 330 Pa.Super 313, 479 A.2d 568,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984133407&pubNum=162&originatingDoc=I64e3b6de9c1d11d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))concluded that conduct of counsel in postconviction proceedings violated prisoner's constitutional rights. Certiorari was granted. The Supreme Court, Chief Justice Rehnquist, held that: (1) prisoner had no equal protection or due process right to appointed counsel in postconviction proceeding, and (2) prisoner, who had no constitutional right to appointed counsel, had no constitutional right to insist on *Anders* procedures for withdrawal of appointed counsel when that attorney found case frivolous on direct appeal.

Reversed and remanded.

Justice Blackmun filed opinion concurring in the judgment.

Justice Brennan filed dissenting opinion joined by Justice Marshall.

Justice Stevens filed dissenting opinion.

**Procedural Posture(s):** On Appeal.

# Herrera v. Collins

#### United States Supreme Court 506 U.S. 390 (1993)

#### Rule of Law

**Federal habeas corpus relief for claims of actual innocence is unavailable if there was no constitutional violation in state criminal proceedings.**

#### Facts

Leonel Torres Herrera (defendant) was convicted of one murder and pled guilty to another. The Texas Court of Criminal Appeals upheld the conviction and death sentence, and the United States Supreme Court denied certiorari. Herrera’s state and federal habeas applications failed, and the Supreme Court denied certiorari. Ten years after conviction, Herrera petitioned for state relief claiming “actual innocence” based on evidence that Herrera’s brother committed the crimes. The state court denied the claim, and Herrera filed a federal habeas petition claiming the state failed to provide exculpatory evidence to the defense as required by *Brady v. Maryland*, 373 U.S. 83 (1963). The United States Supreme Court granted certiorari.

#### Issue

Is federal habeas corpus relief for claims of actual innocence available if no constitutional violation occurred during state criminal proceedings?

#### Holding and Reasoning (Rehnquist, C.J.)

No. There is no federal habeas relief for claims of actual innocence if there was no constitutional violation during state proceedings. A criminal defendant is presumed innocent only until proven guilty. Habeas relief remedies constitutional violations, not factual mistakes. Proof of innocence allows federal judges to grant relief under the “fundamental miscarriage of justice exception” for claims that would be barred by the rule against successive habeas petitions. Still, inmates must show an independent constitutional violation. The dissent’s “probable innocence” standard would burden state courts by requiring retrials for people who have shown only that a new jury might not convict. Herrera claims the Eighth and Fourteenth Amendments bar his execution. Herrera‘s claim of factual error is time barred in state court and does not fall into the miscarriage of justice exception. The fact that Herrera is facing a death sentence is irrelevant. States are entitled to deference in matters of criminal law, and Texas’s jurisdictional rule barring this claim is not unfair. Herrera can seek executive clemency. Federal habeas relief may be granted after a strong showing of innocence, but Herrera has not made one. Herrera’s petition is denied.

#### Concurrence (O’Connor, J.)

Executing an innocent person is unconstitutional, but Herrera is not innocent. The issue is whether a legally guilty person who suffered no constitutional violation is entitled to a retrial. Historically, clemency was the only remedy available in such cases. The Court indicates that federal habeas relief would be available to an innocent person if there were no other remedy, but the Court does not now and may never have to make that holding since clemency and other remedies are available.

#### Concurrence (Scalia, J.)

There is no legal basis for a constitutional right to a retrial based on new evidence. The dissent would invalidate the practice of courts based on personal beliefs. The Court may assume a right exists in order to make its finding, though it is hesitant to admit that the Constitution may not remedy every wrong, especially one as serious as a wrongful execution. This issue may never come up again, because evidence of innocence strong enough to satisfy the Court would almost certainly result in executive clemency.

#### Concurrence (White, J.)

Execution would be unconstitutional if there is proof of innocence such that no rational finder of fact could find the person guilty beyond a reasonable doubt, even if the claim is time barred in state court. Herrera has not met this standard.

#### Dissent (Blackmun, J.)

Executing an innocent person is “shocking to the conscience” and violates the Eighth and Fourteenth Amendments. Punishment that needlessly inflicts pain or is disproportionate is unconstitutional; executing an innocent person is both. There is no clear separation between guilt and punishment. It is irrelevant that a new trial would be less reliable; no state would retry a person who is probably innocent. This Court created an exception to the principle of finality for claims of actual innocence but now takes the illogical view that an innocent person must also show a constitutional violation. The Court gives no guidance for the states, and the existence of executive clemency does not satisfy the states’ constitutional obligations. State remedies must be exhausted. Texas provided Herrera no remedy, and Herrera was entitled to have his factual questions resolved by a federal court. Relief for actual innocence should be granted when the prisoner has proven probable innocence. This standard is high because retrial may be impossible and habeas relief may be the final disposition of a case. Thus, convictions must be given due respect. District courts must weigh all evidence to determine whether prisoners have met this burden in a given case. Execution of a prisoner who is probably innocent is unconstitutional.

# District Attorney’s Office v. Osborne

#### United States Supreme Court 557 U.S. 52 (2009)

#### Rule of Law

**The Due Process Clause of the Fourteenth Amendment does not provide a constitutional right to postconviction DNA testing.**

#### Facts

William Osborne (defendant) was convicted of kidnapping and sexual assault in Alaska in 1993. The parole board released Osborne from prison after 14 years, due in part to his confession to the crime at a parole hearing. Osborne was subsequently arrested for a new crime, and the District Attorney’s Office for the Third Judicial District (plaintiff) petitioned to revoke his parole. Osborne then requested that the Alaska Court of Appeals order deoxyribonucleic acid (DNA) testing on biological evidence found on a condom collected from the 1993 crime scene. Osborne claimed that he had made the same request of his lawyer, Sidney Billingslea, at the 1993 trial, but that she had failed to act on his request. Billingslea testified that she had not requested the testing for various reasons, including her belief that the results would confirm Osborne’s guilt. Osborne alleged that his confession had been a lie made in order to gain a quicker release. The court of appeals denied relief based on Osborne’s failure to make the request at the 1993 trial and his confession to the parole board. Osborne then brought a federal action under 42 U.S.C. § 1983, claiming that he was entitled to DNA testing under the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. The federal district court agreed with Osborne and ordered the state to turn over the evidence for testing. The United States Court of Appeals for the Ninth Circuit affirmed, holding that the duty to disclose exculpatory evidence extends to postconviction proceedings. The United States Supreme Court granted certiorari to review the constitutional claim.

#### Issue

Does the Due Process Clause of the Fourteenth Amendment provide a constitutional right to postconviction DNA testing?

#### Holding and Reasoning (Roberts, C.J.)

No. Although a defendant has a postconviction right to demonstrate innocence with new evidence, federal courts will not interfere with adequate state-law procedures governing DNA testing. The Due Process Clause prohibits states from depriving individuals of certain rights without proper process. New DNA-testing technology can exonerate wrongfully convicted defendants. As a result, most states and the federal government have developed legislation that permits postconviction DNA testing under certain conditions. Although Alaska does not have a specific statute regarding DNA testing, the state has permitted testing under its postconviction-relief statute as a claim of newly discovered evidence establishing actual innocence. In addition, the state court of appeals has used a three-part test for a defendant seeking postconviction DNA testing. A defendant must show that (1) the conviction relied heavily on eyewitness-identification evidence, (2) there was real doubt regarding the identification of the defendant, and (3) the DNA testing available likely would be conclusive. Exoneration is granted upon a compelling showing of new evidence that establishes innocence. These requirements are similar to those of other states and to the law governing federal prisoners. This process is entirely adequate to protect substantive due-process rights. Here, the Alaska Court of Appeals denied Osborne’s request under these state procedures. The federal courts therefore erred by creating a federal due-process right when the state law provided adequate protection. Additionally, Osborne’s general claim of a constitutional right to prove his actual innocence, even if the right exists, must be brought as a habeas corpus claim, not under § 1983. Accordingly, the judgment of the federal court of appeals is reversed and remanded.

#### Concurrence (Alito, J.)

There are two reasons other than the constitutional claim to deny Osborne’s request: (1) a defendant must exhaust state remedies through a habeas corpus claim before filing a § 1983 claim, and (2) a defendant who refuses to request DNA testing at the time of trial for strategic reasons has no right to request testing after conviction.

#### Dissent (Souter, J.)

Although the state process is adequate, Alaska has failed to properly follow its process in enough instances that the state has violated Osborne’s due-process rights.

#### Dissent (Stevens, J.)

The state procedure does not provide adequate due process. The Alaska court denied Osborne relief under the postconviction statute because he did not request DNA testing at trial and therefore could not claim that the DNA testing was new evidence. The DNA testing would be new evidence, however, because the type of DNA testing requested was not available at the time of trial. The three-part test is not adequate, because identification testimony carries little weight compared to DNA testing, and the DNA test results would be conclusive. The state’s refusal to provide Osborne with access to evidence for DNA testing that could prove his innocence is so arbitrary that the refusal qualifies as a violation of due process.

**Key Terms:**

**Freestanding Due Process** - The concept that substantive due-process rights offer a guarantee that exists independent of the guarantees with which due-process rights are typically associated and that expands to other areas, including postconviction rights.

***District Attorney’s Office v. Osborne*** reflects the differing perspectives that have often divided the Court in its determination of the independent content of due process.

**Tenn. R. Crim. Proc. Rules 23 - 31**

**Tenn. Rules of Criminal Procedure – Rules 23 - 31**

**Tenn**. R. Crim. P., **Rule** **23**

**Rule 23. Trial by Jury**

[Currentness](https://1.next.westlaw.com/Document/NB2CA287008B811DCA0BCE207F6B84988/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad62aef000001782a4c44ec74a35106%3Fppcid%3D97a355fa5e1a4f9a8f9e47722976a609%26Nav%3DSTATUTE%26fragmentIdentifier%3DNB2CA287008B811DCA0BCE207F6B84988%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=5b6271ea696f59968b8be651abb2dc8d&list=STATUTE&rank=1&sessionScopeId=15282738797cd339e9ec50015d6657e8e8416f59ed9152ab3942c3c85b5fd114&ppcid=97a355fa5e1a4f9a8f9e47722976a609&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_anchor_I21B70851E12E11EAB9E2CD0ACABD5002)

**(a) Right to Jury Trial.** In all **criminal** prosecutions except for small offenses, the defendant is entitled to a jury trial unless waived.

**(b) Waiver.**

(1) Timing. The defendant may waive a jury trial at any time before the jury is sworn.

(2) Procedures. A waiver of jury trial must:

(A) be in writing;

(B) have the consent of the district attorney general; and

(C) have the approval of the court.

Tenn. R. Crim. P., Rule 24

**Rule 24. Trial Jurors**

[Currentness](https://1.next.westlaw.com/Document/NB416307008B811DCA0BCE207F6B84988/View/FullText.html?originationContext=previousnextsection&contextData=(sc.Search)&transitionType=StatuteNavigator&needToInjectTerms=False#co_anchor_I23343271E12E11EAB9E2CD0ACABD5002)

**(a) Initial Actions in Jury Selection.**

(1) *By Court.* The court shall:

(A) cause the prospective jurors to swear or affirm to answer truthfully the questions they will be asked during the selection process;

(B) identify the parties and their counsel; and

(C) briefly outline the nature of the case.

(2) *By Counsel.* At or near the beginning of jury selection, the court shall permit counsel to introduce themselves and make brief, non-argumentative remarks that inform the potential jurors of the general nature of the case.

**(b) Questioning Potential Jurors.**

(1) *Questioning Jurors by Court and Counsel.* The court may ask potential jurors appropriate questions regarding their qualifications to serve as jurors in the case. It shall permit the parties to ask questions for the purpose of discovering bases for challenge for cause and intelligently exercising peremptory challenges.

(2) *Questioning Outside Presence of Other Jurors.* On motion of a party or its own initiative, the court may direct that any portion of the questioning of a prospective juror be conducted out of the presence of the tentatively selected jurors and other prospective jurors.

**(c) Challenges for Cause.**

(1) *Procedures.* After examination of any juror, the judge shall excuse that juror from the trial of the case if the court is of the opinion that there are grounds for challenge for cause. After the court has tentatively determined that the jury meets the prescribed qualifications, counsel may conduct further examination and, alternately, may exercise challenges for cause.

(2) *Grounds.* Any party may challenge a prospective juror for cause if:

(A) Cause Provided by Law. There exists any ground for challenge for cause provided by law;

(B) Exposure to Information. The prospective juror's exposure to potentially prejudicial information makes the person unacceptable as a juror. The court shall consider both the degree of exposure and the prospective juror's testimony as to his or her state of mind. A prospective juror who states that he or she will be unable to overcome preconceptions is subject to challenge for cause no matter how slight the exposure. If the prospective juror has seen or heard and remembers information that will be developed in the course of trial, or that may be inadmissible but is not so prejudicial as to create a substantial risk that his or her judgment will be affected, the prospective juror's acceptability depends on whether the court believes the testimony as to impartiality. A prospective juror who admits to having formed an opinion about the case is subject to challenge for cause unless the examination shows unequivocally that the prospective juror can be impartial.

**(d) Exercising Peremptory Challenge.** After the court conducts its initial examination and seats a tentative group of jurors not excluded for cause, the following procedure shall be followed until a full jury has been selected from those jurors and accepted by counsel:

(1) At each round of peremptory challenges, counsel shall submit simultaneously to the court either a blank sheet of paper or a sheet of paper challenging one or more jurors in the group of the first twelve (or more if additional jurors are seated under the single entity process of Rule 24(f)(2)(A)) jurors who have been seated. Neither party shall make known the fact that the party has not challenged a juror.

(2) Replacement jurors will be seated in the panel of twelve (or more if additional jurors are seated under the single entity process of Rule 24(f)(2)(A)) in the order of their selection.

(3) If necessary, additional replacement jurors will be examined for cause and, after passed, counsel will again submit simultaneously, and in writing, the name of any juror in the group of twelve (or more if additional jurors are seated under the single entity process of Rule 24(f)(2)(A)) that counsel elects to challenge peremptorily. Peremptory challenges may be directed to any member of the jury; counsel are not limited to using such challenges against replacement jurors.

(4) Alternate jurors are selected in the same manner, unless the single entity process of Rule 24(f)(2)(A) is used.

(5) The trial judge shall keep a list of those challenged. If the same juror is challenged by both parties, each party is charged with the challenge. The trial judge shall not disclose to any juror the identity of the party challenging the juror.

**(e) Number of Peremptory Challenges.**

(1) *Death Penalty.* If the offense charged is punishable by death, each defendant is entitled to fifteen peremptory challenges and the state is entitled to fifteen peremptory challenges for each defendant.

(2) *Imprisonment More Than Year.* If the offense charged is punishable by imprisonment for more than one year, each defendant is entitled to eight peremptory challenges and the state is entitled to eight peremptory challenges for each defendant.

(3) *Imprisonment Less Than Year or Fine.* If the offense charged is punishable by imprisonment for less than one year or by fine or both, each side is entitled to three peremptory challenges for each defendant.

(4) *Additional Jurors.* For each additional juror selected pursuant to Rule 24(f), each side is entitled to one peremptory challenge for each defendant. Such additional peremptory challenges may be used against any regular or additional juror.

**(f) Additional Jurors.** Before jury selection begins, the court may call and impanel one or more jurors in addition to the regular jury of twelve persons. The following procedures apply:

(1) *Same as Regular Jurors.* The additional jurors shall be drawn in the same manner, have the same qualifications, be subject to the same examination and challenges, take the same oath, and have the same functions, powers, facilities, and privileges as the regular jurors.

(2) *Methods of Impaneling Additional Jurors.* The trial court may use either of the following methods to select and impanel additional jurors:

(A) Single Entity. During jury selection and trial of the case, the court shall make no distinction as to which jurors are additional jurors and which jurors are regular jurors. Before the jury retires to consider its verdict, the court shall select by lot the names of the requisite number of jurors to reduce the jury to a body of twelve or such other number as the law provides. A juror who is not selected to be a member of the deliberating jury shall be discharged when that jury retires to consider its verdict.

(B) Separate Entities. Following the selection of the jury of twelve regular jurors, the additional jurors shall be selected and impaneled as alternate jurors. Alternate jurors in the order in which they are called shall replace jurors who become unable or disqualified to perform their duties prior to the time the jury retires to consider its verdict. An alternate juror who does not replace a regular juror shall be discharged when the jury retires to consider its verdict.

**(g) Admonitions.** The court shall give the prospective jurors appropriate admonitions regarding their conduct during the selection process. After jurors are sworn, the court shall also give them appropriate admonitions regarding their conduct during the case. In both situations these shall include admonitions:

(1) not to communicate with other jurors or anyone else regarding any subject connected with the trial;

(2) not to form or express any opinion about the case until it is finally submitted to the jury;

(3) to report promptly to the court:

(A) any incident involving an attempt by any person improperly to influence any jury member; or

(B) a juror's violation of any of the court's admonitions;

(4) not to read, hear, or view any news reports concerning the case; and

(5) to decide the case solely on the evidence introduced in the trial.

**(h) List of Prospective Jurors.** On request, the parties shall be furnished with a list indicating for each member of the jury panel:

(1) the member's name, address, occupation, spouse's name and occupation; and

(2) whether each member has served previously on a criminal court jury. Information about previous jury experience need not be provided prior to the day of trial.

Tenn. R. Crim. P., Rule 24.1

**Rule 24.1. Juror Information**

[Currentness](https://1.next.westlaw.com/Document/NB51E78B008B811DCA0BCE207F6B84988/View/FullText.html?originationContext=previousnextsection&contextData=(sc.Document)&transitionType=StatuteNavigator&needToInjectTerms=False#co_anchor_I20E07E70E12E11EAB9E2CD0ACABD5002)

**(a) Notetaking.**

(1) Notetaking Allowed. The court shall instruct jurors that they may take notes during the trial and deliberations.

(2) Materials. The court shall provide suitable materials for this purpose.

(3) Access to Notes. Jurors shall have access to their notes during recesses and deliberations.

(4) Destruction of Notes. After the jury has rendered a verdict, the notes shall be collected by court personnel who shall destroy them promptly.

**(b) Notebooks.**

(1) Allowed in Court's Discretion. When the court deems it helpful in a particular case, jurors may be provided with notebooks to use in collecting and organizing appropriate materials, including items such as jury instructions, copies of written and other exhibits, and the juror's own notes.

(2) Participation by Counsel. Counsel should be apprised of this procedure and invited to prepare exhibits and other materials in a way that facilitates their inclusion in the jurors' notebooks.

(3) Disposition of Notebooks. At the end of the trial, the notebooks shall be collected by court personnel and their contents destroyed, unless the court instructs to the contrary.

**(c) Juror Questions of Witnesses.** In the court's discretion, the court may permit a juror to ask a question of a witness. The following procedures apply:

(1) Written Submission of Questions. The juror shall put the question in writing and submit it to the judge through a court officer at the end of a witness' testimony. A juror's question shall be anonymous and the juror's name shall not be included in the question.

(2) Procedure After Submission. The judge shall review all such questions and, outside the hearing of the jury, shall consult the parties about whether the question should be asked. The judge may ask the juror's question in whole or part and may change the wording of the question before asking it. The judge may permit counsel to ask the question in its original or amended form in whole or part.

(3) Jury Instructions. When juror questions are permitted, the court shall instruct jurors early in the trial about the mechanics of asking a question and to give no meaning to the fact that the judge chose not to ask a question or altered the wording of a question submitted by a juror.

(4) Retaining Questions for Record. All jurors' questions--whether approved or disapproved by the court--shall be retained for the record.

## Editors' Notes

**ADVISORY COMMISSION COMMENT**

This rule permits three procedures designed to assist jurors in the effective performance of their important functions.

Rule 24.1(a) specifically states that jurors are allowed to take notes during the trial and to use those notes during deliberations. The court is to provide the necessary materials and to collect and destroy the notes at the end of the trial. The premise of this rule is that jurors, like judges and lawyers, may find it helpful to take notes during the trial in order to assist in remembering the evidence.

Rule 24.1(b) authorizes the court, in its discretion, to provide jurors with notebooks to use in collecting and organizing the various materials presented to the jury. The notebook might include such items as jury instructions, copies of exhibits (photographs, charts, etc.), basic definitions of words used in the trial, and any other appropriate materials.

The court is given the discretion whether to use notebooks. The court might want to ask counsel to assist in the preparation of the notebooks. The content and financial aspects of the notebooks might be discussed and resolved during pretrial conference. After the trial, the court may collect the notebooks and destroy any contents that will not be used again, although the actual disposition is left to the court's discretion.

Rule 24.1(c) gives the court the discretion to allow jurors to ask questions of witnesses. This rule is designed to assist jurors in their understanding of evidence and to make them feel more involved in the trial process. The procedure in this rule should ensure that improper questions are not propounded to witnesses. After a witness has completed testimony, a juror desiring to ask a question must submit that question in writing to a court officer who will give it to the judge. The question is submitted to the judge without identifying the juror who asked it. The judge then screens the question. Counsel shall be invited to comment on the propriety of the question out of the hearing of the jury. The court is given the discretion to reject or ask the question in whole or in part, to rephrase it, and to have counsel ask the question of the witness. If necessary, the court may accompany the question or the rejection of the question with appropriate jury instructions. All questions are to be retained for the record.

Tenn. R. Crim. P., Rule 25

**Rule 25. Disability of Judge**

[Currentness](https://1.next.westlaw.com/Document/NB65FF96008B811DCA0BCE207F6B84988/View/FullText.html?originationContext=previousnextsection&contextData=(sc.Document)&transitionType=StatuteNavigator&needToInjectTerms=False#co_anchor_I3A1E9750E12E11EAB9E2CD0ACABD5002)

**(a) During Trial.** Any judge regularly presiding in or who is assigned to a court may complete a jury trial if:

(1) the judge before whom a jury trial has commenced is unable to proceed because of death, sickness, or other disability; and

(2) the judge completing the trial certifies that he or she has become familiar with the record of the trial.

**(b) After Verdict of Guilt.**

(1) In General. After a verdict of guilty, any judge regularly presiding in or who is assigned to a court may complete the court's duties if the judge before whom the trial began cannot proceed because of absence, death, sickness, or other disability.

(2) Granting a New Trial. The successor judge may grant a new trial when that judge concludes that he or she cannot perform those duties because of the failure to preside at the trial or for any other reason.

Tenn. R. Crim. P., Rule 26

**Rule 26. [Reserved]**

[Currentness](https://1.next.westlaw.com/Document/NADDD10200A1111DCA0BCE207F6B84988/View/FullText.html?originationContext=previousnextsection&contextData=(sc.Document)&transitionType=StatuteNavigator&needToInjectTerms=False#co_anchor_I322C9832E12E11EAB9E2CD0ACABD5002)

<**Research Note**>

<See Raybin, Tennessee Practice, volumes 9-11, for a comprehensive treatment of criminal practice and procedure.>

Rules Crim. Proc., Rule 26, TN R RCRP Rule 26

State court rules are current with amendments received through December 1, 2020.

Tenn. R. Crim. P., Rule 26.1

**Rule 26.1. [Reserved]**

[Currentness](https://1.next.westlaw.com/Document/NAD2DBD500A1111DCA0BCE207F6B84988/View/FullText.html?originationContext=previousnextsection&contextData=(sc.Document)&transitionType=StatuteNavigator&needToInjectTerms=False#co_anchor_I24FDF5F0E12E11EAB9E2CD0ACABD5002)

<**Research Note**>

<See Raybin, Tennessee Practice, volumes 9-11, for a comprehensive treatment of criminal practice and procedure.>

Rules Crim. Proc., Rule 26.1, TN R RCRP Rule 26.1

State court rules are current with amendments received through December 1, 2020.

Tenn. R. Crim. P., Rule 26.2

**Rule 26.2. Production of Statements of Witnesses**

[Currentness](https://1.next.westlaw.com/Document/NB7681A9008B811DCA0BCE207F6B84988/View/FullText.html?originationContext=previousnextsection&contextData=(sc.Document)&transitionType=StatuteNavigator&needToInjectTerms=False#co_anchor_I3931C650E12E11EAB9E2CD0ACABD5002)

**(a) Motion for Production.** After a witness other than the defendant has testified on direct examination, the court, on motion of a party who did not call the witness, shall order the attorney for the state or the defendant and the defendant's attorney to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter of the witness's testimony.

**(b) Production of Statement.**

(1) Entire Statement. If the entire statement relates to the subject matter of the witness's testimony, the court shall order that the statement be delivered to the moving party.

(2) Redacted Statement.

(A) Delivery to Court. If the other party claims that the statement contains matter that does not relate to the subject matter of the witness's testimony, the court shall order that it be delivered to the court in camera.

(B) Redaction of Unrelated Portions. Upon inspection, the court shall redact the portions of the statement that do not relate to the subject matter of the witness's testimony. The remaining parts of the statement shall be delivered to the moving party. Any portion of the statement that is withheld from the defendant over the defendant's objection must be preserved by the attorney for the state. In the event of a conviction and an appeal by the defendant, this preserved portion shall be made available to the appellate court for the purpose of determining the correctness of the decision to excise the portion of the statement.

**(c) Recess for Examination of Statement.** The court may recess the proceedings to allow time for a party to examine the statement and prepare for its use.

**(d) Sanction for Failure to Produce Statement.** If the party who called the witness disobeys an order to deliver a statement, the court shall strike the witness's testimony from the record and order the trial to proceed. If the attorney for the state disobeys the order, the court shall declare a mistrial if required in the interest of justice.

**(e) Production of Statements at Pretrial Hearing.** Except as otherwise provided by law, this rule shall apply at a motion hearing under [Rule 12(b)](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1008875&cite=TNRRCRPR12&originatingDoc=NB7681A9008B811DCA0BCE207F6B84988&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Document)).

**(f) Definition of “Statement.”** As used in this rule, a witness's “statement” means:

(1) A written statement that the witness makes and signs, or otherwise adopts or approves; or

(2) A substantially verbatim, contemporaneously recorded recital of the witness's oral statement that is contained in a stenographic, mechanical, electrical, or other recording or a transcription of such a statement.

## Editors' Notes

**ADVISORY COMMISSION COMMENT**

The language of Rule 26.2 is similar to the language in [Rule 26.2 of the Federal Rules of Criminal Procedure](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000598&cite=USFRCRPR26.2&originatingDoc=NB7681A9008B811DCA0BCE207F6B84988&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Document)). There are, however, two differences that deserve comment.

First, the Committee deliberately did not incorporate that provision of subdivision (e)(3) of the federal Jenck's Act, [18 U.S.C. § 3500](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000546&cite=18USCAS3500&originatingDoc=NB7681A9008B811DCA0BCE207F6B84988&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Document)), which applies to statements of witnesses before a grand jury, and such statements are not meant to be obtainable simply because a grand jury witness testifies for the state.Such statements may only be obtained under the limited provisions of existing law now contained in Rule 6(k)(2).

Second, Rule 26.2(e) now makes it clear that this rule applies not only to trial situations, but also to pretrial testimony such as might be given at a suppression hearing. There would be little logic in requiring statement production only at trial, and not at pretrial hearings where testimony as to the facts of the case is being given under oath. This provision is similar to language found in [Rule 12(i) of the Federal Rules of Criminal Procedure](https://1.next.westlaw.com/Link/Document/FullText?findType=L&pubNum=1000598&cite=USFRCRPR12&originatingDoc=NB7681A9008B811DCA0BCE207F6B84988&refType=LQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Document)), but the Tennessee rules commission elected to treat all witness statements in one rule. However, the Tennessee rule applies to all pretrial motions under Rule 12(b). Further, the Federal rule treats law enforcement officials as witnesses called by the state, but the commission elected not to adopt this provision. Obviously, Rule 26.2(b) applies to such pretrial motion hearings. Thus, only part of a witness' statement may be relevant to the hearing. The remainder may then be disclosed at trial under the provisions of Rule 26.2(a).

The commission desires to make clear that this entire rule in no way applies to a preliminary hearing or any other hearing conducted in general sessions court. Rather, Rule 26.2 applies only in criminal court.

Tenn. R. Crim. P., Rule 26.3

**Rule 26.3. Order of Expert Testimony**

[Currentness](https://1.next.westlaw.com/Document/NB859CD9008B811DCA0BCE207F6B84988/View/FullText.html?originationContext=previousnextsection&contextData=(sc.Document)&transitionType=StatuteNavigator&needToInjectTerms=False#co_anchor_I2F9DAFF0E12E11EAB9E2CD0ACABD5002)

In a trial involving conflicting expert testimony and with the consent of all parties, the court may reorder the ordinary proof process to increase the likelihood that jurors will be able to comprehend and evaluate expert testimony.

## Editors' Notes

**ADVISORY COMMISSION COMMENT**

This rule is designed to assist jurors in understanding conflicting expert testimony by providing judges and lawyers with considerable flexibility in the scheduling and mode of that testimony. There are many possible methods that can be used pursuant to this rule. On rare occasions, it may be helpful if expert testimony on the same subject be given in the same block of time rather than separated by days or weeks and given during each party's proof process. For example, in a criminal homicide case where both sides will present expert testimony on causation, jurors may benefit if the prosecution's causation experts testify, followed immediately by the defendant's causation experts. This procedure may give the jurors a better way of resolving the critical issue of causation. Because of the tactical, financial, scheduling, and procedural issues raised by this new procedure, it can only be utilized with the consent of the court and all parties.

Rules Crim. Proc., Rule 26.3, TN R RCRP Rule 26.3

State court rules are current with amendments received through December 1, 2020.

Tenn. R. Crim. P., Rule 27

**Rule 27. [Reserved]**

[Currentness](https://1.next.westlaw.com/Document/NB93E131008B811DCA0BCE207F6B84988/View/FullText.html?originationContext=previousnextsection&contextData=(sc.Document)&transitionType=StatuteNavigator&needToInjectTerms=False#co_anchor_I22311A50E12E11EAB9E2CD0ACABD5002)

## Credits

[Former Rule 27 deleted and Rule number reserved effective July 1, 1991.]

<**Research Note**>

<See Raybin, Tennessee Practice, volumes 9-11, for a comprehensive treatment of criminal practice and procedure.>

## Editors' Notes

**ADVISORY COMMISSION COMMENT TO 1991 AMENDMENT**

Former Rule 27 dealt with admissibility of official records. The amendment deletes the rule, official records now being covered by such provisions as T.R.Evid. 803(8) and 902(4).

Rules Crim. Proc., Rule 27, TN R RCRP Rule 27

State court rules are current with amendments received through December 1, 2020.

Tenn. R. Crim. P., Rule 28

**Rule 28. Interpreters**

[Currentness](https://1.next.westlaw.com/Document/NBA1BA1D008B811DCA0BCE207F6B84988/View/FullText.html?originationContext=previousnextsection&contextData=(sc.Document)&transitionType=StatuteNavigator&needToInjectTerms=False#co_anchor_I55323380E12E11EAB9E2CD0ACABD5002)

The court may appoint an interpreter pursuant to section 3 of Tennessee Supreme Court Rule 42. Costs associated with an interpreter's services shall be assessed pursuant to Supreme Court Rule 42. All interpreter costs not covered by Supreme Court Rule 42 shall be taxed as costs.

## Editors' Notes

**ADVISORY COMMISSION COMMENT [2013]**

Tenn. Sup. Ct. R. 42 was revised (effective July 1, 2012) to govern the payment of costs for services of interpreters used in proceedings covered by that rule. Rule 28 was amended to provide that payment for interpreters' services is governed by Tenn. Sup. Ct. R. 42, but that any such costs not covered by that rule shall be taxed as costs.

Tenn. R. Crim. P., Rule 29

**Rule 29. Motion for Judgment of Acquittal**

[Currentness](https://1.next.westlaw.com/Document/NBB08C0F008B811DCA0BCE207F6B84988/View/FullText.html?originationContext=previousnextsection&contextData=(sc.Document)&transitionType=StatuteNavigator&needToInjectTerms=False#co_anchor_I246F7190E12E11EAB9E2CD0ACABD5002)

**(a) Directed Verdict Abolished.** Motions for directed verdict are abolished and are replaced by motions for judgment of acquittal.

**(b) Grounds for Judgment of Acquittal.** On defendant's motion or its own initiative, the court shall order the entry of judgment of acquittal of one or more offenses charged in the indictment, presentment, or information after the evidence on either side is closed if the evidence is insufficient to sustain a conviction of such offense or offenses.

**(c) Proof After Denial of Motion.** If--at the close of the state's proof--the court denies a defendant's motion for judgment of acquittal, the defendant may offer evidence without having reserved the right to do so.

**(d) Reserving Decision on Motion at Close of Evidence.** If a motion for judgment of acquittal is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury, and decide the motion:

(1) before the jury returns a verdict;

(2) after it returns a verdict of guilty; or

(3) after it is discharged without having returned a verdict.

**(e) Motion After Guilty Verdict or Discharge of Jury.**

(1) Timing of Motion. If the jury returns a verdict of guilty, a defendant may move for a judgment of acquittal, or renew such a motion, within 30 days of the date the order of sentence is entered or within such further time as the court sets during the 30-day period. If the jury is discharged without having returned a verdict, the 30-day period begins to run from the date the jury is discharged.

(2) Setting Aside Guilty Verdict. If the defendant moves for a judgment of acquittal after the jury returns a verdict of guilty, the court may set aside the guilty verdict, dispose of a motion for new trial, and grant the judgment of acquittal. The state may appeal when the court sets aside a verdict of guilty and enters a judgment of acquittal.

## Editors' Notes

**ADVISORY COMMISSION COMMENT**

Thirty days are allowed after the date the order of sentence is entered within which to move for a judgment of acquittal. This time period was selected to conform to that allowed for filing a motion for a new trial, and it is permissible to file the two together; indeed, the commission anticipates that this will be the case. The same time period of thirty days applies to motions for judgment of acquittal, motions for new trials, and motions in arrest of judgment. They may be filed in any order or together, without any waiver, but all must come within the thirty days after the date the order of sentence is entered.

Tenn. R. Crim. P., Rule 29.1

**Rule 29.1. Closing Argument**

[Currentness](https://1.next.westlaw.com/Document/NBC3D977008B811DCA0BCE207F6B84988/View/FullText.html?originationContext=previousnextsection&contextData=(sc.Document)&transitionType=StatuteNavigator&needToInjectTerms=False#co_anchor_I75E182C0E12E11EAB9E2CD0ACABD5002)

**(a) State's First Closing Argument; Waiver.**

(1) State's First Closing Argument. At the close of the evidence, the state has the right to make the first closing argument to the trier of facts.

(2) Waiver. If the state desires that all closing argument be waived, it may offer to waive such argument. If the defendant agrees, then no argument will be made. The state may not waive the first closing argument unless all closing argument is waived.

(3) Scope of State's Opening Argument. The state's first closing argument shall cover the entire scope of the state's theory.

**(b) Defendant's Closing Argument; Waiver**

(1) Defendant Argues after State. Each defendant shall be allowed to make a closing argument following the state's first closing argument. If the defendant waives this closing argument, the state is not permitted to make a final closing argument.

(2) Scope of Defendant's Argument. Defendant's closing argument may address any relevant and proper subject and is not limited to matters actually argued by the state.

**(c) State's Final Closing Argument.**

(1) State's Final Closing Argument. The state shall be allowed a final closing argument following the defendant's closing arguments, unless the defendant has waived closing argument or the state has waived all argument or its final argument.

(2) Scope of State's Final Closing Argument. The state's final closing argument is limited to the subject matter covered in the state's first closing argument and the defendant's intervening argument.

**(d) Court's Discretion to Control Closing Arguments**.

(1) Discretion to Regulate Arguments. The court has discretion to set:

(A) the number of closing arguments permitted on behalf of the state beyond the first and final closing arguments;

(B) the number of closing arguments in excess of one permitted each defendant; and

(C) the order and length of closing arguments.

(2) Policies. The court shall allow adequate but not excessive time for closing arguments to make a full presentation of the theory of the case. If more than two arguments are made for the state, the court shall ensure that no defendant is deprived of the opportunity to answer a new argument made by the state against that defendant. It is the purpose of this rule to ensure that all argument be waived only with the consent of both sides; that the defendant shall be permitted to waive all remaining argument after the state's first closing argument; and that while the state, having the burden of proof, has the right to open and close the argument, this right shall not be exercised in such way as to deprive the defendant of the opportunity to fully answer all state argument. The court, on motion, shall enforce this purpose.

## Editors' Notes

**ADVISORY COMMISSION COMMENT**

This rule reflects the generally-followed philosophy of controlling summation in this state. However, the commission is aware of variances in local practice and therefore deems it necessary to spell out both the philosophy and the mechanics in order to assure fairness and uniformity of procedure.

Tenn. R. Crim. P., Rule 29.2

**Rule 29.2. Interim Commentary**

[Currentness](https://1.next.westlaw.com/Document/NBD1A89F008B811DCA0BCE207F6B84988/View/FullText.html?originationContext=previousnextsection&contextData=(sc.Document)&transitionType=StatuteNavigator&needToInjectTerms=False#co_anchor_I2157F860E12E11EAB9E2CD0ACABD5002)

During the course of the trial, the court may permit counsel to address the jury to assist jurors in understanding the evidence that has been presented or will be presented. The trial court may place reasonable time limits on such statements and shall permit all counsel to respond to the remarks of any one lawyer.

## Editors' Notes

**ADVISORY COMMISSION COMMENT**

This rule gives the court the discretion to allow counsel to speak directly to the jury during the trial in order to assist the jurors in understanding the context of the evidence. For example, the court may allow counsel to make a short explanation of what legal issue the next two witnesses will address. The court is given the discretion to place time and content limits on these statements, but each counsel must be given a chance to respond to the interim commentary of any lawyer.

Rules Crim. Proc., Rule 29.2, TN R RCRP Rule 29.2

State court rules are current with amendments received through December 1, 2020.

Tenn. R. Crim. P., Rule 30

**Rule 30. Instructions**

[Currentness](https://1.next.westlaw.com/Document/NBE428F3008B811DCA0BCE207F6B84988/View/FullText.html?originationContext=previousnextsection&contextData=(sc.Document)&transitionType=StatuteNavigator&needToInjectTerms=False#co_anchor_I37313B60E12E11EAB9E2CD0ACABD5002)

**(a) Special Requests.**

(1) Filing Request. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court may also entertain requests for instructions at any time before the jury retires to consider its verdict.

(2) Copy to Adversary Counsel. Counsel requesting a jury instruction shall furnish a copy to adversary counsel at the same time the request is filed with the court.

(3) Decision on Request. Prior to counsels' closing jury arguments, the court shall inform counsel of its proposed action on:

(A) the requests for jury instructions; and

(B) any other portion of the instructions concerning which inquiries are made.

**(b) Objections to Instructions.** After the court instructs the jury, the parties shall be given an opportunity to object--out of hearing of the jury--to the content of an instruction that was given or to the failure to give a requested instruction. Counsel's failure to object does not prejudice the right of a party to assign the basis of the objection as error in a motion for a new trial.

**(c) Form, Use, and Disposition of Instructions.** In the trial of all felonies--except where pleas of guilty have been entered--every word of the judge's instructions shall be reduced to writing before being given to the jury. The written charge shall be read to the jury and taken to the jury room by the jury when it retires to deliberate. The jury shall have possession of the written charge during its deliberations. After the jury's deliberations have concluded, the written charge shall be returned to the judge and filed with the record, but it need not be copied in the minutes.

**(d) Timing of Jury Instructions.**

(1) At Beginning of Trial. Immediately after the jury is sworn, the court shall instruct the jury concerning its duties, its conduct, the order of proceedings, the general nature of the case, and the elementary legal principles that will govern the proceeding.

(2) Before and After Closing Argument. The court may instruct the jury on the applicable law before or after closing argument. After closing argument the court may repeat all or part of the instructions that were given before closing argument. The court may also give additional instructions concerning organizational and related matters after closing argument.

## Editors' Notes

**ADVISORY COMMISSION COMMENT**

This rule generally assures that counsel will know what the charge will contain before making the summation argument to the jury.

The requirement that a written charge be used in felony cases, which must be taken by the jury to the jury room, returned to the judge, and filed with the other papers, reiterates present law.

Rule 30(d) deals with the timing of jury instructions.

Rule 30(d)(1) requires the court to give basic instructions on procedures and law at the beginning of the trial. This requirement should better enable jurors to understand the evidence and apply the proof to the applicable law. With this background, jurors will be able to put the proof in the context of the legal rules involved in the dispute.

Rule 30(d)(2) provides the court the option of giving the bulk of the final jury instructions before closing argument. This procedure may improve the utility of counsel's closing argument by enabling the lawyers to make specific reference to the law at issue in the case. This option should greatly assist jurors in their efforts to apply the facts to the law. If such instructions are given before closing argument, the court should provide additional housekeeping instructions after that argument. The court may also repeat some of the substantive instructions already given before the closing argument.

Tenn. R. Crim. P., Rule 30.1

**Rule 30.1. Exhibits in Jury Room**

[Currentness](https://1.next.westlaw.com/Document/NBF19B55008B811DCA0BCE207F6B84988/View/FullText.html?originationContext=previousnextsection&contextData=(sc.Document)&transitionType=StatuteNavigator&needToInjectTerms=False#co_anchor_I205FB5B0E12E11EAB9E2CD0ACABD5002)

Unless for good cause the court determines otherwise, the jury shall take to the jury room for examination during deliberations all exhibits and writings, except depositions, that have been received in evidence.

## Editors' Notes

**ADVISORY COMMISSION COMMENT**

This rule changes the long-standing practice in Tennessee of not allowing the jury in criminal cases to take the exhibits to the jury room for their study and examination during deliberations.

This rule, applicable in criminal cases, is mandatory unless the judge, either on motion of a party or sua sponte, determines that an exhibit should not be submitted to the jury. Among the reasons why a particular exhibit might not be submitted are that the exhibit may endanger the health and safety of the jurors, the exhibit may be subjected to improper use by the jury, or a party may be unduly prejudiced by submission of the exhibit to the jury.

Tenn. R. Crim. P., Rule 31

**Rule 31. Verdict**

[Currentness](https://1.next.westlaw.com/Document/NC01F8C9008B811DCA0BCE207F6B84988/View/FullText.html?originationContext=previousnextsection&contextData=(sc.Document)&transitionType=StatuteNavigator&needToInjectTerms=False#co_anchor_I228750A0E12E11EAB9E2CD0ACABD5002)

**(a) Unanimity.** The jury's verdict shall be unanimous.

**(b) Return in Open Court.** The jury shall return the verdict to the judge in open court.

**(c) Multiple Defendants.** If there are multiple defendants, the jury may return a verdict at any time during its deliberations as to any defendant about whom it has agreed. If the jury cannot agree on all defendants, the state may try again any defendant on whom the jury was not in agreement.

**(d) Conviction of Lesser Offense.**

(1) Definition of Lesser Included Offense. The defendant may be found guilty of:

(A) an offense necessarily included in the offense charged; or

(B) an attempt to commit either the offense charged or an offense necessarily included therein if the attempt is an offense.

(2) Procedures When No Unanimous Verdict. If the court instructs the jury on one or more lesser included offenses and the jury reports that it cannot unanimously agree on a verdict, the court shall address the foreperson and inquire whether there is disagreement as to the charged offense and each lesser offense on which the jury was instructed. The following procedures apply:

(A) The court shall begin with the charged offense and, in descending order, inquire as to each lesser offense until the court determines at what level of the offense the jury has disagreed;

(B) The court shall then inquire if the jury has unanimously voted not guilty to the charged offense.

(i) If so, at the request of either party, the court shall poll the jury as to their verdict on the charged offense.

(ii) If it is determined that the jury found the defendant not guilty of the charged offense, the court shall enter a not guilty verdict for the charged offense.

(C) The court shall then inquire if the jury unanimously voted not guilty as to the next, lesser instructed offense.

(i) If so, at the request of either party the court shall poll the jury as to their verdict on this offense.

(ii) If it is determined that the jury found the defendant not guilty of the lesser offense, the court shall enter a not guilty verdict for that offense.

(D) The court shall continue this inquiry for each lesser instructed offense in descending order until the inquiry comes to the level of the offense on which the jury disagreed.

(E) The court may then declare a mistrial as to that lesser offense, or the court may direct the jury to deliberate further as to that lesser offense as well as any remaining offenses originally instructed to the jury.

**(e) Poll of Jury.** After a verdict is returned but before the verdict is recorded, the court shall--on a party's request or on the court's own initiative--poll the jurors individually. If the poll indicates that there is not unanimous concurrence in the verdict, the court may discharge the jury or direct the jury to retire for further deliberations.

## Editors' Notes

**ADVISORY COMMISSION COMMENT**

This rule is similar to the federal rule, except that it contains no provision dealing with criminal forfeiture.

In cases where the court instructs the jury on the charged offense and one or more lesser offenses, and the jury reports an inability to reach a verdict, it is not always apparent on which offense the jury disagreed. The practice in Tennessee is to give sequential jury instructions that require a jury to consider guilty of the greatest charged offense before moving on to consider the lesser offenses. In some cases, the jury may acquit the defendant of the greater offense but be unable to reach a unanimous verdict on one or more lesser offenses. If the court grants a mistrial as to all offenses because of the jury's failure to reach agreement on a lesser offense, the double jeopardy clause is implicated if the jury actually acquitted the defendant of one or more of the greater offenses but disagreed on a lesser one.

Subdivision (d) is intended to minimize double jeopardy issues and avoid releasing a jury without determining whether it reached agreement on some degree of the charged offense.

The rule provides for a sequential inquiry by the trial court, beginning with the greatest charged offense and continuing in descending order of offenses until the court determines at what level the jury has disagreed. The court must then determine whether the jury unanimously found the defendant not guilty of any greater offense. To eliminate ambiguity, the rule also provides for jury polling on a party's request. Rule 30(e) also permits the court to poll the jury on the court's own initiative.

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**April 8, 2021**

**Chapter 18 – The Trial**

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**Chapter 18 – The Trial**

**\*\*ILLINOIS v. ALLEN\*\***

United States Supreme Court  
397 U.S. 337 (1970)

**Rule of Law**

**Removing a disruptive defendant from a criminal trial does not violate the Sixth Amendment Confrontation Clause.**

**Facts**

Allen (defendant) was a defendant in a criminal trial. Despite repeated warnings from the judge, Allen was highly disruptive and antagonistic. The judge ordered Allen’s removal so that the trial could be conducted outside his presence, but later allowed Allen to return. When Allen resumed the unruly behavior, the judge again ordered removal. Allen was permitted to return for the rest of the trial upon his promise to behave. After conviction, Allen appealed. The court of appeals held that a criminal defendant can never be denied the right to be present for trial. The United States Supreme Court granted certiorari to consider whether the Sixth Amendment prohibits removal of an unruly and highly disruptive criminal defendant.

**Issue**

Does removing a disruptive defendant from a criminal trial violate the Sixth Amendment Confrontation Clause?

**Holding and Reasoning (Black, J.)**

No. A highly disruptive defendant may be constitutionally removed from a criminal trial. Under the Sixth Amendment, a criminal defendant is entitled to confront any witness against him. Inherent in this guarantee is the right to be present during proceedings. Nevertheless, criminal trials must be conducted in a dignified manner. Trial judges have a degree of flexibility to deal with those who fail to meet the minimum standards of behavior. Although there is one method for maintaining order in every case, judges may constitutionally utilize (1) physical restraints, (2) contempt citations, or (3) removal of an unruly criminal defendant. Binding and gagging a defendant would eliminate disruptive behavior so that trial could continue in the defendant’s presence. This may be constitutionally appropriate in extreme cases, but there are substantial drawbacks including risk of prejudice to the jury, inherent indignity of restraints, and reduction in the defendant’s ability to assist his attorney. Next, criminal contempt sanctions may be used, but this may have little deterrent effect on defendants threatened with serious criminal penalties. Lastly, a judge may order a defendant’s removal until he agrees to behave. In this case, Allen’s conduct was disruptive and antagonistic enough to justify binding and gagging. Allen was given multiple warnings and allowed to return with a promise of good behavior. Allen gave up his Sixth Amendment right to be present. The appellate court’s ruling is reversed.

**Key Terms:**

**Confrontation Clause -** The provision of the Sixth Amendment to the United States Constitution that guarantees a criminal defendant the right to confront the witnesses against him and conduct a reasonable cross-examination.

**Snyder v. Massachusetts**

54 S.Ct. 330

Supreme Court of the United States

**SNYDER**

**v.**

**COMMONWEALTH OF MASSACHUSETTS.**

No. 241.

Argued Nov. 7, 1933.Decided Jan. 8, **1934**.

## Synopsis

Herman **Snyder** was convicted of murder in the first degree, and judgment of conviction was affirmed by the Supreme Judicial Court of [**Massachusetts** (185 N.E. 376),](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1933112944&pubNum=577&originatingDoc=Ice04cd709cc211d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) and defendant brings certiorari.

Affirmed.

See, also, [187 N.E. 775](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1933113239&pubNum=577&originatingDoc=Ice04cd709cc211d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

Mr. Justice ROBERTS, Mr. Justice BRANDEIS, Mr. Justice SUTHERLAND, and Mr. Justice BUTLER, dissenting.

On Writ of Certiorari to the Superior Court in and for the County of Middlesex, Commonwealth of **Massachusetts**.

**Deck v. Missouri**

United States Supreme Court  
544 U.S. 622 (2005)

**Rule of Law**

**The use of visible shackles during the penalty phase of a capital trial violates due process.**

**Facts**

Carmen Deck (defendant) was tried for the robbery and murder of two people. During trial, Deck wore leg shackles that could not be seen by the jury. Deck was found guilty and sentenced to die. The Missouri Supreme Court affirmed the conviction but overturned the sentence. During the new penalty hearing, Deck was shackled at his legs, belly, and wrists. Deck’s attorney objected to the restraints, but was overruled. The United States Supreme Court granted certiorari to address whether a defendant may be shackled during the penalty proceeding of a capital trial.

**Issue**

Does the use of visible shackles during the penalty phase of a capital trial violate due process?

**Holding and Reasoning (Breyer, J.)**

Yes. Visibly shackling a criminal defendant during the penalty phase of trial violates the Constitution unless warranted by an “essential state interest.” Historically, visible shackles have not been permitted during the guilt phase of trial absent some important government interest. At common law, shackles were only permitted if there was a substantial danger that the defendant might escape. This rule has been incorporated into our law and interpreted as part of the right to due process under the Fifth and Fourteenth amendments. In *Illinois v. Allen*, 397 U.S. 337 (1970), the Court held that the use of physical restraints may be permissible in cases involving an unruly criminal defendant. In *Holbrook v. Flynn*, 475 U.S. 560 (1986), the Court held that placing a uniformed security officer in the courtroom was constitutional and did not endanger the defendant’s right to a fair trial like shackling. Although there is no uniform set of rules governing the use of shackles in the lower courts, it is clear that the Due Process Clause prohibits the use of visible shackles without a finding by the trial court that the use is warranted by an important state interest related to the individual defendant. This finding may be based upon the standard elements used for assessing security or escape risks. This rule applies during the guilt phase to prevent prejudice to the defendant and preserve decorum in the court. Likewise, the rule applies during the penalty phase not to preserve the presumption of innocence but to prevent tainting a jury’s opinion of a defendant when his life hangs in the balance.

**Dissent (Thomas, J.)**

Deck was presented to the jury as a convicted robber and murderer. The finding that the use of shackles violated Deck’s right to due process of law is illogical and does not adequately address the trial court’s security concerns.

**Key Terms:**

**Due Process -** A constitutional guarantee that a law shall not be unreasonable, arbitrary, or capricious and that individuals will be given notice of legal proceedings conducted fairly with an opportunity for an individual to be heard before the government may impose sanctions on one’s life, liberty, or property.

**\*\*MICHIGAN v. BRYANT\*\***

United States Supreme Court  
562 U.S. 344 (2011)

**Rule of Law**

**Statements made to assist police in addressing an ongoing emergency are not testimonial for Confrontation purposes because they are not made for the primary purpose of creating a record for trial.**

**Facts**

At 3:25 a.m. on April 29, 2001, police arrived at a gas station in response to a reported shooting and they found Anthony Covington in severe pain suffering from a gunshot wound to his abdomen. As the officers arrived at different times, they each asked Covington questions about what had happened, who had shot him and where the shooting occurred. Covington responded that Richard (“Rick”) Bryant (defendant) had shot Covington through the door while Covington was on Bryant’s back porch and was turning to leave. Covington, who fled after being shot, described Bryant’s physical appearance and gave the location of Bryant’s home about six blocks from the gas station where police found him. Covington did not know Bryant’s location at the time of the questioning. While answering the officers’ questions, Covington asked repeatedly when emergency medical service providers would be arriving. Emergency medical services transported Covington to the hospital shortly thereafter and he died a few hours later. A subsequent search of Bryant’s house turned up blood and a shell casing on the back porch and a bullet hole in the door. Bryant, however, had left. At Bryant’s trial for murder, the State offered the statements Covington made to police at the gas station. The trial court admitted the statements as excited utterances. The Michigan Supreme Court reversed the trial court, ruling that Covington’s statements were testimonial and did not fall within the emergency exception in *Davis v. Washington*, 547 U.S. 813 (2006). The State appealed to the United States Supreme Court.

**Issue**

Are statements made to assist police in addressing an ongoing emergency testimonial for Confrontation purposes?

**Holding and Reasoning (Sotomayor, J.)**

No. As in *Davis*, where statements are made to police to enable the police to respond to an ongoing emergency, those statements are not testimonial for Confrontation purposes. Such statements lack the testimonial purpose of creating a record for trial. Although the facts of the instant case differ from *Davis* because the ongoing emergency extends from the declarant experiencing an ongoing emergency to a potential threat to the police and the public, the circumstances and the statements and actions of the parties must be objectively analyzed as in *Davis*, to determine the primary purpose of the police interrogation. Since the likelihood of fabrication is substantially reduced when statements are made for the primary purpose of resolving an ongoing emergency, determining whether an ongoing emergency exists or is believed to exist, is a critical aspect of assessing whether or not the statements were testimonial. Here, objective analysis of the statements and actions of both the police and the declarant show an ongoing emergency since Covington fled after being shot and did not know Bryant’s location. Since the shooting had happened just twenty-five minutes earlier and only six blocks away, the risk created by the emergency extended to the police and the general public. The questions asked by police were the type of questions that would be asked to resolve an ongoing emergency and elicited the same type of non-testimonial statements as the initial inquiries in *Davis*. Moreover, Covington’s medical condition informs the primary purpose of his statements, since a person in pain and in need of medical assistance would not be concerned with making statements for later use at trial. Since an objective analysis of the circumstances in this case show that Covington’s primary purpose in making the statements to police was to enable the police to resolve an ongoing emergency, Covington’s statements were not testimonial. The order of the Michigan Supreme Court is vacated and the case remanded.

**Concurrence (Thomas, J.)**

Due to the informal nature of the police questioning that occurred in a disorganized fashion as police officers arrived on the scene at different times, Covington’s statements were not testimonial because they lacked the “indicia of solemnity” that an affidavit or deposition would have. There also is no indication that Covington’s statements were made to avoid Confrontation.

**Dissent (Scalia, J.)**

The purpose of the police in questioning the declarant is not relevant in analyzing whether a declarant’s statements were testimonial. Only the declarant’s purpose in making the statements is relevant. From Covington’s perspective, the threat posed by Bryant ended when he fled from Bryant’s home. The only purpose Covington could have believed his statements to be serving was the apprehension and prosecution of Bryant. Covington’s statements were testimonial and should not have been admitted.

**Dissent (Ginsburg, J.)**

Covington’s statements were testimonial. Nevertheless, there is reason to consider a dying declaration exception to the Crawford doctrine.

**Key Terms:**

**Confrontation Clause -** The provision of the Sixth Amendment to the United States Constitution that guarantees a criminal defendant the right to confront the witnesses against him and conduct a reasonable cross-examination.

# Crawford v. Washington

#### United States Supreme Court 541 U.S. 36 (2004)

#### Rule of Law

**Testimonial statements of witnesses not present at trial are admissible only where the declarant is unavailable and the defendant had a prior opportunity for cross examination.**

# Davis v. Washington

#### United States Supreme Court 547 U.S. 813 (2006)

#### Rule of Law

**Statements made to law enforcement personnel are nontestimonial and not subject to the Confrontation Clause under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.**

#### Facts

[Editor’s note: This case was decided along with *Hammon v. Indiana*] In *Davis v. Washington*, a 911 operator answered a call from Michelle McCottry, who was in the midst of a physical fight with her boyfriend, Adrian Davis (defendant). McCottry was frantic and in response to the 911 operator’s questions, identified Davis as the person who was beating her. Davis was charged with felony violation of a domestic no-contact order. At trial, the recording of the 911 call was admitted into evidence, over Davis’s objections. The jury convicted Davis, and he appealed. The lower appellate court and the Washington Supreme Court affirmed. In *Hammon v. Indiana*, police responded to a report of a domestic disturbance at the home of Amy and Hershel Hammon (defendant). Amy Hammon greeted them, looking frightened but denying that anything was the matter. She gave them permission to enter the house, whereupon the police saw a broken furnace. One of the police officers remained with Hershel Hammon while the other officer questioned Amy Hammon in the living room. In response to the officer’s questions, Amy Hammon wrote a statement that admitted that Hammon had broken the furnace, shoved her down into the broken glass, hit her, and threw her down. Hammon was charged with domestic battery and violating his probation. Amy Hammon did not appear at trial. The prosecution called the officer who had spoken with Amy Hammon to testify as to what she had said to him and to authenticate her affidavit. Hammon was convicted, and the conviction was affirmed by the lower appellate court and the Indiana Supreme Court. The United States Supreme Court granted certiorari in both cases.

#### Issue

Are statements made to law enforcement personnel during a 911 call or at a crime scene for the purpose of assisting the police to meet an ongoing emergency “testimonial” and thus subject to the requirements of the Sixth Amendment’s Confrontation Clause?

#### Holding and Reasoning (Scalia, J.)

No. Statements made to law enforcement personnel are not testimonial if they are made under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. In *Crawford v. Washington*, this Court held that testimonial hearsay triggers the Sixth Amendment right to confrontation. Here, the circumstances in *Davis* made McCottry’s statements nontestimonial. McCottry was speaking about events that were happening as she spoke, not about events in the past. It was clear that McCottry was in the middle of an emergency, as she was being beaten by Davis. The judgment is affirmed. In *Hammon*, the circumstances were not of the same nature. There was no ongoing emergency. The domestic disturbance had already happened and the police were there to find out what happened. There was no immediate threat to Amy Hammon. The purpose of the questioning was to investigate a possible crime, not gather information necessary to assist in an emergency. The police officer’s hearsay testimony and Amy Hammon’s affidavit should have been excluded pursuant to the Sixth Amendment. The case is remanded.

#### Concurrence/Dissent (Thomas, J.)

The history of the Confrontation Clause leads me to the view that it applies only to extrajudicial statements contained in formalized testimony materials, such as affidavits, depositions or prior testimony. The court’s holding breaks from history and creates an unworkable standard. In many cases, the purpose of the police questioning is both to respond to the ongoing emergency and to gather evidence. I concur in the judgment in *Davis* and dissent from the judgment in *Hammon*.

**Key Terms:**

**Confrontation Clause -** The provision of the Sixth Amendment to the United States Constitution that guarantees a criminal defendant the right to confront the witnesses against him and conduct a reasonable cross-examination.

# Ohio v. Roberts

#### United States Supreme Court 448 U.S. 56 (1980)

#### Rule of Law

**To be admissible hearsay under the Confrontation Clause, the declarant must be unavailable and the statement must have adequate “indicia of reliability.”**

#### Facts

Roberts (defendant) was charged with forgery of a check and possession of stolen credit cards belonging to the Isaacses. At the preliminary hearing, the Isaacses’ daughter, Anita, denied Roberts’s contention that she had given Roberts her parents’ checkbook and credit cards with the instruction that he could use them. Despite being subpoenaed, Anita did not show up at Roberts’s trial and her mother said Anita was traveling out of state and did not know Anita’s whereabouts. The prosecution sought to introduce into evidence a transcript of Anita’s testimony at the preliminary hearing. Roberts objected to the admission of the transcript on the basis of the Confrontation Clause. The trial court admitted the transcript and convicted Roberts. The Supreme Court of Ohio reversed, holding that admission of the transcript violated the Confrontation Clause. The prosecution appealed.

#### Issue

Is testimony of an unavailable witness at a preliminary hearing admissible at trial?

#### Holding and Reasoning (Blackmun, J.)

Yes. The Confrontation Clause of the Sixth Amendment provides that a defendant has the right to confront the witnesses against him and conduct a reasonable cross-examination. Although the clause on its face abolishes almost every hearsay exception, hearsay may still be admissible under the Confrontation Clause if the declarant is unavailable and the statement has adequate “indicia of reliability.” In this case, the prosecution has proven that Anita Isaacs is unavailable because she is out of the state and cannot be tracked down. In addition, the transcript of Anita’s testimony at the preliminary hearing has sufficient indicia of reliability to be admissible and not in violation of the Confrontation Clause. Roberts had a significant opportunity to cross examine Anita at the preliminary hearing and actually availed himself of that opportunity. Thus, because Anita’s testimony at the hearing was under oath and subject to cross-examination, it bore sufficient indicia of reliability to be admissible. The Supreme Court of Ohio is reversed and the case is remanded.

# Davis v. Washington

#### United States Supreme Court 547 U.S. 813 (2006)

#### Rule of Law

**Statements made to law enforcement personnel are nontestimonial and not subject to the Confrontation Clause under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.**

**Hammon v. Indiana**

126 S.Ct. 552

Supreme Court of the United States

**Hershel HAMMON, petitioner,**

**v.**

**INDIANA.**

No. 05-5705.

Oct. 31, 2005.

**Synopsis**

Case below, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I38e3cc53de8511d983e7e9deff98dc6f&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[829 N.E.2d 444](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006805029&pubNum=578&originatingDoc=If58129dc0b2111daaea49302b5f61a35&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

**Opinion**

Motion of petitioner for leave to proceed *in forma pauperis* granted. Petition for writ of certiorari to the Supreme Court of Indiana granted. This case is to be argued in tandem with No. 05-5224, [*Davis v. Washington,*546 U.S. 975, 126 S.Ct. 547, 163 L.Ed.2d 458, 2005 WL 1671669](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006965783&pubNum=708&originatingDoc=If58129dc0b2111daaea49302b5f61a35&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))

829 N.E.2d 444

Supreme Court of Indiana.

**Hershel HAMMON, Appellant (Defendant below),**

**v.**

**STATE of Indiana, Appellee (Plaintiff below).**

No. 52S02–0412–CR–510.

June 16, 2005.

## Synopsis

**Background:** Defendant was convicted, following a bench trial, in the Circuit Court, Miami County, [Rosemary Higgins Burke](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0101727501&originatingDoc=I38e3cc53de8511d983e7e9deff98dc6f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)&analyticGuid=I38e3cc53de8511d983e7e9deff98dc6f), J., of domestic battery. Defendant appealed. The Court of Appeals, affirmed in part and reversed in part.

**Holdings:** On petition to transfer, the Supreme Court, [Boehm](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0232144401&originatingDoc=I38e3cc53de8511d983e7e9deff98dc6f&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)&analyticGuid=I38e3cc53de8511d983e7e9deff98dc6f), J., held that:

[1](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006805029&pubNum=578&originatingDoc=If58129dc0b2111daaea49302b5f61a35&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_anchor_F42006805029) defendant's wife's statement to police that defendant hit her and threw her down satisfied excited utterance exception to hearsay rule;

[2](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006805029&pubNum=578&originatingDoc=If58129dc0b2111daaea49302b5f61a35&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_anchor_F72006805029) statement that qualifies as excited utterance is not necessarily nontestimonial under Confrontation Clause, abrogating [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I35ea36a5d45911d9bf60c1d57ebc853e&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.DocLink))[Beach v. State, 816 N.E.2d 57;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2005235698&pubNum=578&originatingDoc=I38e3cc53de8511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink))[](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I3daed355d45011d9a489ee624f1f6e1a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.DocLink))[Rogers v. State, 814 N.E.2d 695;](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2005045811&pubNum=578&originatingDoc=I38e3cc53de8511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink))[](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I94f08689d45511d98ac8f235252e36df&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.DocLink))[Fowler v. State, 809 N.E.2d 960](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2004582033&pubNum=578&originatingDoc=I38e3cc53de8511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink));

[3](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006805029&pubNum=578&originatingDoc=If58129dc0b2111daaea49302b5f61a35&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_anchor_F122006805029) defendant's wife's oral statement to police was not “testimonial,” and thus statement was admissible under Confrontation Clause notwithstanding defendant's lack of opportunity to cross-examine her;

[4](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006805029&pubNum=578&originatingDoc=If58129dc0b2111daaea49302b5f61a35&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_anchor_F142006805029) affidavit completed and signed by defendant's wife, relating what had occurred between defendant and wife in domestic dispute, was “testimonial,” and thus inadmissible; but

[5](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2006805029&pubNum=578&originatingDoc=If58129dc0b2111daaea49302b5f61a35&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)#co_anchor_F172006805029) admission of statement in violation of defendant's Confrontation Clause rights was harmless beyond a reasonable doubt.

Affirmed.

Opinion, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I591fb861d45511d983e7e9deff98dc6f&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.DocLink))[809 N.E.2d 945,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2004582039&pubNum=578&originatingDoc=I38e3cc53de8511d983e7e9deff98dc6f&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.DocLink)) vacated.

# Ohio v. Clark

#### United States Supreme Court 576 U.S. 1 (2015)

#### Rule of Law

**Out-of-court statements made to persons other than law-enforcement officers are not excluded from admission into evidence by the Confrontation Clause.**

#### Facts

In March 2010, Darius Clark (defendant) dropped off L.P., his three–year–old son, at preschool. L.P.’s teachers noticed that one of L.P.’s eyes was bloodshot, and uncovered more bruises on his body. The teachers asked L.P. who had done this to him. L.P. implicated that Clark was his abuser. Clark was indicted of several counts of child abuse by a grand jury. At trial, L.P.’s statements to his teachers were introduced into evidence. L.P. himself was barred from testifying under Ohio state law, which deemed him incompetent to testify. Clark moved to exclude the statements based on the Confrontation Clause. The trial court denied the motion, finding that L.P.’s statements were not testimonial. The jury convicted Clark. Clark appealed, and the court of appeals reversed. The Supreme Court of Ohio affirmed. The United States Supreme Court granted certiorari.

#### Issue

Are out-of-court statements made to persons other than law-enforcement officers excluded from admission into evidence by the Confrontation Clause?

#### Holding and Reasoning (Alito, J.)

No. Out-of-court statements made to persons other than law-enforcement officers and introduced into evidence are generally admissible because they are not subject to the Confrontation Clause. The Sixth Amendment of the U.S. Constitution states that in a criminal trial, the defendant has the right to cross-examine witnesses who testify against the defendant. This is known as the Confrontation Clause. In order to determine whether a statement is subject to the Confrontation Clause, courts apply the primary-purpose test. If the primary purpose of the conversation eliciting the statement is to create a testimonial statement to substitute for trial testimony, the statement is within the scope of the Confrontation Clause. If the primary purpose of the conversation eliciting the statement is to respond to an ongoing emergency, the statement is not within the scope of the Confrontation Clause. Statements to non–law enforcement are much less likely to be considered testimonial. Here, L.P.’s teachers asked L.P. questions in order to figure out who was abusing him, which was an attempt to prevent him from being further abused. The teachers were resolving an ongoing emergency. Other factors showing that L.P.’s statement was not testimonial were the informal setting of the interrogation and L.P.’s young age. The primary purpose of the teachers’ questions was to ensure that L.P. was out of harm’s way, not to elicit testimony from him for a potential court proceeding. L.P.’s testimony is admissible because it is not testimonial and is therefore not subject to the Confrontation Clause. The state supreme court’s judgment is reversed.

#### Concurrence (Thomas, J.)

If the statements bear a sufficient indicia of solemnity to qualify as testimonial, whether the person asking the questions is law enforcement or not is inconsequential. Affidavits, depositions, prior testimony, and confessions qualify as testimonial. Statements obtained through a formalized dialogue or after reading *Miranda* warnings also qualify as testimonial.

#### Concurrence (Scalia, J.)

The majority opinion states that the primary-purpose test is merely one way of determining whether the Confrontation Clause applies. This dicta is misleading, as the primary-purpose test is the only means of categorizing whether a statement is testimonial or not.

**Key Terms:**

**Confrontation Clause -** The provision of the Sixth Amendment to the United States Constitution that guarantees a criminal defendant the right to confront the witnesses against him and conduct a reasonable cross-examination.

**Primary-Purpose Test -** If the primary purpose of the conversation eliciting the statement was testimonial, it is within the scope of the Confrontation Clause; if the primary purpose was to respond to an ongoing emergency, it is generally not within the scope of the Confrontation Clause.

# \*\*RICHARDSON v. MARSH\*\*

#### United States Supreme Court 481 U.S. 200 (1987)

#### Rule of Law

**It is not a violation of the Confrontation Clause to admit a defendant’s confession implicating a co-defendant if the confession has been redacted to omit any mention of the co-defendant and the jury has been instructed not to use the confession against the co-defendant.**

#### Facts

Marsh, Williams, and Martin (defendants) were suspected of assault and murder. Over Marsh’s objection, Marsh and Williams were tried jointly for the crimes. Marsh testified that she was innocent. Williams did not testify, but Williams’ earlier confession to police was redacted to delete all mention of Marsh and admitted into evidence. The jury was repeatedly instructed not to hold Williams’ confession against Marsh. Nevertheless, the confession did implicate Marsh when connected with other evidence at trial. Marsh was convicted of murder, robbery, and assault. Marsh filed a petition for a writ of habeas corpus on the grounds that the admission of Williams’ confession violated her Sixth Amendment rights. The United States Supreme Court granted certiorari on this issue.

#### Issue

Under the Confrontation Clause, may a defendant’s confession be admitted if the confession has been redacted to omit any mention of the co-defendant and the jury is instructed not to use the confession against the co-defendant?

#### Holding and Reasoning (Scalia, J.)

No. The admission of a defendant’s confession, which has been redacted to omit any reference to the co-defendant and paired with a jury instruction not to hold the confession against the co-defendant, does not violate the Confrontation Clause. The Sixth Amendment ensures that a defendant will have the right to confront and cross-examine any witness against him. Thus, in a joint trial, an earlier confession by a defendant who does not testify may not be admitted against a co-defendant. Generally, it is assumed that juries obey limiting instructions. Nevertheless, in *Bruton v. United States*, 391 U.S. 123 (1968), the Court carved out an exception to this rule. Under *Bruton*, the admission of one defendant’s pretrial confession implicating a co-defendant is considered a violation of the codefendant’s Sixth Amendment right. A jury instruction not to hold the confession against the co-defendant will not remedy the violation. In that case, the confession at issue directly implicated the co-defendant. Unlike *Bruton*, the confession in this case was redacted so as not to reference the co-defendant. Thus, the confession was only incriminating when connected to other evidence at trial. The assumption that juries follow instructions is valuable, and the exception carved out in *Bruton* is narrow. This case does not fall into that exception. A confession admitted under these circumstances does not violate the Confrontation Clause. The judgment of the lower court is reversed and remanded.

**Key Terms:**

**Confrontation Clause -** The provision of the Sixth Amendment to the United States Constitution that guarantees a criminal defendant the right to confront the witnesses against him and conduct a reasonable cross-examination.

# Bruton v. United States

#### United States Supreme Court 391 U.S. 123 (1968)

#### Rule of Law

**The admission of a defendant’s confession incriminating a co-defendant violates the Sixth Amendment Confrontation Clause.**

#### Facts

Bruton (defendant) and Evans were charged with committing armed postal robbery. Bruton and Evans had a joint trial. At trial, a postal inspector testified that Evans orally confessed to him that Evans and Bruton had committed the robbery. The confession was admitted into evidence against Evans, but the trial court instructed the jury that Evans’ confession was inadmissible hearsay against Bruton. Bruton and Evans were both convicted. The Court of Appeals for the Eighth Circuit set aside Evans’ conviction because of the admission of the hearsay confession. However, the Eighth Circuit affirmed Bruton’s conviction because the jury was instructed to disregard the confession with regard to Bruton’s guilt or innocence. The Supreme Court granted certiorari.

#### Issue

Under the Sixth Amendment, may a defendant’s confession incriminating a co-defendant be admitted if the jury is instructed to disregard the reference to the co-defendant?

#### Holding and Reasoning (Brennan, J.)

No. Admitting one defendant’s confession implicating a co-defendant is a violation of the Sixth Amendment Confrontation Clause. A jury instruction to disregard the reference to the co-defendant in assessing the co-defendant’s guilt or innocence is not a sufficient replacement for the right to cross-examination. The ruling in *Delli Paoli v. United States*, 352 U.S. 232 (1957), that a properly instructed jury could ignore one defendant’s out-of-court confession implicating another co-defendant is overruled. It is not feasible to expect a jury of ordinary people to disregard such a confession during deliberations. Judge Learned Hand has discussed the practical impossibility of juries ignoring inadmissible hearsay, and Judge Hand and Judge Jerome Frank have compared the limiting jury instruction to a “placebo” or a “judicial lie.” Although joint trials are generally more efficient than separate trials, that efficiency cannot be valued above the constitutional rights of the accused. The jury instructions in this case were clear. Nevertheless, a jury instruction to disregard incriminating statements made by one defendant implicating a co-defendant cannot cure the Sixth Amendment violation.

#### Dissent (White, J.)

There is no indication in this case that the jury was unable to follow the limiting instruction. The Court provides no justification for its departure from *Delli Paoli*. Limiting instructions may be used in some types of cases, but the Court creates an assumption that juries are incapable of following jury instructions in cases where one defendant’s confession implicates a co-defendant. A defendant’s admission is likely the best evidence against him. The Court’s rule will curtail joint trials, which are more efficient and reduce the risk of unfairness and inconsistency between defendants. The Court has provided no guidance for lower courts. It seems that all confessions in joint trials will have to be excluded or redacted, or the government will be forced to try the defendants separately. For efficiency’s sake, the prosecution should attempt to determine admissibility as soon as possible. Oral testimony will likely be particularly problematic.

**Key Terms:**

**Confrontation Clause -** The provision of the Sixth Amendment to the United States Constitution that guarantees a criminal defendant the right to confront the witnesses against him and conduct a reasonable cross-examination.

# Melendez-Diaz v. Massachusetts

#### United States Supreme Court 557 US 305 (2009)

#### Rule of Law

**In a criminal case, laboratory reports prepared by government analysts are inadmissible against the defendant because such reports constitute testimonial evidence under the Confrontation Clause.**

#### Facts

The Commonwealth of Massachusetts (the Government) (plaintiff) tried Melendez-Diaz (defendant) for distributing and trafficking in cocaine. At trial, the Government introduced “certificates of analysis,” prepared by analysts in the State Crime Laboratory, in order to show that the substance seized from Melendez-Diaz was cocaine. The analysts did not testify at trial. On appeal, Melendez-Diaz asserted that the certificates of analysis were testimonial and their admission by the trial court violated his constitutional rights under the Confrontation Clause. The Massachusetts Court of Appeals affirmed and Melendez-Diaz appealed to the United States Supreme Court. On appeal in the Supreme Court, the Government presented six grounds for finding that admission of the certificates did not implicate or violate the Confrontation Clause. First, the witnesses were not accusatory because the information in the certificates did not directly accuse Melendez-Diaz of wrongdoing. Second, the analysts’ statements in the certificates were not the type of ex parte statements presented in the trial of Sir Walter Raleigh. Third, Melendez-Diaz would not derive a benefit from having the opportunity to cross-examine on the “neutral, scientific testing” contained in the certificates. Fourth, the certificates are admissible as business or public records under the common law. Fifth, Melendez-Diaz could have subpoenaed the analysts. Sixth, stringent application of the Confrontation Clause in this case will make the prosecution of criminals overly burdensome because analysts will have to testify any time scientific data is presented.

#### Issue

In a criminal case, does the Confrontation Clause preclude admission of laboratory reports prepared by government analysts against the defendant?

#### Holding and Reasoning (Scalia, J.)

Yes. Laboratory reports prepared by government analysts are not admissible against the defendant in a criminal case because such reports contain testimonial evidence and therefore implicate the defendant’s rights under the Confrontation Clause. When evidence is testimonial, *Crawford* requires that the defendant in a criminal case have the opportunity “to be confronted with the witnesses against him.” Here, the certificates of analysis are clearly testimonial. The certificates introduce the same information as would have been introduced by direct examination. Under *Crawford*, therefore, each analyst was required to testify at trial unless the Government showed that the analyst was unavailable to testify and Melendez-Diaz had a prior opportunity to cross-examine the analyst. Otherwise, the certificates were not admissible against Melendez-Diaz. The Government’s arguments do not require a different result. First, the Confrontation Clause is implicated even though the analysts’ statements in the certificates do not directly accuse Melendez-Diaz of wrongdoing because the certificates were offered against Melendez-Diaz to help prove an element of the offense. Second, although the *ex parte* testimony offered in the trial of Sir Walter Raleigh exemplified violations of the Confrontation Clause, this case does not define the limits of the clause. Third, studies have shown that government laboratory reports, such as the certificates in this case are not as neutral or reliable as the Government claims. Confrontation of the analysts through cross-examination would have allowed Melendez-Diaz to expose a fraudulent or incompetent analyst. Fourth, even if a report would otherwise be admissible as a business or public record, the Confrontation Clause is nevertheless implicated in a criminal case if, as here, the evidence is testimonial. Fifth, Melendez-Diaz’s right to subpoena witnesses under the Compulsory Process Clause does not relieve the Government of its obligations under the Confrontation Clause. Sixth, this Court does have the authority to abrogate the rights afforded by the Confrontation Clause to relieve the burden on the Government. Thus, admission of the certificates of analysis violated Melendez-Diaz’s rights under the Confrontation Clause. The decision of the Appeals Court of Massachusetts is reversed.

#### Concurrence (Thomas, J.)

Since the certificates of analysis are clearly affidavits, they belong to the class of documents that are testimonial in nature and therefore implicate the Confrontation Clause.

#### Dissent (Kennedy, J.)

Since several people may be involved in testing a substance believed to be an illegal drug, each of those people—whether running the test, calibrating the machine or certifying the final test results—would be considered an “analyst” and required to testify under the majority decision. The formalism required by the majority creates such a substantial burden for the government that it may preclude the use of scientific tests in other trials, even where the evidence of guilt is clear.

**Key Terms:**

**Confrontation Clause -** The provision of the Sixth Amendment to the United States Constitution that guarantees a criminal defendant the right to confront the witnesses against him and conduct a reasonable cross-examination.

# Harris v. New York

#### United States Supreme Court 401 U.S. 222 (1971)

#### Rule of Law

**Statements made by a suspect who has not received the *Miranda* warnings may be admitted at trial for impeachment purposes.**

# Miranda v. Arizona

#### United States Supreme Court 384 U.S. 436 (1966)

#### Rule of Law

**Without certain hallmark warnings regarding the right to remain silent and the right to counsel, statements made during custodial interrogation are inadmissible at trial.**

# Moran v. Burbine

#### United States Supreme Court  475 U.S. 412 (1986)

#### Rule of Law

**If a suspect has knowingly waived his *Miranda* rights, officers' deception of a lawyer seeking to represent the suspect and their refusal to inform the suspect that his family had obtained a lawyer for him does not invalidate the suspect's *Miranda*waiver.**

# Gray v. Maryland

#### United States Supreme Court 523 U.S. 185 (1998)

#### Rule of Law

**Out-of-court statements made by a codefendant that incriminate another defendant are inadmissible at trial even with a limiting instruction or if the name of the defendant is redacted.**

#### Facts

Anthony Bell confessed to the police that he and Kevin Gray (defendant) had beaten a man to death. The United States (plaintiff) charged Bell and Gray with murder. The district court tried Bell and Grey jointly and admitted Bell’s confession into evidence. However, the judge ordered that Gray’s name be redacted. Thus, when the police officer read Bell’s statement into evidence, he replaced Gray’s name with the word “deleted” or “deletion.” After the officer read the confession, the prosecutor asked him whether the information he received from Bell allowed him to then go and arrest Gray. The officer answered in the affirmative. The prosecution also admitted a written copy of the confession into evidence. Gray’s name was again redacted. In its place was a blank space separated by commas. The judge instructed the jury that the confession was evidence against Bell, not Gray. The jury convicted both men. Maryland's intermediate appellate court set aside Gray's convicted and applied *Bruton v. United States*, 391 U.S 123 (1968). In*Bruton,* the court held that, even if a court offers a limiting instruction telling the jury that it should consider a confession as evidence only against the confessing codefendant, introducing such a confession at a joint trial violates the nonconfessing defendant's right to cross-examine witnesses under the Sixth Amendment. The of Court of Appeals of Maryland, Maryland's highest court, reinstated the conviction. The United States Supreme Court granted certiorari.

#### Issue

Are out-of-court statements made by a codefendant that incriminate another defendant inadmissible at trial even with a limiting instruction or if the name of the defendant is redacted?

#### Holding and Reasoning (Breyer, J.)

Yes. Out-of-court statements made by a codefendant that incriminate another defendant are inadmissible at trial even with a limiting instruction or if the name of the defendant is redacted. *Bruton*held that if a codefendant confesses and names another defendant, the confession is inadmissible at trial, even with a limiting instruction. Considering the *Bruton* rule, the Court in *Richardson v. Marsh*, 481 U.S. 200 (1987), held that the Confrontation Clause is not violated if a codefendant’s confession is redacted to eliminate the other defendant’s name and any reference to the other defendant. The *Richardson* opinion noted that *Bruton* was concerned about the prejudicial effect of naming another defendant. The Court reasoned that concern did not exist if a redacted confession eliminated any reference to another defendant. In such a case, a limiting instruction would be sufficient. However, a jury often realizes that a confession that replaces a defendant’s name with an obvious blank space or the word “deleted” refers to the defendant. This may be especially true if a judge specifically tells the jury not to consider the confession as evidence against the defendant. Additionally, an obvious deletion can call the jury's attention to the removed name and encourage the jury to speculate as to who the removed name might be. In this case, Grey’s name was either replaced with an obvious blank space or the word “deleted” in the redacted confession. The redacted confession serves as a directly accusatory statement against Gray. Therefore, Bell’s confession is inadmissible and the judgment of the Court of Appeals is vacated.

#### Dissent (Scalia, J.)

The redacted statements at issue are not sufficiently incriminating that the Court must depart from the normal presumption that the jury follows its instructions. *Bruton* and *Richardson* prohibit the admission of a facially incriminating codefendant’s statement; statements that are incriminating independent of other evidence presented at trial. However, the redacted confession implicates no one but Bell and any inferences the jury might draw as to who “deleted” refers to will be drawn from the other evidence presented at trial.

**Key Terms:**

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

# \*\*DAVIS v. ALASKA\*\*

#### United States Supreme Court 415 U.S. 308 (1974)

#### Rule of Law

**A defendant’s Sixth Amendment right to impeach a witness through cross-examination outweighs a state’s interest in maintaining the confidentiality of the witness’s juvenile record.**

#### Facts

Davis (defendant) was charged with the theft of a safe containing over $1,000 from a bar in Anchorage, Alaska on February 16, 1970. The empty safe was discovered outside of the city later that day. Sixteen-year-old Richard Green lived nearby and told police that he had seen two Negro men standing by a car near where the safe was found and that one of the men had a crowbar. Green identified Davis as one of the men. Green had a juvenile criminal record for burglary and was on probation at the time of the investigation. Prior to trial, the state moved for a protective order to prevent Davis from questioning Green about his juvenile record. Davis responded that he planned to use the juvenile record only to show that Green was on probation during the investigation and not as a general impeachment of Green’s character. Davis planned to then argue at trial that Green might have felt pressure to identify Davis in order to shift any suspicion away from Green or out of fear that Green’s probation might be revoked if he did not satisfy the police. The trial court granted the protective order based upon state laws that prohibited the use of juvenile adjudications against an individual in future proceedings. During trial, Davis cross-examined Green about his state of mind during the investigation and specifically asked Green if he had ever been questioned like that before by the police. Green responded in the negative, and the judge prevented further questioning. Davis was convicted and appealed. The Alaska Supreme Court affirmed the conviction, holding that Davis had a reasonable opportunity to cross-examine Green on bias and motive without using the juvenile record. The United States Supreme Court granted certiorari.

#### Issue

Does a defendant’s Sixth Amendment right to impeach a witness through cross-examination outweigh a state’s interest in maintaining the confidentiality of the witness’s juvenile record?

#### Holding and Reasoning (Burger, C.J.)

Yes. The right of confrontation that a defendant has against an accusing witness takes priority over a state’s policy of protecting a juvenile offender. The Sixth Amendment to the United States Constitution guarantees an accused the right to confront the witnesses against him. A primary protection offered by the Confrontation Clause is the right of cross-examination. *See Douglas v. Alabama*, 380 U.S. 415 (1965). Cross-examination is the principal means by which to test the credibility and truthfulness of a witness. Cross-examination may also be used to impeach a witness through the introduction of prior convictions. Exposing a witness’s biases, prejudices, or ulterior motives is also an important function of cross-examination. Here, the truthfulness of Green’s testimony was critical. Davis sought to use cross-examination to challenge the accuracy of Green’s identification of Davis based on the fact that Green was on probation at the time. The inference was that Green felt undue pressure to identify a suspect for fear of probation revocation or fear that Green himself might be a suspect. Davis had a right under the Confrontation Clause to pursue this matter on cross-examination by introducing Green’s juvenile record. The Alaska Supreme Court incorrectly held that Davis’s cross-examination without using the record was sufficient, especially when Green denied having been questioned by the police in the past. Any state interest in protecting the privacy of Green, a juvenile offender, was not as important as protecting the Sixth Amendment rights of Davis, the accused. Accordingly, the judgment is reversed, and the case is remanded for further proceedings.

#### Concurrence (Stewart, J.)

The holding in this case is limited to the facts presented and does not create a rule of law that cross-examination regarding juvenile records is permitted in every case.

#### Dissent (White, J.)

There is no constitutional issue here, and this Court should not disturb the trial court’s exercise of discretion to control the limits of cross-examination.

**Key Terms:**

**Impeachment of a Witness -** The questioning or discrediting of a witness's veracity or reliability. Any party may impeach any witness, including a witness the party has called.

**Douglas v. Alabama**

85 S.Ct. 1074

Supreme Court of the United States

**Jesse Elliott DOUGLAS, Petitioner,**

**v.**

**STATE OF ALABAMA.**

No. 313.

Argued March 9 and 10, **1965**.Decided April 5, **1965**.

**Synopsis**

Prosecution for assault with intent to commit murder.

 The Circuit Court, Dallas County, **Alabama**, entered a judgment of conviction and the defendant appealed. The Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ief110a1008e311d99e26e917ec01b803&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=ef5474b022f7411db4d3e3ec04bc6249&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[42 Ala.App. 314, 163 So.2d 477,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1963132334&pubNum=735&originatingDoc=I650262689c1d11d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))affirmed, and the **Alabama** Supreme Court denied certiorari, [276 **Ala**. 703, 163 So.2d 496.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1964204511&pubNum=735&originatingDoc=I650262689c1d11d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) The Supreme Court granted certiorari and in an opinion by Mr. Justice Brennan, held that State defendant's inability to cross-examine witness, who had been convicted for the same crime and refused while acting in his own interests to answer any questions in reliance on privilege against self-incrimination as to witness' alleged confession which implicated defendant and which was read to jury by prosecutor under guise of cross-examination after witness had claimed privilege, constituted a denial of defendant's right of cross-examination secured by Confrontation Clause of the Sixth Amendment.

Reversed and remanded.

# Greene v. McElroy

#### United States Supreme Court 360 U.S. 474 (1959)

#### Rule of Law

**Congressional or executive acquiescence or implied ratification is not enough to show an effective delegation of authority to take actions that are potentially contradictory to long-accepted constitutional requirements.**

#### Facts

The National Security Act of 1947, 5 U.S.C. § 171 et. seq., (the Act) created the Department of Defense (DoD) and gave its officers the authority to control their departments. Though the Act did not explicitly authorize the creation of a clearance program, the DoD implemented one, which was used to evaluate fitness for security clearance through hearings and fact determinations. Greene (plaintiff) was an aeronautical engineer employed by a private manufacturer that produced goods for the armed services. The nature of Greene’s job required security clearance. After proceedings that did not afford him the rights to confrontation and cross-examination, Greene was discharged from his employment solely based on a determination by the DoD program that his clearance should be revoked. Greene argued that the actions taken by the DoD were not authorized by Congress or the president and violated Fifth Amendment Due Process Clause. The federal government (the Government) (defendant) contended that authorization from Congress could be inferred from a number of other contract and criminal statutes that showed Congress’s recognition of the importance of keeping military secrets secure. The Government also argued that congressional authorization was implied from the continued appropriation of funds by Congress to different aspects of the DoD’s clearance program. The lower court ruled in the Government’s favor. Greene petitioned the United States Supreme Court for certiorari, which was granted.

#### Issue

Is congressional or executive acquiescence or implied ratification enough to show an effective delegation of authority to take actions that are potentially contradictory to long-accepted constitutional requirements?

#### Holding and Reasoning (Warren, C.J.)

No. The decision by Congress or the president to authorize potentially questionable constitutional actions must be stated explicitly. An unambiguous statement of intention is necessary to ensure the protection of important rights and that those rights are not denied to individuals through unapproved procedures. When clear or overt action is taken, it is then apparent that there has been a deliberate and focused consideration of the issues by those entrusted with creating and executing the laws. In the absence of such unequivocal action by Congress, decisions of great constitutional import and effect would be transferred to administrators who have not been constitutionally granted the authority to decide them. Greene lost his job and cannot secure another in the same field as a result of a fact determination based on a hearing that did not afford him traditional, fair procedural protections. The type of hearing conducted by the DoD was the outcome of an administrative decision that was not explicitly authorized by either the president or Congress. The Court does not answer the question of whether the procedures were, in fact, constitutional under the circumstances, but only decides that in the absence of explicit authorization, the DoD was not empowered to deprive Greene of his job in a proceeding lacking the safeguards of confrontation and cross-examination. Therefore, the lower court’s judgment is reversed, and the case is remanded to district court.

#### Concurrence (Frankfurter, J.)

Without even touching on the validity of the procedures involved, the lower court’s judgment should be reversed, because it has not been shown that either Congress or the president authorized the procedures through which Greene’s security clearance was revoked.

**Key Terms:**

**Nondelegation Doctrine -** Congress cannot delegate its legislative powers to administrative agencies. When authorizing agencies to regulate, Congress must provide them with an “intelligible principle” upon which to base their regulations.

**Smith v. Illinois**

88 S.Ct. 748

Supreme Court of the United States

**Fleming SMITH, Petitioner,**

**v.**

**STATE OF ILLINOIS.**

No. 158.

Argued Dec. 7, 1967.Decided Jan. 29, **1968**.

**Synopsis**

Defendant was convicted in the Circuit Court, Cook County, **Illinois**, of unlawful sale of narcotic drugs and he appealed. The Appellate Court of **Illinois**, First District, First Division, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I0c1012cdd93e11d983e7e9deff98dc6f&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=207fe5378ec84556a98ea0dde1e24541&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[70 Ill.App.2d 289, 217 N.E.2d 546,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1966124126&pubNum=578&originatingDoc=I64df4a0f9c1d11d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed. Certiorari was granted. The Supreme Court, Mr. Justice Stewart held that defendant had right guaranteed to him under Sixth and Fourteenth Amendments of Constitution to cross-examine informer who was principal prosecution witness as to informer's actual name and address.

Reversed.

Mr. Justice Harlan dissented.

# \*\*GRIFFIN v. CALIFORNIA\*\*

#### United States Supreme Court 380 U.S. 609 (1965)

#### Rule of Law

**It is a violation of the Fifth Amendment for the prosecution to comment on the defendant’s silence or for the trial judge to instruct the jury that the defendant’s silence can be evidence of guilt.**

#### Facts

Griffin (defendant) was convicted of first degree murder. He did not testify at his trial. During its closing, the prosecution repeatedly referred to Griffin’s failure to testify, implying that it indicated guilt. The judge instructed the jury that Griffin had a constitutional right not to testify. However, pursuant to a California statute, the judge told the jury that it could infer as true any evidence or facts that Griffin could have reasonably been expected to deny or explain. The state supreme court affirmed the conviction. The United States Supreme Court granted certiorari.

#### Issue

Is the Fifth Amendment violated where a prosecutor indicates to the jury that the defendant’s failure to testify is an indication of his guilt and where a trial judge tells the jury that it may take a defendant’s failure to deny or explain a piece of evidence as tending to indicate the truth of that evidence?

#### Holding and Reasoning (Douglas, J.)

Yes. The Fifth Amendment, incorporated to the states through the Fourteenth Amendment, forbids the prosecution from commenting on a defendant’s failure to testify and forbids a judge from instructing the jury that such silence is evidence of guilt. A defendant has the right not to testify and to rely on the presumption of innocence. Furthermore, a defendant may decide not to testify for a number of reasons, from nervousness to embarrassment, or the desire to keep prior convictions out of evidence. Commenting on the defendant’s failure to testify imposes an unconstitutional penalty on the defendant for exercising his Fifth Amendment right.

#### Concurrence (Harlan, J.)

In light of current jurisprudence, the Court’s decision today is correct. However, hopefully the Court will soon overrule the decision in *Malloy v. Hogan*, 378 U.S. 1 (1964), that the Fifth Amendment is incorporated to the states through the Fourteenth Amendment.

#### Dissent (Stewart, J.)

The Constitution demands that a defendant not be compelled to testify against himself. The California statute allowing the judge to instruct the jury on the defendant’s failure to testify does not act as an unconstitutional compulsion and actually protects the defendant. The jury will notice that the defendant has not testified and it will naturally draw conclusions about what this means. Without a limiting instruction, the jury may draw inferences that are far too broad.

**Key Terms:**

**Fifth Amendment** - An amendment added to the U.S. Constitution as part of the Bill of Rights that provides important protections from government actions, including a guarantee that no person will be required to answer for a capital crime unless first indicted by a grand jury; no one will suffer double jeopardy; no one must testify against himself or herself; no one will be deprived of life, liberty, or property without due process of law; and no property will be taken for public use without just compensation.

**Wilson v. United States**

13 S.Ct. 765

Supreme Court of the **United** **States**.

**WILSON**

**v.**

**UNITED STATES.**

No. 1284.

April 17, 1893.

**Synopsis**

In error to the district court of the **United** **States** for the northern district of Illinois. Reversed.

**\*\*765** Statement by Mr. Justice FIELD:

The defendant below, George E. **Wilson**, the plaintiff in error here, is a bookseller and publisher, carrying on his business in Chicago, Ill. He was indicted in the **United** **States** district court for the northern district of that state for a violation of section 2 of the act of congress of September 26, 1888, (25 St. p. 496,) amending section 3893 of the Revised Statutes, relating to the use of the mails to give information where and by what means obscene and lewd publications might be obtained, and was convicted and sentenced to imprisonment in the penitentiary of the state for two years. To reverse that judgment, he has brought this case to this court on writ of error.

The indictment charged, in different counts, that the defendant, by himself and another person, had deposited in the mail at Chicago, for delivery to John Hobart, at O'Fallon, Ill., and Jack Horner, at Collinsville, Ill., a letter and circular giving information where certain designated lewd and obscene books could be obtained. No attempt was made to show that the letter and circular was mailed by the defendant in person, but an attempt was made to show that some other person had done the act at the instigation or request of the defendant, and that he was responsible for it.

The defendant did not request to be a witness or offer himself as such, and the district attorney of the **United** **States**, in summing up the case to the jury, commented upon the fact that he had not appeared on the stand, as follows:

‘They say **Wilson** is a man of good character. It is a grand thing for a young man in Chicago to be the son of an honest man, because blood will tell. If the father is  **\*\*766** honest, the chances are the son will be honest too. Men live all their lives to build up a good character, because it is a shield against the attack of infamy. They called two or three witnesses here who testified to this young man's character as being good, so far as they know; but I want to say to you, gentlement of the jury, that, if I am ever charged with a crime, I will not stop by putting witnesses on the stand to testify to my good character, but I will go upon the stand, and hold up my hand before high heaven, and testify to my innocence of the crime.’

To this language of the district attorney the counsel for the defendant excepted, and called the court's attention to it, and the court said: ‘Yes, I suppose the counsel should not comment upon the defendant not taking the stand.

While the **United** **States** court is not governed by the state's statutes, I do not know that it ought to be the subject of comments by counsel,’-to which the district attorney replied as follows: ‘I did not mean to refer to it in that light, and I do not intend to refer in a single word to the fact that he did not testify in his own behalf,’-to which the counsel for the defendant thereupon excepted.

The act of congress of March 16, 1878, (20 St. p. 30, c. 37,) provides ‘that in the trial of all indictments, informations, complaints, and other proceedings against persons charged with the commission of crimes, offenses, and misdemeanors, in the **United** **States** courts, territorial courts, and courtsmartial, and courts of inquiry, in any state or territory, including the District of Columbia, the person so charged shall, at his own request, but not otherwise, be a competent witness; and his failure to make such request shall not create any presumption against him.’

The objections of the defendant's counsel to the language of the district attorney in his argument to the jury in referring to the defendant's failure to appear on the stand as a witness, and testify to his innocence of the charge against him, and to the neglect of the court to forbid and condemn such reference, were embodied in a bill of exceptions, and constitute one of the grounds urged for a reversal of the judgment and the award of a new trial.

# United States v. Robinson

#### United States Court of Appeals for the First Circuit 843 F.2d 1 (1988)

#### Rule of Law

**Two nations may informally agree to enforce one nation’s laws on a ship of the other nation.**

#### Facts

The United States Coast Guard stopped a Panamanian ship manned by Hernando and Jorge Robinson (defendants). Coast Guard officers boarded the ship with the master’s consent. The officers then became suspicious, and received permission from Panama to proceed further. A Panamanian official testified that that the government of Panama authorized the Coast Guard officers not only to board and inspect the ship, but also to prosecute those aboard. The officers found a large quantity of marijuana hidden on the ship. The Robinsons were subsequently convicted under U.S. law for unlawful possession of marijuana with intent to distribute. The Robinsons appealed, arguing that the principles of international and constitutional law prevented the United States government (plaintiff) from applying U.S. drug laws to them. The case was heard by the United States Court of Appeals for the First Circuit.

#### Issue

May two nations informally agree to enforce one nation’s laws on a ship of the other nation?

#### Holding and Reasoning (Breyer, J.)

Yes. Two nations may informally agree to enforce one nation’s laws on a ship of the other nation. A nation has authority to enforce law in the territory of another nation to the extent provided by agreements with the other nation. The agreement may be made through both formal and informal means. U.S. federal law bans the possession of controlled substances on any vessel within the customs waters of the U.S. If a foreign government permits the U.S. to enforce its laws upon a vessel, the waters around the vessel become custom waters, and U.S. drug laws are enforceable. The protective principle of international law allows a country to forbid extraterritorial conduct that threatens the country’s security. However, any assertion of jurisdiction under the protective principle must be reasonable. In this case, the protective principle is irrelevant. Panama agreed to permit the U.S. to apply U.S. law to its ship. Thus, the U.S. properly convicted the Robinsons. The conviction is affirmed.

**Key Terms:**

**Protective Principle -** A principle of international law which provides that a State may assert jurisdiction over foreigners for acts committed outside the State that are directed against the territorial integrity, security, or political independence of a state.

# Mitchell v. United States

#### United States Supreme Court 526 U.S. 314 (1999)

#### Rule of Law

**A defendant who pleads guilty does not waive the Fifth Amendment right against self-incrimination at the sentencing hearing.**

#### Facts

In 1995, Amanda Mitchell (defendant) pled guilty in federal court to distributing cocaine. Mitchell did not have a plea agreement and reserved the right at sentencing to challenge the drug quantity for which she was responsible. During the guilty plea, the district court advised Mitchell that she was waiving her Fifth Amendment right to remain silent at trial by pleading guilty. When asked if she had committed the acts necessary to be found guilty, Mitchell responded, “Some of it.” At the sentencing hearing, the United States government (plaintiff) offered witnesses who testified regarding Mitchell’s role in drug dealing and generally to the amounts she handled. Mitchell did not testify or offer evidence at sentencing, but her counsel argued that the prosecution could only attribute a minimal amount of drugs to her. The district court ruled that Mitchell did not have the right to remain silent at sentencing and expressly held her silence against her in sentencing her to the mandatory 10-year sentence for selling more than five kilograms of cocaine. The United States Court of Appeals for the Third Circuit affirmed. The United States Supreme Court granted certiorari.

#### Issue

Does a defendant who pleads guilty waive the Fifth Amendment right against self-incrimination at the sentencing hearing?

#### Holding and Reasoning (Kennedy, J.)

No. A defendant who pleads guilty maintains the right against self-incrimination at sentencing. The Fifth Amendment to the United States Constitution provides that no person can be compelled to be a witness against himself or herself in any criminal case. A witness may not, however, testify voluntarily about a subject and then invoke the right to remain silent when questioned further about the details. *Rogers v. United States*, 340 U.S. 367, 373 (1951). To allow otherwise would permit a witness to distort the facts by controlling what testimony is given. Here, if Mitchell had testified at trial that she did “some of it,” she would have been subject to cross-examination on the details. The concerns of selected trial testimony are not present, however, during a guilty-plea colloquy, where the defendant is admitting to the charges. The limited, necessary inquiry of a plea colloquy cannot reasonably be considered a waiver of the important right against self-incrimination. Rule 11 of the Federal Rules of Criminal Procedure governs pleas and directs that a court may question a defendant during a guilty plea to establish a factual basis for the plea. A defendant who invokes Fifth Amendment rights during a plea runs the risk that the court rejects the plea. The court of appeals incorrectly held that Mitchell’s guilty plea extinguished her right against self-incrimination on the basis that the incrimination was then complete. While the privilege does terminate when a sentence has been given and the conviction becomes final, incrimination is not complete prior to sentencing. *Estelle v. Smith*, 451 U.S. 454 (1981). A defendant who is compelled to testify at sentencing certainly could incriminate himself or herself and receive a lengthier sentence as a result. The prosecution argues that even if the right to remain silent continues through sentencing, the invocation of this privilege can be used against a defendant. However, *Griffin v. California*, 380 U.S. 609 (1965), establishes that no negative inference can be drawn from a defendant’s failure to testify at trial, and no exception to this rule exists for a defendant who invokes the privilege at sentencing. Accordingly, the judgment of the court of appeals is reversed, and the case is remanded for further proceedings.

#### Dissent (Thomas, J.)

Justice Scalia’s dissent is correct and demonstrates that the holding in *Griffin* should be reexamined.

#### Dissent (Scalia, J.)

Although Mitchell should have been permitted to invoke her right against self-incrimination at the sentencing hearing, the court should be able to draw an inference from her failure to testify. Although *Griffin* should not be overruled, its logic runs counter to commonsense; in everyday life, a negative inference is drawn if a person is silent upon being asked if he or she did something wrong. Therefore, the rule in *Griffin* should not be extended beyond use at trial.

**Key Terms:**

**Fifth Amendment Privilege Against Self-Incrimination** - Constitutional protection that prevents the government from compelling a person to give testimony against himself.

**Guilt-Plea Colloquy -** An inquiry by the court to a defendant to ensure that the defendant’s guilty plea to criminal charges is knowing, voluntary, and based upon facts sufficient to support a finding of guilt.

# Carter v. Kentucky

#### United States Supreme Court 450 U.S. 288 (1981)

#### Rule of Law

**A trial court judge has a constitutional obligation to instruct the jury that it may draw no adverse inference from a defendant’s decision not to testify when the defendant requests such an instruction.**

#### Facts

Carter (defendant) was tried for criminal offenses in the state of Kentucky (plaintiff). Carter requested a jury instruction advising the jury that the jury could not infer guilt from Carter’s decision not to testify. The trial court refused to give the requested jury instruction. Carter was convicted and his conviction was upheld through the state courts. Carter petitioned the United States Supreme Court for review.

#### Issue

Does a trial court judge have a constitutional obligation to instruct the jury that it may draw no adverse inference from a defendant’s decision not to testify when the defendant requests such an instruction?

#### Holding and Reasoning (Stewart, J.)

Yes. A trial court judge has a constitutional obligation to instruct the jury that it may draw no adverse inference from a defendant’s decision not to testify when the defendant requests such an instruction. The state asserts that the judge’s refusal to grant the requested instruction actually protected the defendant because any comment would have called undue attention to the fact that the defendant had not testified on his own behalf. We rejected that argument in *Lakeside v. Oregon*, 308 U.S. 287 (1978), because we found it doubtful that the jury would not have noticed the defendant’s failure to testify on its accord and potentially draw adverse inferences in the absence of instruction to the contrary. We also considered it doubtful that the jury would ignore the admonition against adverse inferences if given a proper instruction. The use of appropriate jury instruction minimizes the risk that the jury will draw impermissible inferences from the defendant’s silence. When a defendant requests a jury instruction for the protection of the right to remain silent, failure to deliver the instruction impermissibly restricts the full and free exercise of the right to remain silent. The judgment of conviction is reversed and the case remanded for a new trial.

#### Concurrence (Stevens, J.)

I write separately to emphasize that this ruling applies only to cases in which the defendant expressly requests the jury instruction at issue. The court does not have any independent duty to deliver such an instruction when not requested by the defendant.

#### Dissent (Rehnquist, J.)

The Fifth Amendment prevents any person from being compelled to act as a witness against himself. No one here claims that Taylor was forced to unwillingly take the stand or testify against himself. The majority’s analysis of burdens or penalties against the exercise of constitutional rights threatens to deprive trial judges of any control over the instructions they administer to juries.

**Key Terms:**

**Fifth Amendment** - An amendment added to the U.S. Constitution as part of the Bill of Rights that provides important protections from government actions, including a guarantee that no person will be required to answer for a capital crime unless first indicted by a grand jury; no one will suffer double jeopardy; no one must testify against himself or herself; no one will be deprived of life, liberty, or property without due process of law; and no property will be taken for public use without just compensation.

**Lakeside v. Oregon**

98 S.Ct. 1091

Supreme Court of the United States

**Ensio Ruben LAKESIDE, Petitioner,**

**v.**

**State of OREGON.**

No. 76-6942.

Argued Jan. 18, 1978.Decided March 22, 1978.

**Synopsis**

Defendant's conviction of escape was reversed by the [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ia45fbf57f74611d9bf60c1d57ebc853e&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[Oregon Court of Appeals, 25 Or.App. 539, 549 P.2d 1287,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1976114176&pubNum=661&originatingDoc=Ic1e591f79c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))but was subsequently reinstated by the [Oregon Supreme Court, 277 Or. 569, 561 P.2d 612.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977111859&pubNum=661&originatingDoc=Ic1e591f79c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) Defendant's petition for a writ of certiorari was granted. The Supreme Court, Mr. Justice Stewart, held that: (1) the giving by a state trial judge over a criminal defendant's objection of a cautionary instruction that the jury is not to draw any adverse inference from the defendant's decision not to testify in his behalf did not violate the privilege against compulsory self-incrimination, and (2) such an instruction did not deprive the objecting defendant of his right to counsel by interfering with his attorney's trial strategy.

Judgment of Supreme Court of Oregon affirmed.

Mr. Justice Stevens filed a dissenting opinion which Mr. Justice Marshall joined in part.

# Portuondo v. Agard

#### United States Supreme Court 529 U.S. 61 (2000)

#### Rule of Law

**A criminal defendant’s constitutional rights are not violated by a prosecutorial comment to the jury indicating that the defendant may have gained an advantage by choosing to testify last during trial.**

#### Facts

Agard (defendant) was tried in federal court for multiple criminal charges. Agard was the last witness to testify at trial. During closing arguments, the prosecution remarked to the jury that Agard had benefited from his choice to testify last. The prosecution suggested to the jury that Agard had used the testimony of prior witnesses to his advantage. Agard objected to the prosecutor’s remarks on grounds that it deprived him of the right to be present at trial. The trial court overruled Agard’s objection and stated that it was fair for the prosecution to comment about the fact that he gained an advantage from testifying last. Agard was convicted and appealed. The court of appeals concluded that the prosecutor’s comments violated Agard’s Fifth, Sixth and Fourteenth Amendment rights and reversed his conviction. The prosecution petitioned the United States Supreme Court for review.

#### Issue

Are a criminal defendant’s constitutional rights violated by a prosecutorial comment to the jury indicating that the defendant may have gained an advantage by choosing to testify last during trial?

#### Holding and Reasoning (Scalia, J.)

No. A criminal defendant’s constitutional rights are not violated by a prosecutorial comment to the jury indicating that the defendant may have gained an advantage by choosing to testify last during trial. In *Griffin v. California*, 380 U.S. 609 (1965), we reversed a criminal conviction in a case in which the trial court told the jury that it was allowed to regard the defendant’s refusal to testify as evidence of the truth of the charges against him. We held that the court’s comments imposed an unconstitutional penalty against the exercise of the defendant’s privilege against self-incrimination. The point of *Griffin* was to preserve the defendant’s right to make the prosecution prove its case without the benefit of the defendant’s self-incriminating testimony. To maintain that right, the jury must not be allowed to draw an inference of guilt from the defendant’s silence. By contrast, the fact that a defendant chooses to testify last may be properly considered by the jury in its assessment of the defendant’s credibility. When a defendant takes the stand, his credibility is subject to impeachment. The Constitution does not prohibit the jury from considering the timing of a defendant’s testimony in its assessment of credibility. Agard also argues that the prosecutor’s comments were impermissible because they were not based on any particular evidence that Agard had actually tailored his testimony. A comment that calls the jury’s attention to a generalized condition that may bear upon a defendant’s credibility does not violate any of the defendant’s constitutional rights. Agard asserts that the prosecutor’s comments were impermissible because they were made during closing arguments and the defense had no opportunity for rebuttal. It is a long-standing tradition of our trial procedure to require the defendant to make closing arguments before the prosecution. The defense is expected to anticipate the prosecution’s arguments, and there is no reason to depart from that practice when a defendant testifies on his own behalf. Finally, Agard argues that because state law required him to be present at trial, the prosecution’s comments about his presence violated his due process rights. Even if Agard’s mandatory presence at trial affected his credibility, there is no precedent for ascribing a due process violation to any diminishment in credibility. The judgment of the court of appeals is reversed.

#### Dissent (Ginsburg, J.)

The Court’s ruling converts a defendant’s Sixth Amendment right to be present at trial into an impairment of his credibility. There is no way for the jury to know whether or not Agard tailored his testimony based upon prior witnesses. One possible explanation for consistency between the testimony of a defendant and prior witnesses is that the defendant is telling the truth. The prosecution’s generic comment would impeach the credibility of a completely innocent defendant just as much as it would affect a guilty defendant. With no opportunity for defense rebuttal, there is no way for the jury to take account of the defendant’s response to the accusation of tailoring in its assessment of credibility. These summary prosecutorial comments infringed upon the defendant’s Sixth Amendment rights without affording the defendant any compensatory rights. For that reason, the court of appeals issued a narrow holding that a prosecutor may not issue a general accusation of tailoring during closing arguments. Nothing in the court of appeals’ opinion would prevent the prosecution from cross-examining a defendant about the decision to testify last. Cross-examination promotes the truth-finding function of a trial, whereas unchallengeable summary comments diminish the rights of defendants with no benefit to the discovery of truth. The prosecution’s comments did not simply point out to the jury that Agard had the opportunity to tailor testimony based upon prior witnesses. The prosecutor encouraged the jury to draw an inference of tailoring. There is no precedent indicating that the jury may constitutionally draw such an inference. Even if the Constitution does not prohibit the inference, that does not make it permissible for the prosecution to encourage the jury to draw such an inference. The Court’s ruling infringes upon the constitutional rights of defendants while adding nothing to the truth-finding goal of the trial process. I would affirm the ruling of the court of appeals.

**Key Terms:**

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

**Due Process -** A constitutional guarantee that a law shall not be unreasonable, arbitrary, or capricious and that individuals will be given notice of legal proceedings conducted fairly with an opportunity for an individual to be heard before the government may impose sanctions on one’s life, liberty, or property.

# Rock v. Arkansas

#### United States Supreme Court 483 U.S. 44 (1987)

#### Rule of Law

**A rule prohibiting the admission of hypnotically refreshed testimony violates a criminal defendant’s constitutional right to testify on her own behalf.**

# \*\*ROCK v. ARKANSAS\*\*

#### United States Supreme Court 483 U.S. 44 (1987)

#### Rule of Law

**A rule prohibiting the admission of hypnotically refreshed testimony violates a criminal defendant’s constitutional right to testify on her own behalf.**

#### Facts

Vickie Rock (defendant) was charged with manslaughter in the shooting death of her husband. The incident stemmed from an argument between the two that became physical. At first, Rock could not recall the exact circumstances that led to the shooting. However, after being hypnotized by Dr. Back, Rock recalled that she had never pulled the trigger, but the gun had accidentally discharged when her husband grabbed her arm during the fight. The trial court listened to a recording of the hypnosis and determined that Dr. Back was objective and did not ask Rock leading questions during the hypnosis. Additionally, an inspection of the gun indicated that it was defective and had a tendency to go off without the trigger being pulled. Rock sought to testify to her post-hypnosis recollection about the incident at trial. However, the trial court excluded all of Rock’s testimony to recollections she had after the hypnosis and limited her testimony to what she had recalled prior to the hypnosis, which was recorded in the hypnotist’s pre-hypnosis notes. As a result of this exclusion, the trial court convicted Rock. The Supreme Court of Arkansas affirmed. The United States Supreme Court granted certiorari to consider the constitutionality of Arkansas' per se prohibition on admitting a criminal defendant's hypnotically refreshed testimony.

#### Issue

Does a rule prohibiting the admission of hypnotically refreshed testimony violate a criminal defendant’s constitutional right to testify on her own behalf?

#### Holding and Reasoning (Blackmun, J.)

Yes. A criminal defendant has a constitutional right to testify on her own behalf. Some states have enacted rules for the purpose of ensuring that evidence presented at trial is trustworthy, but if applying these rules results in an arbitrary denial of a defendant's right to testify or present witnesses on her behalf, then the rules are unconstitutional. Although a criminal defendant's right to testify is not absolutely unlimited, the right may not be restricted unless the interests served by the restriction justify the limitation on the defendant's constitutional rights. In this case, the Arkansas rule excluding post-hypnotic testimony does so with no regard for the circumstances surrounding the hypnosis or any independent verification of the testimony it produces. This has an adverse impact on the defendant’s right to testify. Furthermore, Arkansas has not shown that hypnotically enhanced testimony is always so unreliable that it justifies impinging on a defendant’s constitutional right. Thus, although it is true that safeguards should be put into place regarding post-hypnotic testimony, an outright ban on this type of testimony is unwarranted. Here, Rock's testimony was corroborated by the investigation into the effectiveness of the gun. Additionally, the trial court found that Dr. Back was objective during the hypnosis and did not use leading questions. Accordingly, Rock has made a strong enough argument for consideration by the trial court of the admission of her hypnotically refreshed testimony. The judgment of the Arkansas Supreme Court is vacated, and the case is remanded.

#### Dissent (Rehnquist, C.J.)

The majority admits that after being hypnotized, an individual becomes subject to suggestion, confabulation, and artificially increased confidence in both true and false memories. All of these factors make post-hypnotic testimony unreliable and render the Arkansas ban on this type of testimony constitutionally valid. A defendant’s right to present evidence is always subject to reasonable restrictions, and a rule designed to exclude testimony with inherently suspect reliability certainly is a worthy restriction.

**Key Terms:**

**Fourteenth Amendment Due Process** **Clause** - The provision set forth at Amendment XIV, Section 1 of the United States Constitution prohibiting states from depriving any person of life, liberty, or property by means that are arbitrary or fundamentally unfair.

**Ferguson v. Georgia**

81 S.Ct. 756

Supreme Court of the United States

**Billy FERGUSON, Appellant,**

**v.**

**STATE OF GEORGIA.**

No. 44.

Argued Nov. 14, 15, 1960.Decided March 27, **1961**.

**Synopsis**

The Supreme Court of the [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I6a93ea8104a311da9439b076ef9ec4de&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=a96e49f4dede41dc941357831fa3c5c6&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[State of **Georgia**, 215 **Ga**. 117, 109 S.E.2d 44,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1959124684&pubNum=711&originatingDoc=Ia09c13359c9a11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed a murder conviction, and the defendant appealed. The United States Supreme Court, Mr. Justice Brennan, held that in effectuating statutory provisions for unsworn statements, **Georgia**, consistently with Fourteenth Amendment, could not, in context of statute making defendants incompetent to testify under oath on their own behalf, deny to defendant the right to have his counsel question him to elicit his unsworn statement.

Reversed and remanded.

# Faretta v. California

#### United States Supreme Court 422 U.S. 806 (1975)

#### Rule of Law

**The right to defend is personal and defendants have the constitutional right to represent themselves at trial if they so choose.**

**United States v. Valenzuela-Bernal**

102 S.Ct. 3440

Supreme Court of the United States

**UNITED STATES, Petitioner**

**v.**

**Ricardo VALENZUELA–BERNAL.**

No. 81–450.

Argued April 20, 1982.Decided July 2, 1982.

## Synopsis

Defendant was convicted in the United States District Court for the Southern District of California of transporting an illegal alien and he appealed. The Court of Appeals for the Ninth Circuit, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ia1623905927811d9bdd1cfdd544ca3a4&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[647 F.2d 72](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981121729&pubNum=0000350&originatingDoc=Ia09f47819c9a11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), reversed. The Supreme Court, Justice Rehnquist, held that: (1) defendant seeking to show denial of due process or denial of Sixth Amendment right of confrontation because of the deportation of an alien witness must make some plausible explanation of the assistance that he would have received from the testimony of the deported witnesses; (2) responsibility of the Executive Branch to faithfully execute the immigration policy of the country justifies prompt deportation of illegal alien witnesses upon a good-faith determination that they possess no evidence favorable to the defendant; and (3) sanctions will be warranted for deportation of alien witnesses only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact.

Reversed.

Justice Blackmun and Justice O'Connor filed opinions concurring in the judgment.

Justice Brennan filed a dissenting opinion in which Justice Marshall joined.

# Harris v. New York

#### United States Supreme Court 401 U.S. 222 (1971)

#### Rule of Law

**Statements made by a suspect who has not received the *Miranda* warnings may be admitted at trial for impeachment purposes.**

# Chambers v. Mississippi

#### United States Supreme Court 410 U.S. 284 (1973)

#### Rule of Law

**A criminal defendant’s due process rights are violated when the trial court prohibits the defendant from cross-examining his own witness and excludes hearsay testimony of statements against the witness’ penal interests when assurances of reliability warrant an exception from the hearsay rule.**

#### Facts

Chambers (defendant) was accused of murdering a police officer during a confrontation between police and a hostile crowd. Several months after Chambers’ arrest, McDonald spoke with Chambers’ attorneys and gave a written confession to the murder. McDonald repudiated his confession at a subsequent preliminary hearing and was released from custody. At trial, Chambers called McDonald as a witness and had his confession admitted into evidence. After the prosecution cross-examined McDonald, Chambers moved to examine him as an adverse witness in order to challenge the credibility of his subsequent repudiations of his confession. The trial court denied his request for adverse examination. Chambers attempted to elicit testimony of three additional witnesses who would have presented evidence of conduct and statements tending to validate McDonald’s confession. The trial court excluded the admission of testimony from each witness on hearsay grounds. Chambers was convicted and appealed through the state courts. The state courts upheld his conviction and Chambers petitioned the United States Supreme Court for review.

#### Issue

Are a criminal defendant’s due process rights violated when the trial court prohibits the defendant from cross-examining his own witness and excludes hearsay testimony of statements against the witness’ penal interests when assurances of reliability warrant an exception from the hearsay rule?

#### Holding and Reasoning (Powell, J.)

Yes. A criminal defendant’s due process rights are violated when the trial court prohibits the defendant from cross-examining his own witness and excludes hearsay testimony of statements against the witness’ penal interests when assurances of reliability warrant an exception from the hearsay rule. Mississippi adheres to a common law that prohibits a party from impeaching the credibility of his own witness through adverse examination. The common law rule is founded on a predicate known as the “voucher rule” which presumes that a party vouches for the credibility of his own witness by calling the witness to testify. Although the voucher rule may have made sense in the past, the reality of modern criminal process is that a defendant must often rely on witnesses with personal motives adverse to the defendant’s interests. In Chambers’ case, the voucher rule detracted from his ability to present an effective defense by prohibiting him from cross-examining McDonald to impeach the credibility of McDonald’s repudiation of his confession. The state argues that the Confrontation Clause of the Sixth Amendment applies only to witnesses adverse to the accused. McDonald’s testimony was highly adverse to Chambers. McDonald’s retraction of his confession tended to inculpate Chambers and the denial of cross-examination gave Chambers no opportunity to explore exculpatory evidence that might have given more weight to McDonald’s confession. Even if the denial of cross-examination was not sufficient in itself to deprive Chambers of due process, the trial court’s exclusion of the testimony of other witnesses warrants reversal. The purpose of the hearsay rule is to exclude evidence of statements not made under oath and not immediately subject to cross-examination on grounds that they lack sufficient indicia of reliability. An exception to the hearsay rule generally applies to statements made against a party’s interests on the principle that a person is unlikely to make a false statement against his own interests. Mississippi recognizes the exception only with respect to statements against a party’s pecuniary interests. Most states exclude statements against the declarant’s penal interests on the theory that confessions in criminal matters suffer from a vulnerability to external motivations that are typically not present in cases involving statements against pecuniary or proprietary interests. In this case, McDonald’s confessions were made to close friends shortly after the murder took place and they were corroborated by other evidence. McDonald stood nothing to gain by confessing his involvement to friends. Any questions as to the reliability of his confessions could have been effectively addressed through cross-examination by the state. Under the circumstances, concerns about reliability that might justify exclusion of the witness’ testimony are not implicated. The hearsay rule should not be applied in such a manner as to deprive a defendant of a fair trial in violation of due process rights. The judgment of conviction is reversed.

#### Dissent (Rehnquist, J.)

I would not rule on the merits of Chambers’ argument since he failed to raise the constitutional question at issue in the state courts. If I were to rule on the merits, I would not agree with the Court’s application of constitutional law to the common law of evidence.

**Key Terms:**

**Hearsay -** An out-of-court statement offered to prove the truth of the matter asserted in the statement.

**Due Process -** A constitutional guarantee that a law shall not be unreasonable, arbitrary, or capricious and that individuals will be given notice of legal proceedings conducted fairly with an opportunity for an individual to be heard before the government may impose sanctions on one’s life, liberty, or property.

**Confrontation Clause -** The provision of the Sixth Amendment to the United States Constitution that guarantees a criminal defendant the right to confront the witnesses against him and conduct a reasonable cross-examination.

# \*\*HOLMES v. SOUTH CAROLINA\*\*

#### United States Supreme Court 547 U.S. 319 (2006)

#### Rule of Law

**In order to have a “meaningful opportunity to present a complete defense,” the defendant must be entitled to introduce evidence of a third party’s guilt.**

#### Facts

Holmes (defendant) was charged with murder, sexual assault, burglary, and robbery in connection with an incident involving the victim, Mary Stewart, at her home. The trial court convicted Holmes, the South Carolina Supreme Court affirmed the conviction, and the United States Supreme Court denied certiorari. However, upon state post-conviction review, a new trial was ordered. At the new trial, Holmes sought to introduce proof that another man, Jimmy McCaw White, was actually the one who had committed the crimes against Stewart. The trial court excluded this evidence of third party guilt and the South Carolina Supreme Court affirmed on the grounds that evidence of a third party’s guilt is not admissible if it merely implicates a third party and does not exculpate the defendant. The United States Supreme Court granted certiorari.

#### Issue

Is evidence of a third party’s guilt admissible if it merely implicates the third party and does not exculpate the defendant?

#### Holding and Reasoning (Alito, J.)

Yes. Under the U.S. Constitution, a criminal defendant must be afforded a “meaningful opportunity to present a complete defense.” This right includes the opportunity to present evidence of not only his innocence, but of the guilt of a third party. Excluding such evidence and thus hearing only the prosecution’s evidence on the issue does not allow the court to make a conclusion based on all available evidence. The prosecution’s evidence providing strong support that the defendant is guilty does not automatically mean that evidence of a third party’s guilt is weak. As a result, in this case, Holmes is entitled to introduce evidence of White’s guilt. The exclusion of this evidence was a violation of Holmes’s right to have a “meaningful opportunity to present a complete defense.” The judgment of the South Carolina Supreme Court is vacated and the case is remanded.

**South Carolina v. Gregory**

198 S.C. 98

Supreme Court of South Carolina.

**STATE**

**v.**

**GREGORY.**

No. 15312.

Sept. 25, **1941**.

**Synopsis**

Appeal from General Sessions Circuit Court of Spartanburg County; G. Duncan Bellinger, Judge.

L. I. **Gregory** was convicted of embezzlement, and he appeals.

Conviction affirmed, sentence thereon set aside, and case remanded for resentence only.

# United States v. Scheffer

#### United States Supreme Court 523 U.S. 303 (1998)

#### Rule of Law

**The Sixth Amendment right to present a defense is not unlimited, but rather is subject to reasonable restrictions.**

#### Facts

Edward Scheffer (defendant), an airman in the Air Force, was charged by the court martial with using methamphetamines due to a positive urinalysis test. Scheffer claimed that he has not used drugs since his entry in the Air Force. At trial, Scheffer sought to introduce the results of a polygraph test in which he stated that he did not knowingly use drugs. The Military Rules of Evidence had a rule that categorically excluded polygraph evidence. The court martial followed this per se rule, excluded the evidence, and convicted Scheffer. The Air Force Court of Criminal Appeals affirmed. The United States Court of Appeals for the Armed Forces reversed on Sixth Amendment grounds and the prosecution appealed.

#### Issue

Must evidence from a polygraph test be admissible in a court martial proceeding?

#### Holding and Reasoning (Thomas, J.)

No. The Sixth Amendment provides that a defendant has the right to present a defense including evidence in his favor. However, this right is subject to various limitations and may be restricted if the interests served by the restriction justify the limitation. In this case, the military’s per se restriction of polygraph evidence is justified. The President has a significant interest in making sure that evidence introduced in a military trial is reliable, and there is no consensus in the scientific community that polygraph evidence is reliable. In addition, on the opposite side of this governmental interest, restricting a defendant from introducing polygraph evidence does not significantly hinder his ability to bring forth a defense. He is still able to present other factual evidence, and, importantly, testify on his own behalf. As a result, the military’s per se exclusion of polygraph evidence does not significantly impinge upon a defendant’s Sixth Amendment right and such exclusion is justified. The United States Court of Appeals for the Armed Forces is reversed.

**Crane v. Kentucky**

106 S.Ct. 2142

Supreme Court of the United States

[**Major CRANE**](https://1.next.westlaw.com/Search/Results.html?query=advanced%3a+OAID(5037542845)&saveJuris=False&contentType=BUSINESS-INVESTIGATOR&startIndex=1&contextData=(sc.Default)&categoryPageUrl=Home%2fCompanyInvestigator&originationContext=document&transitionType=DocumentItem)**, Petitioner,**

**v.**

**KENTUCKY.**

No. 85–5238.

Argued April 23, 1986.Decided June 9, 1986.

**Synopsis**

[](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I11ac8bf4e79e11d983e7e9deff98dc6f&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[Defendant was convicted of murder before the Circuit Court, Jefferson County, and he appealed. The Kentucky Supreme Court, 690 S.W.2d 753](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1985111995&pubNum=0000713&originatingDoc=Id8e6c5099c1c11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), affirmed. After granting certiorari, the Supreme Court, Justice O'Connor, held that exclusion of testimony at trial concerning circumstances of defendant's confession, on ground that the testimony pertained solely to issue of voluntariness resolved against defendant in pretrial ruling, deprived him of a fair trial.

Reversed and remanded.

Opinion on remand, [726 S.W.2d 302](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1987032297&pubNum=0000713&originatingDoc=Id8e6c5099c1c11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

# Chambers v. Mississippi

#### United States Supreme Court 410 U.S. 284 (1973)

#### Rule of Law

**A criminal defendant’s due process rights are violated when the trial court prohibits the defendant from cross-examining his own witness and excludes hearsay testimony of statements against the witness’ penal interests when assurances of reliability warrant an exception from the hearsay rule.**

# Washington v. Texas

#### United States Supreme Court 388 U.S. 14 (1967)

#### Rule of Law

**A state law that prohibits persons charged or convicted as coparticipants in a crime from testifying on behalf of one another violates the Sixth Amendment right to compulsory process.**

#### Facts

Washington (defendant) was convicted of murder after a jury trial. A coparticipant in the crime had already been convicted of the same murder prior to the time of Washington’s trial. Laws of the state of Texas (plaintiff) prohibited persons charged or convicted as coparticipants in the same crime from testifying on behalf of one another. If not prohibited by state law, the codefendant would have testified that he committed the murder and that Washington tried to prevent him from committing the murder. The state courts upheld Washington’s conviction on appeal. Washington petitioned the United States Supreme Court for review.

#### Issue

Does a state law that prohibits persons charged or convicted as coparticipants in a crime from testifying on behalf of one another violate the Sixth Amendment right to compulsory process?

#### Holding and Reasoning (Warren, J.)

Yes. A state law that prohibits persons charged or convicted as coparticipants in a crime from testifying on behalf of one another violates the Sixth Amendment right to compulsory process. The question before the Court is whether the Sixth Amendment right to compulsory process in federal trials is so fundamental as to also apply to the states by virtue of the Due Process Clause of the Fourteenth Amendment. The right of a defendant to present witnesses for the establishment of his own defense is a fundamental element of due process of law and is applicable in state criminal proceedings. The right to compulsory process was included in the Bill of Rights in response to a common law rule that prohibited defendants charged with treason or felony offenses from presenting any witnesses in their own defense. Even after the prohibition was abolished, common law continued to bar codefendants from testifying on each other’s behalf under the theory that each would lie in order to save the other. In *Rosen v. United States*, 161 U.S. 29 (1896), this Court overruled the common law and held that a defendant has the right to call any witness who would testify in his defense. A state law that bars a whole class of witnesses from testifying based on the arbitrary presumption that they are likely to commit perjury defeats the Sixth Amendment’s intent to make the testimony of a defendant’s witnesses admissible in his own defense. The Texas rule could not even be justified on the rationale of preventing perjury. The rule does not prevent a codefendant from testifying on behalf of the prosecution. It seems implausible to presume that criminals will be more likely to commit perjury in order to acquit a codefendant than to commit perjury in order to receive favorable treatment from the prosecution. Washington was denied his right to compulsory process because the state arbitrarily denied him the right to call his codefendant to testify on his behalf. The state court judgment is reversed.

**Key Terms:**

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

**Fourteenth Amendment –** Provides that all persons born or naturalized in the United States are U.S. citizens. Also provides that no state shall: (1) abridge the privileges or immunities of a U.S. citizen; (2) deprive any person of life, liberty, or property, without due process of law; or (3) deny equal protection of the laws to anyone within its jurisdiction.

**Due Process -** A constitutional guarantee that a law shall not be unreasonable, arbitrary, or capricious and that individuals will be given notice of legal proceedings conducted fairly with an opportunity for an individual to be heard before the government may impose sanctions on one’s life, liberty, or property.

**Fry v. Pliler**

127 S.Ct. 2321

Supreme Court of the United States

**John Francis FRY, Petitioner,**

**v.**

**Cheryl K. PLILER, Warden.**

No. 06–5247.

Argued March 20, 2007.Decided June 11, 2007.

**Synopsis**

**Background:** State prisoner filed application for a writ of habeas corpus based on constitutional error allegedly committed during his criminal trial in excluding witness' testimony. The United States District Court for the Eastern District of California, [Frank C. Damrell](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0506152301&originatingDoc=Idaf17f39181211dcaf8dafd7ee2b8b26&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Idaf17f39181211dcaf8dafd7ee2b8b26), J., [2004 WL 5264357](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2011828394&pubNum=0000999&originatingDoc=Idaf17f39181211dcaf8dafd7ee2b8b26&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), denied petition on ground that this alleged constitutional error had no substantial and injurious effect on proceedings and was thus not prejudicial. The Court of Appeals for the Ninth Circuit, [2006 WL 249542, 209 Fed.Appx. 622](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2008341118&pubNum=0006538&originatingDoc=Idaf17f39181211dcaf8dafd7ee2b8b26&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), affirmed. Certiorari was granted.

[**Holding:**](https://1.next.westlaw.com/Document/Idaf17f39181211dcaf8dafd7ee2b8b26/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_anchor_F12012447170) The Supreme Court, Justice [Scalia](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254763301&originatingDoc=Idaf17f39181211dcaf8dafd7ee2b8b26&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Idaf17f39181211dcaf8dafd7ee2b8b26), held that, on collateral review by federal habeas court of criminal judgment of state court, federal court assesses prejudicial impact of state court's constitutional error under *Brecht's*more forgiving “substantial and injurious effect” standard, and not under *Chapman's* “harmless beyond reasonable doubt” standard, regardless of whether state courts recognized the error and reviewed for harmless beyond reasonable doubt under [*Chapman*](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0506151301&originatingDoc=Idaf17f39181211dcaf8dafd7ee2b8b26&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Idaf17f39181211dcaf8dafd7ee2b8b26).

Affirmed.

Justice Stevens concurred in part and dissented in part and filed opinion, in which Justices [Souter](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0263202201&originatingDoc=Idaf17f39181211dcaf8dafd7ee2b8b26&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Idaf17f39181211dcaf8dafd7ee2b8b26) and [Ginsburg](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=Idaf17f39181211dcaf8dafd7ee2b8b26&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Idaf17f39181211dcaf8dafd7ee2b8b26)joined, and in which Justice Breyer joined in part.

Justice Breyer concurred in part and dissented in part and filed opinion.

# Rock v. Arkansas

#### United States Supreme Court 483 U.S. 44 (1987)

#### Rule of Law

**A rule prohibiting the admission of hypnotically refreshed testimony violates a criminal defendant’s constitutional right to testify on her own behalf.**

# \*\*TAYLOR v. KENTUCKY\*\*

#### United States Supreme Court 436 U.S. 478 (1978)

#### Rule of Law

**A trial court’s refusal to provide a jury instruction on the presumption of innocence violates a defendant’s due process rights.**

#### Facts

Taylor (defendant) was tried for robbery in the state of Kentucky (plaintiff). The prosecutor read the indictment to the jury during *voir dire*. Taylor requested jury instructions explaining the presumption of innocence and advising that the indictment was not evidence of guilt. The trial court denied the requests for instructions. Taylor was convicted and appealed on grounds that failure to provide the requested instructions violated his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment.

#### Issue

Does a trial court’s refusal to provide a jury instruction on the presumption of innocence violate a defendant’s due process rights?

#### Holding and Reasoning (Powell, J.)

Yes. A trial court’s refusal to provide a jury instruction on the presumption of innocence violates a defendant’s due process rights. Although the presumption of innocence and the requirement of proof beyond a reasonable doubt are logically similar concepts, the lay juror may derive important guidance from the addition of an instruction about the presumption of innocence. The use of such an instruction is not constitutionally mandated, but an instruction on the presumption of innocence represents one manner of safeguarding a defendant’s Fourteenth Amendment rights. Under the circumstances of this case, the court’s refusal to deliver the additional instruction deprived Taylor of the opportunity for a fair trial. The trial court’s jury instructions placed little emphasis on the prosecution’s burden to prove its case beyond a reasonable doubt. The trial court failed to instruct the jury that it must reach a verdict only on the basis of the evidence introduced at trial. The prosecutor delivered closing arguments that tended to invite the jury to draw inferences of guilt from facts not in evidence at trial. The trial court defined reasonable doubt as “substantial doubt,” which we have previously criticized as a confusing formulation. The fact that Taylor’s counsel explained the presumption of innocence in opening and closing statements does not compensate for the court’s failure to properly instruct the jury. The court’s refusal to give the instructions requested by Taylor deprived him of his right to a fair trial as guaranteed by the Due Process Clause of the Fourteenth Amendment. The judgment of conviction is reversed and the case remanded for a new trial.

#### Dissent (Stevens, J.)

Although the omission of an instruction about the presumption of innocence may be so prejudicial in some cases as to require reversal of conviction, the constitution does not require that such an instruction be delivered in every criminal trial. In this case, the *voir dire*made it clear to the jury that Taylor was entitled to a presumption of innocence. Taylor did not object to the prosecutor’s closing arguments, so that cannot form the basis for his appeal. I do not believe that any constitutional error occurred that would require reversal.

**Key Terms:**

**Fourteenth Amendment –** Provides that all persons born or naturalized in the United States are U.S. citizens. Also provides that no state shall: (1) abridge the privileges or immunities of a U.S. citizen; (2) deprive any person of life, liberty, or property, without due process of law; or (3) deny equal protection of the laws to anyone within its jurisdiction.

**Estelle v. Williams**

96 S.Ct. 1691

Supreme Court of the United States

**W. J. ESTELLE, Jr., Director, Texas Department of Corrections, Petitioner,**

**v.**

**Harry Lee WILLIAMS.**

No. 74-676.

Argued Oct. 7, 1975.Decided May 3, 1976.Rehearing Denied June 21, 1976.

See [426 U.S. 954, 96 S.Ct. 3182](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1976216518&pubNum=708&originatingDoc=Ic1e6a36e9c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

**Synopsis**

After he was convicted by a Texas court of assault with intent to murder with malice and the conviction was affirmed on appeal by the Texas Court of Criminal Appeals, petitioner sought federal habeas corpus relief, alleging that he had appeared at trial in clothes that were distinctly marked as prison issue. The District Court denied relief on the ground that the error was harmless, but the Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I211cd2d6905411d9a707f4371c9c34f0&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[500 F.2d 206,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1974111358&pubNum=350&originatingDoc=Ic1e6a36e9c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) reversed. On grant of certiorari, the Supreme Court, Mr. Chief Justice Burger, held that although the state cannot, consistent 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 as to being tried in such clothes, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation.

Reversed and remanded.

Mr. Justice Powell concurred and filed opinion in which Mr. Justice Stewart joined.

Mr. Justice Brennan dissented and filed opinion in which Mr. Justice Marshall concurred.

**Coffin v. United States**

15 S.Ct. 394

Supreme Court of the **United** **States**.

**COFFIN et al.**

**v.**

**UNITED STATES.**

No. 741.

March 4, **1895**.

**Synopsis**

In Error to the District Court of the **United** **States** for the District of Indiana.

**\*\*395**  **\*433** By section 5209 of the Revised Statutes, relating to national banks, certain acts therein enumerated are made misdemeanors punishable by imprisonment for not less than 5 nor more than 10 years. The section reads as follows:

‘Every president, director, cashier, teller, clerk, or agent of any association who embezzles, abstracts, or willfully misapplies any of the moneys, funds, or credits of the association; or who, without authority from the directors, issues or puts in circulation any of the notes of the association; or who, without such authority, issues or puts forth any certificate of deposit, draws any order or bill of exchange, makes any acceptance, assigns any note, bond, draft, bill of exchange, mortgage, judgment, or decree; or who makes any false entry in any book, report, or statement of the association with intent in either case to injure or defraud the association or any other company, body politic or corporate, or any individual person, or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association; and every person who with like intent aids or abets any officer, clerk, or agent in any violation of this section shall be deemed guilty of a misdemeanor, and shall be imprisoned not less than five years nor more than ten.’

The indictment in this case was found on the 21st December, 1893, against Theodore P. Haughey, who had been president of the Indianapolis National Bank, for violations of the foregoing section.

 F. A. **Coffin** and Percival B. **Coffin**, plaintiffs in error, and A. S. Reed, were charged therein with having aided and abetted Haughey in his alleged misdemeanors. The indictment is prolix and redundant, and it is difficult to  **\*434** analyze it so as to make a concise statement of its contents. It contains 50 counts, and alleges that the various offenses enumerated in them were committed on different dates between January 1, 1891, and July 26, 1893. The counts embrace a number of acts made misdemeanors by the statute, and the charges are commingled in a very indefinite and confusing manner. All the counts, however, may be classified as follows:

(1) Those which aver willful misapplication of the funds of the bank at a specified time, in a precise sum, and by enumerated and distinctly described acts.

(2) Those which, although definite as to date and amount, are indefinite in their statement of the precise means by which the alleged crimes were accomplished.

(3) Those which, while charging a willful misapplication of the funds of the bank for a definite amount are entirely indefinite as to the date or dates upon which the acts took place, and also fail to specify the particular acts by which the wrong was accomplished.

(4) Those which charge false entries in the books of the bank.

(5) Those which charge false entries in certain official statements of the condition of the bank made to the comptroller of the currency.

Under the first head—counts which are definite as to time, dates, amounts, and methods—are included Nos. 1, 2, 3, and 47. The first of these in order of date—for the counts are not arranged chronologically in the indictment—is the forty-seventh, which reads as follows:

‘The grand jurors aforesaid, upon their oaths aforesaid, do further charge and present that Theodore P. Haughey, late of said district, at the district aforesaid, on, to wit, the 21st day of December, in the year of our Lord 1892, the said Theodore P. Haughey then and there being president of a certain national banking association, then and there known and designated as the Indianapolis National Bank, in the city of Indianapolis, in the state of Indiana, which said association had been heretofore **\*435** created and organized under the laws of the **United** **States** of America, and which said association was then and there carrying on a banking business in the city of Indianapolis, state of Indiana, did then and there, by virtue of his said office as president of said bank, unlawfully, feloniously, and willfully misapply the moneys, funds, and credits of the said association, which were then and there under his control, with intent to convert the same to the use of the Indianapolis Cabinet Company, and to other persons to the grand jurors unknown, in a large sum, to wit, the sum of six thousand three hundred and eighteen dollars, by then and there causing said sum to be paid out of the moneys, funds, and credits of said association, upon a check drawn upon said association by the Indianapolis Cabinet Company, which check was then and there cashed and paid out of the moneys, funds, and credits of said association aforesaid, which said sum aforesaid, and no part thereof, was said Indianapolis Cabinet Company entitled to withdraw from said bank, because said company had no funds in said  **\*\*396** association to its credit; that said Indianapolis Cabinet Company was then and there insolvent, as the said Theodore P. Haughey then and there well knew, whereby said sum became lost to said association; that all of said acts as aforesaid were done with intent to injure and defraud said association; that, as such president aforesaid, the said Theodore P. Haughey was intrusted and charged by the board of directors of said national banking association with the custody, control, and care of the moneys, funds, credits, and assets of said association, and the general superintendence of its affairs.

‘And the grand jurors aforesaid do further say that Francis A. **Coffin**, Percival B. **Coffin**, and Albert S. Reed did unlawfully, willfully, knowingly, and feloniously, and with intent to injury and defraud said association, on to wit, the 21st day of December, in the year of our Lord 1892, aid and abet the said Theodore P. Haughey, as aforesaid, to wrongfully, unlawfully, feloniously, and willfully misapply the moneys, funds, and credits of said association as aforesaid, to wit, the sum of six thousand three hundred and eighteen dollars.’

**\*436** The second and third counts are substantially like the foregoing, varying only in the statements of date, amount, and method. The first and remaining count under this head, after fixing the date of the offense and stating the amount at $5,802.84, describes the method by which the misapplication was accomplished, as follows:

‘The Indianapolis Cabinet Company, of Indianapolis, Indiana, presented to said bank and to the said Theodore P. Haughey, as such president thereof, a certain bill of exchange drawn by said Indianapolis Cabinet Company on the Indianapolis Desk Company, of London, England, for the sum of one thousand one hundred and ninety-four pounds sterling, and due on June 1, 1893, which said bill of exchange was received by said Theodore P. Haughey, and placed to the credit of the said Indianapolis Cabinet Company upon the books of said bank, and the said Indianapolis Cabinet Campany thereupon drew its check for said sum upon the said bank, which check was then and there paid by said bank, under the direction of said Theodore P. Haughey; that said Indianapolis Desk Company, of London, England, did not owe said Indianapolis Cabinet Company any sum whatever; that said Theodore P. Haughey failed and refused to send said bill of exchange forward for collection, whereby said sum was lost to said association; that said sum was so willfully misapplied to the use and benefit of the Indianapolis Cabinet Company as aforesaid.’

Under the second head—those definite as to date and amount, but indefinite in the statement of the method by which the wrong was committed—are embraced counts 4, 5, 6, 7, 8, 9, 10, 11, and 12. Of these, the eighth is the first in order of time, and reads as follows:

‘The grand jurors aforesaid, upon their oaths aforesaid, do further charge and present that Theodore P. Haughey, late of said district, at the district aforesaid, on, to wit, the 23d day of September, in the year of our Lord 1892, the said Theodore P. Haughey then and there being the president of a certain national banking association, then and there known and designated as the Indianapolis National Bank, in the city of Indianapolis, in  **\*437** the state of Indiana, which said as sociation had been heretofore created and organized under the laws of the **United** **States** of America, and which association was then and there carrying on a banking business in the city of Indianapolis, state of Indiana, did then and there, by virtue of his said office as president of said bank, unlawfully, feloniously, and willfully misapply the moneys, funds, and credits of the said association, without authority of the directors thereof, with intent to convert the same to the use of the Indianapolis Cabinet Company, and to other persons to the grand jurors unknown, in a large sum, to wit, the sum of three thousand nine hundred and sixty dollars and eighty-four cents, by then and there paying, and causing said sum to be paid out of the moneys, funds, and credits of said association, upon certain divers checks drawn upon said association by the Indianapolis Cabinet Company, which checks were then and there cashed and paid out of the moneys, funds, and credits of said association aforesaid, which said sum aforesaid, and no part thereof, was said Indianapolis Cabinet Company entitled to withdraw from said bank, because said company had no funds in said association to its credit; that said Indianapolis Cabinet Company was then and there insolvent, as the said Theodore P. Haughey then and there well knew, whereby said sum because lost to said association; that all of said acts, as aforesaid, were done with intent to injure and defraud said association; that, as such president aforesaid, the said Theodore P. Haughey was intrusted and charged by the board of directors of said national banking association with the custody, control, and care of the moneys, funds, credits, and assets of said association, and the general superintendence of all its affairs.

‘And the grand jurors aforesaid do further say that Francis A. **Coffin** and Percival B. **Coffin** and Albert S. Reed, at the district and state of Indiana aforesaid, did unlawfully, willfully, knowingly, and feloniously, and with intent to injure and defraud said association, on, to wit, the 23d day of September, in the year of our Lord 1892, aid and abet the said Theodore P. Haughey, as aforesaid, to wrongfully, unlawful, feloniously,  **\*438** and willfully misapply the money, funds, and credits of said association, to wit, the sum of three thousand nine hundred and sixty dollars and eighty-four cents aforesaid.’

**\*\*397** The other counts under this classification substantially vary only as to date and amount.

Under the third head—those which, while charging a willful misapplication of the funds of the bank for a definite amount, are indefinite as to the date or dates upon which the acts took place, and also fail to specify in any definite way the particular methods by which the wrong was accomplished—are embraced counts 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36. Of these counts, the first in order of time is the seventeenth, which is as follows:

‘The grand jurors aforesaid, upon their oaths aforesaid, do further charge and present that Theodore P. Haughey, late of said district, at the district aforesaid, on, to wit, the 1st day of January, in the year of our Lord 1891, and on divers times between said date and the 25th day of July, in the year of our Lord 1893, the said theodore P. Haughey, then and there being the president of a certain national banking association, then and there known and designated as the Indianapolis National Bank, of Indianapolis, in the state of Indiana, which said association had been heretofore created and organized under the laws of the **United** **States** of America, and which said association was then and there carrying on a banking business in the city of Indianapolis, state of Indiana, did then and there, by virtue of his said office as president of said bank, and without authority of the board of directors, unlawfully, feloniously, and willfully misapply the moneys, funds, and credits of said association, with intent to convert the same to the use of the Indianapolis Cabinet Company, a more particular description of said moneys, funds, and credits being to the grand jurors unknown, in a large amount, to wit, the sum of three hundred and seventy-five thousand dollars, by then and there cashing, discounting, and paying, for the use and benefit of said Indianapolis Cabinet Company, out of the funds of said association, a large  **\*439** number of worthless and insolvent notes, drafts, and bills of exchange, being drawn upon and by divers persons, firms, and companies, and corporations, each and all of whom were then insolvent, as the said Theodore P. Haughey then and there well knew, whereby said sum was wholly lost to said association, with intent then and there and thereby to injure and defraud said association; that, as such president aforesaid, the said Theodore P. Haughey was intrusted and charged by the board of directors of said national banking association with the custody, control, and care of the funds, credits, and assets of said association, and the general superintendence of its affairs, and agent of said association in the transaction of all its business.

‘And the grand jurors aforesaid do further say that Francis A. **Coffin**, Percival B. **Coffin**, and Albert S. Reed, at the district and state of Indiana aforesaid, did unlawfully, willfully, knowingly, and feloniously, and with intent to injure and defraud said association, on, to wit, the 1st day of January, in the year of our Lord 1891, and on divers times between said date and the 25th day of July, in the year of our Lord 1893, aid and abet the said Theodore P. Haughey, as aforesaid, to wrongfully, unlawfully, feloniously, and willfully misapply the moneys, funds, and credits of said association, to wit, the sum of three hundred and seventy-five thousand dollars aforesaid.’

The vagueness of the date, as fixed in this charge, is somewhat mitigated in four of the counts coming under this head,—counts 13, 14, 15, and 16,—wherein the offense is stated to have been committed ‘on May 9, 1893, and at divers times between said date and June 18, 1893,’‘on June 19, 1893, and at divers times between said date and July 13, 1893,’‘on the 3d day of March, 1893, and on divers dates between said date and the 8th day of May, 1893,’ and ‘on May 8, 1893, and at divers times between that date and June 18, 1893.’ In all the other counts the offense is said to have been committed between January 1, 1891, and July 25, 1893, except in one, wherein the last date is averred to be July 26, 1893, **\*441** instead of July 25th. The sum averred to have been misapplied in counts 13, 14, 15, and 16 is different from that charged in count 17,—it being in the fourteenth, $9,132.19; in the fifteenth, $12,732.51; in the thirteenth and sixteenth, $10,106.08. In the other counts, where the date of the offense is stated as being between 1891 and 1893, the amount of the alleged misapplication varies; being placed in some at $375,000, and in others at $350,000.

The method by which the misapplication is alleged to have been accomplished is not indefinitely stated in all the other counts, as in the seventeenth, which we have just quoted. In some, instead of charging that the checks or ‘insolvent’ notes, drafts, and bills were drawn ‘by or upon divers persons, firms, companies, and corporations,’ it is specified that the checks or the notes discounted were drawn by the Indianapolis Cabinet Company. With this exception, all the counts under this head are equally vague in regard to the specific methods of the misapplication. Some of them state that it was made by paying out the money of the bank on worthless checks of the Indianapolis Cabinet Company, without giving the dates or the amounts of the checks. More allege that the misapplication was brought about by allowing overdrafts, without giving the dates of such overdrafts, or specifying the various checks through which the overdrafting was done. Others, again, allege that the misapplication was accomplished by loaning the money of the bank to the Indianapolis Cabinet Company, in excess of 10 per cent. of the capital stock, without giving the dates or the precise  **\*\*398** amount of the loans. Again, it is charged that the misapplication was concealed by discounting and entering to the credit of the Indianapolis Cabinet Company a number of worthless notes and bills, without stating who were the drawers of the notes, or giving the dates and amounts of the entries which it is charged were made for the purpose of concealing the misapplication. Indeed, whatever may be the difference between the counts under this head, there is, as has been stated, a uniformity in one respect,—their failure to disclose the specific methods by which the alleged offenses were committed, by giving dates and amounts. The only partial exceptions to this are found in counts 35 and 37, wherein the general charge of payment of ‘a large number of worthless and insolvent drafts and bills of exchange in large amounts, a more particular description of which is to the grand jurors unknown, executed by and upon divers persons, firms, companies, and corporations, in large amounts, to wit,’ is followed by an enumeration of certain persons or corporations, with a lump sum as against each person or corporation named. The intent with which the misapplication is charged to have been committed is not uniform in all the counts. In some it is averred that the misapplications were made to injure and defraud the bank and certain companies, bodies politic, bodies corporate, and individual persons, whose names are to the grand jurors unknown; in others, that it was made to defraud the bank alone; again, that entries of the worthless checks paid, or ‘insolvent’ paper taken, were made on the books of the bank with intent to conceal the misapplication, and to deceive certain officers of the corporation, whose names are to the grand jurors unknown, or to deceive certain agents appointed or to be appointed by the comptroller of the currency, etc.

Under the fourth head—those which charge the making of false entries in the books of the bank—are embraced counts 37, 38, 39, 40, 41, 42, 43, 44, 45, and 46. The counts under this head very only as to the particular false entry complained of, the date when made, and the folio of the account book where entered. Each particular false entry specified, except one, covers two counts; one charging it to have been made with intent to injure and defraud the association (bank), the other averring it to have been made to deceive any agent appointed, or who might be thereafter appointed, to examine the affairs of the bank, ‘the names of said agent or agents being to the grand jurors unknown.’

The remaining counts belong to the fifth class; that is, relate to false entries which it is alleged were made in statements of the condition of the bank furnished to the comptroller of the currency.

A trial was begun under the indictment on the 10th of April, 1894, and progressed until the 25th of that month, when,  **\*442** by consent of all parties, the jury was discharged because of the corrupt misconduct of one of the jurors. The court thereupon set the cause down for trial on the 1st of May. The defendants applied for a continuance upon two grounds: (1) because of the accidental wounding of the leading counsel for the accused, and his consequent inability to take part in the defense; and (2) because the general nature of the charges involved hundreds of transactions, covering thousands of dollars, and a long period of time, necessitating the examination of over 2,000 entries in the books of the bank, which were in the hands of the officers of the government, who denied access thereto. The court refused the motion for continuance, and exception was duly reserved. The trial commenced on May 4th.

During the course of the trial, many exceptions were reserved to the admission or rejection of testimony. They went not only to the admissibility of the proffered testimony under particular counts, but were also taken to the admission of any evidence whatever, upon the theory that the entire indictment charged no offense, therefore no proof could be made under it. Other objections were also reserved to comments made by the court upon the evidence as it was adduced, etc. On the close of the case for the prosecution, the defendants moved the court to oblige the government ‘to elect and specify the particular transactions in each count of the general counts of the indictment in this case, to wit, from the 17th to 36th, both inclusive, upon which it relies as a substantive charge, and upon which it will claim a conviction of the defendants, or either of them; said election to be made before the evidence on behalf of the defendants is commenced, to the end that they, and each of them, may know to what particular charge in each count their evidence is required to be addressed.’ To the refusal of the court to grant this motion, exception was reserved. The reason for refusing the request is not stated, but in the charge of the court to the jury the following language was used, which indicates its opinion on the subject: ‘The particular acts of misapplication described in the several specific counts must be established by proof as therein respectively **\*443** charged. If, however, there are any willful misapplications shown by the evidence which are not covered by special or specific counts, they may be included under the general counts, and a verdict thereon rendered accordingly.

Before the case went to the jury the prosecution abandoned the forty-seventh, forty-eighth, forty-ninth, and fiftieth counts of the indictment; thus eliminating from it one of the specific counts, and all those which referred to false entries in official statements as to the condition of the bank made to the comptroller. On the close of the case the defendants proffered to the court 45 written requests to charge, and, upon the court's refusing them all, excepted to such refusal as  **\*\*399** to each, or rather as to 44 thereof. To the charge of the court actually delivered to the jury, the defendants reserved 26 exceptions. A controversy exists as to whether one of the 26 exceptions was properly taken. The facts, as stated in the bill of exceptions, are as follows:

‘After the court had delivered its charge to the jury, and before it retired, the court said: ‘If it is the desire of counsel for defendant to reserve any exceptions to the charges given and refused, the practice in this court requires that that shall be done before the jury retires.’

‘Mr. Miller: ‘It is, of course, if your honor please, the desire on behalf of defendants to reserve exceptions to the refusal of such instructions as were requested and refused, and to parts of the instruction given. Without having a little time to examine these instructions, it is impossible for **us** now to designate the particular parts. We would like to have time to look at them for that purpose.’

‘The Court: ‘What length of time would you desire?’

‘Mr. Miller: ‘I do not know, if your honor please, how long it would take. It has taken an hour to read them.’

‘Mr. Duncan: ‘They can be made, when made, as of this time, with permission of the court.’

‘The Court: ‘Except so far as any mere verbal changes are concerned, which, if the court's attention was drawn to, it would at once correct, I have no objection to that method of procedure.’

**\*444** ‘Mr. Miller: ‘Of course, anything that is formal, of that character, that won't go to the substance of the matter, we should not expect to insist on. But, as your honor can see it, it is impossible for **us**, from hearing the instructions read for an hour, to select the parts.’

‘The Court: ‘There are the instructions you propose (indicating), and these instructions I do not care to have mislaid or lost (indicating).’

‘Mr. Miller: ‘No, sir; of course not. For that matter, every syllable of them has been taken down by two stenographers here,—all of your instructions, as you read them,—so there cannot be any possibility of any trouble about them. We take them and make——’

‘The Court: ‘Where is the bailiff?’

‘Mr. Taylor: ‘You may take these forms of the verdict and the indictment.’

“Gentlemen of the jury, you may retire with your bailiff.”

The bill of exceptions then states that at the time this colloquy took place the assistant attorney for the prosecution was present in the court room, heard the conversation, and assented to the arrangement thus made.

It further states that a few minutes after 3 in the afternoon the jury retired to consider their verdict; that the defendants' counsel took the instructions given by the court which were typewritten, and noted thereon, by inclosing the same in a parenthesis mark with pencil, the parts of such instructions so given by the court to which exceptions were taken, the parts thus marked being respectively numbered; that at 9 o'clock that night the defendants' counsel returned to the court room, and handed the instructions which had been so marked and numbered by them to the judge, in open court, saying that the parts marked in parentheses and numbered were those to which the defendants excepted, and to which they reserved their bill, under the understanding previously had; that immediately thereafter the jury, which had not reached a conclusion, was brought into court, and informed by the judge that he would be within call until 11 o'clock to receive a verdict, and if they did **\*445** not agree by that time they might seal their verdict, and bring it into court on Monday morning, it being then Saturday evening.

On May 28th the defendants, through their counsel, wrote out in full their exceptions to the various parts of the charge, as marked and numbered, and presented them to the court, which declined to sign them because of the twenty-second exception, which it considered not properly taken, under the understanding between court and counsel above stated. However, the court signed the bill of exceptions, writing therein a narrative of the facts, and predicating its objection to the twenty-second exception on the ground that the matter covered by it was merely verbal, and at the time the parties were given the right to take their bill the court did not include any mere verbal error, which would have been corrected if attention had been called to it in proper time. The language contained in the charge covered by the disputed exception is as follows:

‘I do not wish to be understood as meaning that the intent to injure, deceive, or defraud is conclusively established by the simple proof of the doing of the prohibited act which results in injury. What I do mean is this: That when the prohibited acts are knowingly and intentionally done, and their natural and legitimate consequence is to produce injury to the bank, or to benefit the wrongdoer, the intent to injure, deceive, or defraud is thereby sufficiently established to cast on the accused the burden of showing that their purpose was lawful, and their acts legitimate.’

On the 28th day of May the jury returned a verdict against the plaintiffs in error of guilty as charged on all the counts of the indictment. After an ineffectual motion for a new trial, which restated the various grounds of objection raised to the admissibility of evidence under the indictment, and which had also been urged in the charges which had been requested and refused, the defendants moved in arrest. After argument upon this motion the court sustained the same as to the 17th, 18th, 19th, 20th, 21st, 22d, 23d, 24th,  **\*\*400** 25th, 26th, 27th, 28th, 29th, 30th, 31st, 32d, 33d, 34th, 35th, and 36th counts.

This reduced the indictment—First, to those counts which  **\*446** were specific as to date, amount, and method; second, to those which, while specific in amount and date, were not specific as to method; third, to four counts, Nos. 13, 14, 15, and 16, which were not specific as to date or method, leaving in addition all the counts charging false entries in the books of the bank. The errors assigned here are 78 in number, and cover all the objections which were made to the rulings of the court below during the trial, and the exceptions based on charges requested and refused, as well as charges given.

**United States v. Muckenstrum**

515 F.2d 568

United States Court of Appeals,

Fifth Circuit.

**UNITED STATES of America, Plaintiff-Appellee,**

**v.**

**Kathleen Maude MUCKENSTRUM, a/k/a Kim Baker, Glenda Dale Hodges a/k/a CindyBaker, James Marshall Reed and Jean Hertzka, a/k/a Pat Walker, Defendants-Appellants.**

No. 74-3550.

July 3, 1975.

**Synopsis**

Defendants were convicted in the United States District Court for the Southern District of Florida at Miami, Peter T. Fay, J., for conspiracy to engage in interstate prostitution activities, and certain defendants were convicted of substantive offenses, and they appealed. The Court of Appeals, Bell, Circuit Judge, held that Government's failure to disclose that government witness received subsistence payments prior to testifying, if error, was harmless in light of the overwhelming evidence adduced at trial against defendants; that trial judge did not err in denying motion for new trial based on government witness' recantation of her trial testimony; that FBI report of interview with government witness who was not quoted directly and who had not seen the report prior to posttrial hearing was not Jencks Act material; and that instruction concerning reasonable doubt did not equate reasonable doubt with substantial doubt, although sentence in instruction that doubt must be substantial rather than speculative would better be left unsaid.

Affirmed.

# Henderson v. Kibbe

#### United States Supreme Court 431 U.S. 145 (1977)

#### Rule of Law

**The definition of recklessness includes a causation element.**

#### Facts

Kibbe (defendant) and his co-defendant saw Stafford at a bar, intoxicated and displaying money. The defendants agreed to give Stafford a ride and decided to rob him. Kibbe slapped Stafford, took his money, and made him lower his pants and remove his boots. The defendants abandoned Stafford on a dark road in the snow, without his coat, shoes, and glasses, where he got hit and killed by a speeding truck. The driver testified that he was traveling 10 miles over the speed limit and did not understand warnings about Stafford from other cars. The driver saw Stafford in the road, but did not swerve or stop before hitting him. Kibbe and his co-defendant were convicted pursuant to N.Y. Penal Law § 125.25(2), which provides that a person is guilty of second-degree murder when “under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person.” No jury instruction on causation was requested by either party, and none was given. Instead, the trial judge defined “recklessly” as being aware of and consciously disregarding a substantial and unjustifiable risk that a certain result will occur. The New York Court of Appeals affirmed the conviction, stating that it only must be shown that the ultimate harm is something that should have been foreseen. The court of appeals did not address Kibbe’s claim of inadequate jury instructions, because the issue was not raised in the trial court. Kibbe then filed a writ of habeas corpus in federal district court, which was rejected. The United States Court of Appeals for the Second Circuit reversed, finding that failure to instruct on causation created an impermissible risk that the jury did not make the required finding of causation beyond a reasonable doubt.

#### Issue

Does the definition of recklessness include a causation element?

#### Holding and Reasoning (Stevens, J.)

Yes. Because a determination of recklessness includes a conclusion that a defendant was “aware of and consciously disregarded a substantial risk,” it necessarily includes a finding that the defendant foresaw the ultimate harm that the risk presented and therefore caused the result. To determine whether a jury instruction was erroneous, the given instruction must be compared to the one that should have been given. Kibbe’s claim of prejudice is based on the failure to give an explanation of the “causation” statutory language. The court of appeals found it sufficient that the ultimate harm was foreseeable, whether it was Stafford’s death in general or Stafford’s death by speeding truck. A causation instruction would have properly expressed that if the ultimate harm should have been foreseen as reasonably related to the defendant’s conduct, that conduct should be considered the cause of Stafford’s death. By returning a guilty verdict of a crime with a culpable mental state of recklessness, the jury necessarily found, in coordination with that definition, that Kibbe was “aware of and consciously disregarded a substantial and unjustifiable risk” that death would occur. The jury’s determination that Kibbe acted recklessly inescapably included a finding that the ultimate harm was foreseeable and that therefore, Kibbe caused Stafford’s death. It is likely the jurors would have considered a causation instruction consistently with their consideration of the recklessness instruction, so the additional definition would not have influenced the verdict. Therefore, not including the more complete instruction did not result in a constitutionally defective conviction. Accordingly, the judgment is reversed.

**Key Terms:**

**Foreseeable -** Actions or results that are certain or substantially certain to occur.

**Recklessness -** A conscious disregard of a substantial and unjustifiable risk.

# \*\*DARDEN v. WAINWRIGHT\*\*

#### United States Supreme Court  477 U.S. 168 (1986)

#### Rule of Law

**A court is not required to reverse a defendant’s conviction when the prosecution has made improper comments during closing arguments if the comments do not misstate evidence or facts and the defense is given a chance to rebut.**

#### Facts

Darden was convicted of robbing a furniture store owned by a husband and wife. He killed the husband, shot a neighbor who tried to help the husband, and sexually assaulted the wife. At trial, the defense was allowed to present its closing argument first. The prosecutor then presented his closing which contained several improper and inflammatory comments. The defense was then allowed to rebut the prosecution’s closing. After Darden’s conviction, the jury recommended the death penalty which the judge then imposed. On appeal, Darden argued that the prosecution’s remarks during closing argument made his trial unfair and the resulting sentence unreliable. The court found that the prosecution’s comments had not made the trial unfair and affirmed Darden’s conviction and death sentence. The Supreme Court granted certiorari but later dismissed the writ. Darden again petitioned for habeas corpus but was denied. Darden filed an application for a stay of execution. The Supreme Court treated this as a petition for certiorari, granted certiorari, and stayed Darden’s execution.

#### Issue

Must a court reverse a defendant’s conviction where the prosecution made improper comments during its closing arguments at trial?

#### Holding and Reasoning (Powell, J.)

No. Although the prosecutor’s comments were improper, they did not render Darden’s trial unfair and therefore do not warrant a new trial. In reviewing the prosecutor’s comments, the proper inquiry is whether the comments deprived the defendant of a fair trial and thus violated his right to due process. In his closing argument, the prosecutor insinuated that the department of corrections was partially to blame because Darden was on furlough from prison when he committed the crimes. The prosecutor also stated that the death penalty may be the only way to prevent Darden from committing more violent crimes. He also made several other offensive comments and referred to Darden as an “animal.” Although very offensive, these comments did not misstate evidence or facts or otherwise make Darden’s trial unfair. A lot of the offensive content was invited by the defense’s summation. Moreover, the judge instructed the jury to decide the case based only on the evidence and the defense had an opportunity to rebut the prosecutor’s comments. Thus, the prosecutor’s comments did not render Darden’s trial unfair and he is not entitled to a new trial. The court of appeals’ judgment is affirmed and the case is remanded.

#### Dissent (Blackmun, J.)

A criminal defendant is not guaranteed a perfect trial; he is only guaranteed a fair one. However, a higher degree of fairness is required where a defendant faces the death penalty. The prosecutor’s comments were intended to inflame the jury and they made Darden’s trial unfair. The Court’s decision neglects to consider the professional responsibility rules governing prosecutors. The prosecutor violated these rules by stating his opinion regarding Darden’s guilt, diverting the jury from the issue it is charged with deciding by bringing up the fact that Darden was on prison furlough, and making several offensive comments intended to inflame the jury. Moreover, the Court based its decision on a standard that was established in a case where only a few ambiguous prosecutorial comments were at issue. Using that standard was improper since there were several unambiguously improper comments in Darden’s case. The Court’s reasoning that the defense’s summation invited the prosecutor’s comments fails because the prosecutor’s comments went far beyond anything “invited” by the defense’s summation. The evidence in this case, including the witness identifications and ballistics, was so unconvincing that it must be inferred that Darden would not have been convicted without the prosecutor’s inflammatory comments. Darden’s conviction should be reversed and he should receive a new and fair trial.

**Key Terms:**

**Prison Furlough -** A generally short term of leave from prison granted to an inmate.

**Kentucky v. Whorton**

99 S.Ct. 2088

Supreme Court of the United States

**Commonwealth of KENTUCKY, Petitioner,**

**v.**

**Harold WHORTON.**

No. 78-749.

May 21, 1979.Rehearing Denied Oct. 1, 1979.See [444 U.S. 887, 100 S.Ct. 186](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&pubNum=708&cite=100SCT186&originatingDoc=I17980bf19c1f11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

## Synopsis

The [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I8d061d94ec7411d9b386b232635db992&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[Kentucky Supreme Court, 570 S.W.2d 627,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1978135155&pubNum=713&originatingDoc=I17980bf19c1f11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) ruled that the refusal to give a requested jury instruction on the presumption of innocence in a criminal prosecution cannot be harmless error. On certiorari, the Supreme Court held that failure to give a requested instruction on the presumption of innocence does not in and of itself violate the Constitution; such failure must be evaluated in light of totality of circumstances, including all instructions to jury, arguments of counsel, whether weight of evidence was overwhelming, and other relevant factors, to determine whether defendant received a constitutionally fair trial.

Reversed and remanded.

Mr. Justice Stewart filed a dissenting opinion in which Mr. Justice Brennan and Mr. Justice Marshall joined.

Opinion after remand, [585 S.W.2d 388](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979130664&pubNum=713&originatingDoc=I17980bf19c1f11d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

# Taylor v. Kentucky

#### United States Supreme Court 436 U.S. 478 (1978)

#### Rule of Law

**A trial court’s refusal to provide a jury instruction on the presumption of innocence violates a defendant’s due process rights.**

**Donnely v. DeChristoforo**

94 S.Ct. 1868

Supreme Court of the United States

**Robert H. DONNELLY, Petitioner,**

**v.**

**Benjamin A. DeCHRISTOFORO.**

No. 72—1570.

Argued Feb. 20, 1974.Decided May 13, 1974.

## Synopsis

A habeas corpus proceeding was instituted by a state prisoner. Relief was denied by the United States District Court for the District of Massachusetts, and the petitioner appealed. The Court of Appeals, First Circuit, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Icdf1382c900e11d9bc61beebb95be672&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[473 F.2d 1236,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1973108621&pubNum=350&originatingDoc=I98bc60c99c1c11d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))reversed and remanded. On certiorari, the Supreme Court, Mr. Justice Rehnquist, held that in a joint murder trial during which a codefendant had, to the jury's knowledge, pleaded guilty, and the jury was told by the prosecutor and judge that the prosecutor's remarks were not evidence, the prosecutor's remark to the jury, in reference to defendant and his counsel, ‘They said that they hope that you find him not guilty. I quite frankly think that they hope that you find him guilty of something a little less than first-degree murder’ was ambiguous and not so clearly prejudicial as to be unmitigated in its effect by curative instruction, and, in view of a curative instruction, there was no denial of due process.

Reversed.

Mr. Justice Stewart filed a concurring opinion in which Mr. Justice White joined.

Mr. Justice Douglas dissented and filed opinion, in which Mr. Justice Brennan and Mr. Justice Marshall joined in part.

# United States v. Young

#### United States Supreme Court 470 U.S. 1 (1985)

#### Rule of Law

**Inappropriate statements by the prosecution do not rise to the level of reversible plain error when they are invited by the statements of defense counsel and do no more than offset the prejudicial influence of the statements of defense counsel.**

#### Facts

Young (defendant) was the president of a petroleum company under contract to deliver crude oil to another company. Part of the oil Young supplied was not actually crude oil, but less valuable fuel oil blended with condensate from natural gas wellheads. The discovery that Young was not delivering crude oil led to an FBI investigation, the issuance of multiple federal charges against Young, and a jury trial in the federal district court. During closing arguments, Young’s attorney made comments to the jury suggesting that the prosecution did not actually believe that Young intended to commit fraud. The prosecution did not object to defense counsel’s statements. On rebuttal, the prosecutor suggested that Young’s attorney had elicited his personal opinion about Young’s guilt and informed the jury of his own opinions about Young’s guilt and the veracity of witness testimony. Young’s attorney did not object to the prosecution’s rebuttal statements. Young was found guilty on several counts and appealed on grounds that he had been unfairly prejudiced by the prosecution’s closing remarks. The court of appeals held that the prosecution’s rebuttal statements constituted plain error sufficient to merit a new trial. The United States (plaintiff) petitioned the Supreme Court for review.

#### Issue

Do inappropriate statements by the prosecution rise to the level of reversible plain error when they are invited by the statements of defense counsel and do no more than offset the prejudicial influence of the statements of defense counsel?

#### Holding and Reasoning (Burger, C.J.)

No. Inappropriate statements by the prosecution do not rise to the level of reversible plain error when they are invited by the statements of defense counsel and do no more than offset the prejudicial influence of the statements of defense counsel. The rules of professional conduct recognize that criminal trials may become heated affairs in which inappropriate remarks are exchanged between counsel but nonetheless proscribe the use of inflammatory remarks or personal attacks on opposing counsel. Overzealous advocacy should be promptly addressed by the trial court. This case represents an unfortunately common situation in which defense counsel makes inappropriate comments and the prosecution responds in kind while the judge takes no corrective action. A criminal conviction should not be overturned on the basis of two wrongs. As such, the courts have developed the “invited response” or “invited reply” rule to determine whether the prosecutor’s conducted detracted from the fairness of the trial. Both the conduct of defense counsel and the prosecutor’s response must be evaluated to determine whether the remarks affected the jury’s ability to render an impartial judgment. As a general rule, reversal of a conviction is not warranted when a prosecutor’s responsive remarks tend to balance out the prejudice arising from defense counsel’s remarks. Ideally, this issue would have been resolved by an objection from the prosecution or an admonition from the bench accompanied by remedial jury instructions. The court of appeals appears to have given no weight to the remarks of Frazier’s defense counsel in its conclusion that the prosecution’s remarks amounted to plain error. The plain error doctrine of Federal Rule of Criminal Procedure 52(b) authorizes the court of appeals to correct only those errors of such severity as to compromise the fairness or integrity of criminal proceedings. The plain error rule should be applied sparingly and should take into account the context of the entire proceeding, rather than particular isolated incidents. In Frazier’s case, any prejudice from the prosecution’s inappropriate remarks was ameliorated by the jury’s recognition that they were made in response to defense counsel’s attacks on the integrity of the prosecution. Although the prosecutor’s remarks were inappropriate, they were based upon evidence in the trial record and did not suggest that the prosecution had knowledge of facts tending to prove the defendant’s guilt that were not presented to the jury. The evidence overwhelmingly supported the prosecution’s claim that Young knowingly misrepresented the blended fuel oil as crude oil, so there is no indication that the prosecution’s remarks improperly induced the jury to trust the judgment of the government as opposed to its own assessment of the evidence. The prosecutor’s remarks did not rise to the level of plain error and did not detract from the fairness of the trial. The appellate court’s order for a new trial is reversed.

**Key Terms:**

**Plenary Review – (aka De Novo Review) -** A standard of appellate review of a lower court’s decision, also referred to as *de novo* review, in which the appellate court reviews a question of law without deference to the lower court’s findings.

# Nix v. Whiteside

#### United States Supreme Court 475 U.S. 157 (1986)

#### Rule of Law

**While counsel must take all reasonable and lawful means to attain the objectives of the client, counsel may not assist the client in presenting false evidence or otherwise violating the law.**

# Berger v. United States

#### United States Supreme Court 295 U.S. 78 (1935)

#### Rule of Law

**The cumulative effect of pronounced, persistent prosecutorial misconduct during trial likely prejudices the jury and requires a new trial.**

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**April 15, 2021**

**Chapter 20 – Sentencing Procedures**

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**Chapter 20 – Sentencing Procedures**

**\*\*UNITED STATES v. GRAYSON\*\***

United States Supreme Court  
438 U.S. 41 (1978)

**Rule of Law**

**It is permissible for a sentencing judge to enhance a convicted defendant’s sentence on the basis of the judge’s belief that the defendant committed perjury in his trial testimony.**

**Facts**

Grayson (defendant) escaped from a federal prison camp and was indicted for prison escape. Grayson testified at his trial and several elements of his testimony were contradicted through cross-examination and the testimony of other witnesses. The jury found Grayson guilty. At Grayson’s sentencing hearing, the judge stated that he believed Grayson had completely fabricated his testimony and that he would consider that in determining his sentence. Grayson appealed the sentencing decision.

**Issue**

Is it permissible for a sentencing judge to enhance a convicted defendant’s sentence on the basis of the judge’s belief that the defendant committed perjury in his trial testimony?

**Holding and Reasoning (Burger, C.J.)**

Yes. It is permissible for a sentencing judge to enhance a convicted defendant’s sentence on the basis of the judge’s belief that the defendant committed perjury in his trial testimony. Grayson argues that sentence enhancement based on the perception of perjury is an impermissible violation of due process rights because it penalizes the defendant for an alleged crime without requiring the government to meet its burden of proving guilt. Grayson further asserts that consideration of a defendant’s truthfulness at trial should not be allowed for the purposes of enhancing a sentence even though it is a permissible consideration in the context of the defendant’s need for rehabilitation and the interest in preserving public safety. Grayson asserts that it is practically impossible to tell the difference between the permissible and impermissible uses of the consideration and either use will have the effect of extending the defendant’s prison sentence. The sentencing judge must have the benefit of considering all the facts relevant to determining an appropriate sentence. Even if we adopted Grayson’s proposed rule it would provide no assurance against the improper use of a judge’s first-hand observations of perjury. This practice does not impermissibly burden the exercise of the right to testify on one’s own behalf. There is no constitutional right to present false testimony. The sentencing judge is not required to enhance a sentence in every case in which he perceives perjury, but he is allowed to consider a defendant’s untruthfulness as evidence of his propensity for rehabilitation. A defendant’s right to testify truthfully is not diminished by the authority of the judge to consider falsity along with his other knowledge of the defendant in his consideration of an appropriate sentence. The sentence is affirmed.

**Dissent (Stewart, J.)**

There has been no determination that Grayson presented false testimony at trial. Grayson was sentenced to some unknown amount of additional prison time simply because the judge believed he had committed perjury. As a result of the majority’s ruling, any defendant who testifies on his own behalf and is convicted faces the risk of additional prison time without proof of additional crime. This rule penalizes the defendant who exercises his constitutional right to testify on his own behalf. Other witnesses could be penalized for perjury only after being tried and convicted. The majority’s rule places the witness-defendant at a disadvantage relative to every other trial witness. The minimal relevance that a defendant’s truthfulness at trial bears upon his prospects for rehabilitation does not justify imposing this burden upon the exercise of the constitutional right to testify on one’s own behalf.

**Key Terms:**

**Perjury** - Willfully making a false statement under oath about a material matter.

# Williams v. New York

#### United States Supreme Court 337 U.S. 241 (1949)

#### Rule of Law

**The Due Process Clause of the Fourteenth Amendment does not prohibit sentencing judges from acquiring information about the defendant from out-of-court sources even though the defendant does not have the opportunity to confront or cross-examine the sources.**

#### Facts

Williams (defendant) was convicted of murder. The jury recommended life imprisonment but the trial judge imposed the death sentence. The judge explained that he believed the death penalty was the appropriate punishment after he considered information from the Court’s probation department. The sentencing judge went further, citing the brutality of the crime, Williams’ prior burglaries, and facts from the probation report that supported the conclusion that Williams was a “menace to society,” to further explain his ruling that the death penalty was appropriate. None of this information about Williams had been available to the jury. The court of appeals affirmed the conviction and the sentencing.

#### Issue

Is the Due Process Clause violated where a sentencing judge is permitted to examine information he receives outside of the courtroom, from people the defendant has not been allowed to confront or cross-examine, about the defendant’s life, habits, conduct, and mental and moral propensities?

#### Holding and Reasoning (Black, J.)

No. The Due Process Clause does not prohibit a sentencing judge from considering information that was not available to the jury and that is not subject to the defendant’s cross-examination. Court proceedings determining the guilt of a defendant and those determining the proper sentence once a defendant has been found guilty have historically been subject to very different evidentiary procedural limitations. Sentencing judges have always been given great discretion in the English and American legal systems. In effect, out-of-court affidavits have long been used by sentencing judges to help them determine the appropriate punishment. There is a practical reason for allowing sentencing judges access to out-of-court information. While trials must be full of evidentiary rules to prevent a decision wrongfully based on the defendant’s habit or character, instead of the evidence against him in the particular case, sentencing must take the defendant’s history into account. In addition to the belief that the punishment must fit the crime, at the center of the English and American legal systems is the notion that the punishment must fit the offender. Therefore, the sentencing judge must have access to additional information about the defendant’s life, his criminal history, and other relevant information to help him impose the most appropriate sentence. Modern changes in the treatment of offenders have increased the discretion sentencing judges are afforded. Therefore, it is more important than ever that sentencing judges have access to out-of-court information to assist them in making the most appropriate decisions. Here, the sentencing judge acted within his discretion when he imposed the death penalty and Williams’ due process rights were not violated.

#### Dissent (Murphy, J.)

At the very least, due process requires a fair hearing at all stages of the proceedings. While a judge does have the authority to impose a harsher punishment than that imposed by the jury, in doing so he should make sure that he preserves the rights of the defendant. Here, the judge imposed a harsher punishment on Williams based on information that was inadmissible at trial, either because it was hearsay or it was irrelevant. Furthermore, Williams never had an opportunity to examine or question this information. Therefore, Williams did not receive a fair sentencing hearing and he was deprived of his due process rights.

**Key Terms:**

**Fourteenth Amendment Due Process** **Clause** - The provision set forth at Amendment XIV, Section 1 of the United States Constitution prohibiting states from depriving any person of life, liberty, or property by means that are arbitrary or fundamentally unfair.

# United States v. Tucker

#### United States Supreme Court 404 U.S. 443 (1972)

#### Rule of Law

**When prior convictions factor into a sentencing determination and the prior convictions are later ruled constitutionally invalid, the appropriate remedy is a new sentencing hearing.**

#### Facts

Tucker (defendant) was convicted for armed robbery in 1953. At trial and at sentencing, Tucker acknowledged three prior felony convictions. The judge took his three prior convictions under consideration when he imposed the maximum sentence of 25 years for the armed robbery conviction. Several years after the bank robbery conviction, it came to light that two of Tucker’s prior felony convictions were unconstitutional. Tucker appealed the sentence in his bank robbery conviction. The court of appeals remanded Tucker’s case to the district court for resentencing. The United States (plaintiff) petitioned the United States Supreme Court for review.

#### Issue

When prior convictions factor into a sentencing determination and the prior convictions are later ruled constitutionally invalid, is the appropriate remedy a new sentencing hearing?

#### Holding and Reasoning (Stewart, J.)

Yes. When prior convictions factor into a sentencing determination and the prior convictions are later ruled constitutionally invalid, the appropriate remedy is a new sentencing hearing. The sentencing judge would have made his determination under a very different set of circumstances if it had been recognized prior to the sentencing hearing that Tucker had only one valid prior conviction rather than three. The only remedy to redress the constitutional deprivation is to remand for a new sentencing hearing.

#### Dissent (Blackmun, J.)

As a general rule of constitutional law, the Court’s decision is fine. Under the circumstances, however, it does not apply to the facts of the matter. Tucker’s petition for relief from his sentence was heard by the same judge who imposed the original sentence. The judge concluded that the use of Tucker’s prior invalid convictions constituted harmless error in light of overwhelming evidence establishing his guilt. It seems likely that Tucker’s resentencing hearing will come before the same judge and even more likely that he will impose the same sentence. Irrespective of the merits of the constitutional principle we should be cognizant of the facts and not indulge in futile exercises.

**Key Terms:**

**Harmless Error** - A ruling by a trial judge, which is later held to be mistaken by a higher court, but is not so prejudicial to the defendant as to warrant the reversal of a conviction.

**Chaffin v. Stynchombe**

93 S.Ct. 1977

Supreme Court of the United States

**James CHAFFIN, Petitioner,**

**v.**

**LeRoy STYNCHCOMBE, Sheriff of Fulton County.**

No. 71—6732.

Argued Feb. 22, **1973**.Decided May 21, **1973**.

## Synopsis

State prisoner petitioned for federal writ of habeas corpus. The United States District Court for the Northern District of Georgia denied relief, and petitioner appealed. The United States Court of Appeals for the Fifth Circuit, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I65ec1c948fdc11d98e8fb00d6c6a02dd&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=d4ed30bb5eb24d0aaae745ae4e7fc023&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[455 F.2d 640,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1972108403&pubNum=350&originatingDoc=I220d65e59bf011d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed, and certiorari was granted. The Supreme Court, Mr. Justice Powell, held that the rendition of a higher sentence by jury upon retrial does not violate double jeopardy clause nor does such sentence offend due process clause as long as the jury is not informed of prior sentence and the second sentence is not otherwise shown to be the product of vindictiveness; choice occasioned by possibility of a harsher sentence does not place an impermissible burden on right of criminal defendant to appeal or attack collaterally his conviction.

Affirmed.

Mr. Justice Douglas filed a dissenting statement, Mr. Justice Stewart filed a dissenting opinion in which Mr. Justice Brennan joined, and Mr. Justice Marshall filed a dissenting opinion.

**Procedural Posture(s):** On Appeal.

**Humes v. United States**

186 F.2d 875

United States Court of Appeals, Tenth Circuit.

**HUMES**

**v.**

**UNITED STATES.**

No. 4123.

Jan. 29, 1951.

**Synopsis**

Frank William Humes was convicted in the District Court for the District of Colorado, Alfred P. Murrah, J., for making and presenting to the Verterans Administration a subsistence allowance claim containing false and fraudulent statements, and he appealed. The Court of Appeals, Phillips, Chief Judge, held that the evidence supported the conviction.

Judgment affirmed.

# Scott v. United States

#### United States Court of Appeals for the District of Columbia Circuit) 419 F.2d 264 (1969)

#### Rule of Law

**A judge may not impose a harsher sentence upon a convicted defendant merely because the defendant pleaded not guilty and contested the charges at trial.**

#### Facts

Vincent Scott (defendant) was convicted of robbery and sentenced to five to fifteen years in prison. At the trial, Scott asserted his innocence. At the sentencing hearing, the trial judge stated that he had not believed Scott’s testimony and would have sentenced Scott more leniently if Scott had pleaded guilty. Scott appealed both the conviction and the sentence.

#### Issue

May a judge impose a harsher sentence upon a convicted defendant merely because the defendant pleaded not guilty and contested the charges at trial?

#### Holding and Reasoning (Bazelon, C.J.)

No. A judge may not impose a harsher sentence upon a convicted defendant merely because the defendant plead not guilty and contested the charges at trial. The majority of criminal convictions in the United States are the product of guilty pleas, typically entered before trial begins. It is generally held to be proper to offer charge and sentencing concessions to defendants who admit guilt and thereby reduce the burden on the judicial system. One result of these system-wide concessions is that defendants who agree to plea arrangements typically receive less severe sentences than defendants who demand a trial. Although this systemic discrepancy is in the interest of the public in supporting an efficient criminal justice system, holding an individual defendant who demands a trial more punishable than a defendant who pleads guilty is improper. Individuals charged with crimes are entitled to an adversarial process and have the right to vigorously state their innocence, defend themselves, and assert the privilege against self-incrimination. In this case, Scott pleaded not guilty and testified at trial that he had not committed the crime. Scott was convicted without error as a result of that trial. The trial judge erred, however, in increasing Scott’s sentence as a response to Scott’s assertion of his innocence. The conviction is upheld, but the sentencing is reversed and remanded.

**Key Terms:**

**Fifth Amendment Privilege Against Self-Incrimination** - Constitutional protection that prevents the government from compelling a person to give testimony against himself.

# Witte v. United States

115 S.Ct. 2199

Supreme Court of the **United** **States**

**Steven Kurt WITTE, Petitioner**

**v.**

**UNITED STATES.**

No. 94–6187.

Argued April 17, **1995**.Decided June 14, **1995**.

## Synopsis

Defendant moved to dismiss indictment charging him with conspiracy and attempt to import cocaine. The **UnitedStates** District Court for the Southern District of Texas, [Kenneth M. Hoyt](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0197225301&originatingDoc=I027b85319c4b11d991d0cc6b54f12d4d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I027b85319c4b11d991d0cc6b54f12d4d), J., dismissed indictment based on violation of multiple punishments prong of double jeopardy clause. Government appealed. The Fifth Circuit Court of Appeals, [25 F.3d 250,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1994135632&pubNum=506&originatingDoc=I027b85319c4b11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) reversed and remanded. Certiorari was granted. The Supreme Court, Justice [O'Connor](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0209675601&originatingDoc=I027b85319c4b11d991d0cc6b54f12d4d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I027b85319c4b11d991d0cc6b54f12d4d), held that consideration of uncharged cocaine importation in order to impose higher sentence on marijuana charges within statutorily authorized range did not impose “punishment” for cocaine conduct for double jeopardy purposes and, thus, did not bar subsequent prosecution on cocaine charges.

Judgment of Court of Appeals affirmed.

Justice [Scalia](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254763301&originatingDoc=I027b85319c4b11d991d0cc6b54f12d4d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I027b85319c4b11d991d0cc6b54f12d4d) filed an opinion concurring in the judgment, in which Justice [Thomas](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I027b85319c4b11d991d0cc6b54f12d4d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I027b85319c4b11d991d0cc6b54f12d4d) joined.

Justice [Stevens](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0156277701&originatingDoc=I027b85319c4b11d991d0cc6b54f12d4d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I027b85319c4b11d991d0cc6b54f12d4d) filed an opinion concurring in part and dissenting in part.

**Procedural Posture(s):** On Appeal.

**United States v. Watts**

117 S.Ct. 633

Supreme Court of the **United** **States**

**UNITED STATES**

**v.**

**Vernon WATTS.**

**UNITED STATES**

**v.**

**Cheryl PUTRA.**

No. 95–1906.

Jan. 6, **1997**.Rehearing Denied Feb. 18, **1997**. See [**519** **U.S**. 1144, 117 S.Ct. 1024.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&pubNum=708&cite=117SCT1024&originatingDoc=Ibddab3df9c2511d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))

**Synopsis**

First defendant was convicted in the **United** **States** District Court for the Eastern District of California, [William B. Shubb](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0243065301&originatingDoc=Ibddab3df9c2511d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ibddab3df9c2511d9bc61beebb95be672), J., of possession of crack cocaine with intent to distribute, and he appealed. The Ninth Circuit Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I9539942891bf11d9bc61beebb95be672&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=cc52549342034378bdde589d3f345889&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[67 F.3d 790,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1995195238&pubNum=506&originatingDoc=Ibddab3df9c2511d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed in part, vacated in part, and remanded. Second defendant was convicted in the **United** **States** District Court for the District of Hawai‘i, Harold M. Fong, Chief Judge, of aiding and abetting possession of cocaine with intent to distribute, and she appealed. The Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I46bb2069928311d9a707f4371c9c34f0&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=cc52549342034378bdde589d3f345889&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[78 F.3d 1386,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1996062755&pubNum=506&originatingDoc=Ibddab3df9c2511d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))reversed and remanded for resentencing. Government filed single petition for certiorari, seeking review in both cases. Granting certiorari, the Supreme Court held that sentencing court may consider conduct of which defendant has been acquitted, so long as that conduct has been proved by preponderance of evidence.

Reversed and remanded.

Justice [Scalia](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254763301&originatingDoc=Ibddab3df9c2511d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ibddab3df9c2511d9bc61beebb95be672) filed concurring opinion.

Justice [Breyer](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=Ibddab3df9c2511d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ibddab3df9c2511d9bc61beebb95be672) filed concurring opinion.

Justice [Stevens](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0156277701&originatingDoc=Ibddab3df9c2511d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ibddab3df9c2511d9bc61beebb95be672) filed dissenting opinion.

Justice [Kennedy](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0243105201&originatingDoc=Ibddab3df9c2511d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ibddab3df9c2511d9bc61beebb95be672) filed dissenting opinion.

# \*\*MITCHELL v. UNITED STATES\*\*

#### United States Supreme Court 526 U.S. 314 (1999)

#### Rule of Law

**A defendant who pleads guilty does not waive the Fifth Amendment right against self-incrimination at the sentencing hearing.**

#### Facts

In 1995, Amanda Mitchell (defendant) pled guilty in federal court to distributing cocaine. Mitchell did not have a plea agreement and reserved the right at sentencing to challenge the drug quantity for which she was responsible. During the guilty plea, the district court advised Mitchell that she was waiving her Fifth Amendment right to remain silent at trial by pleading guilty. When asked if she had committed the acts necessary to be found guilty, Mitchell responded, “Some of it.” At the sentencing hearing, the United States government (plaintiff) offered witnesses who testified regarding Mitchell’s role in drug dealing and generally to the amounts she handled. Mitchell did not testify or offer evidence at sentencing, but her counsel argued that the prosecution could only attribute a minimal amount of drugs to her. The district court ruled that Mitchell did not have the right to remain silent at sentencing and expressly held her silence against her in sentencing her to the mandatory 10-year sentence for selling more than five kilograms of cocaine. The United States Court of Appeals for the Third Circuit affirmed. The United States Supreme Court granted certiorari.

#### Issue

Does a defendant who pleads guilty waive the Fifth Amendment right against self-incrimination at the sentencing hearing?

#### Holding and Reasoning (Kennedy, J.)

No. A defendant who pleads guilty maintains the right against self-incrimination at sentencing. The Fifth Amendment to the United States Constitution provides that no person can be compelled to be a witness against himself or herself in any criminal case. A witness may not, however, testify voluntarily about a subject and then invoke the right to remain silent when questioned further about the details. *Rogers v. United States*, 340 U.S. 367, 373 (1951). To allow otherwise would permit a witness to distort the facts by controlling what testimony is given. Here, if Mitchell had testified at trial that she did “some of it,” she would have been subject to cross-examination on the details. The concerns of selected trial testimony are not present, however, during a guilty-plea colloquy, where the defendant is admitting to the charges. The limited, necessary inquiry of a plea colloquy cannot reasonably be considered a waiver of the important right against self-incrimination. Rule 11 of the Federal Rules of Criminal Procedure governs pleas and directs that a court may question a defendant during a guilty plea to establish a factual basis for the plea. A defendant who invokes Fifth Amendment rights during a plea runs the risk that the court rejects the plea. The court of appeals incorrectly held that Mitchell’s guilty plea extinguished her right against self-incrimination on the basis that the incrimination was then complete. While the privilege does terminate when a sentence has been given and the conviction becomes final, incrimination is not complete prior to sentencing. *Estelle v. Smith*, 451 U.S. 454 (1981). A defendant who is compelled to testify at sentencing certainly could incriminate himself or herself and receive a lengthier sentence as a result. The prosecution argues that even if the right to remain silent continues through sentencing, the invocation of this privilege can be used against a defendant. However, *Griffin v. California*, 380 U.S. 609 (1965), establishes that no negative inference can be drawn from a defendant’s failure to testify at trial, and no exception to this rule exists for a defendant who invokes the privilege at sentencing. Accordingly, the judgment of the court of appeals is reversed, and the case is remanded for further proceedings.

#### Dissent (Thomas, J.)

Justice Scalia’s dissent is correct and demonstrates that the holding in *Griffin* should be reexamined.

#### Dissent (Scalia, J.)

Although Mitchell should have been permitted to invoke her right against self-incrimination at the sentencing hearing, the court should be able to draw an inference from her failure to testify. Although *Griffin* should not be overruled, its logic runs counter to commonsense; in everyday life, a negative inference is drawn if a person is silent upon being asked if he or she did something wrong. Therefore, the rule in *Griffin* should not be extended beyond use at trial.

**Key Terms:**

**Fifth Amendment Privilege Against Self-Incrimination** - Constitutional protection that prevents the government from compelling a person to give testimony against himself.

**Guilt-Plea Colloquy -** An inquiry by the court to a defendant to ensure that the defendant’s guilty plea to criminal charges is knowing, voluntary, and based upon facts sufficient to support a finding of guilt.

**United States v. Dunnigan**

113 S.Ct. 1111

Supreme Court of the **United** **States**

**UNITED STATES, Petitioner**

**v.**

**Sharon DUNNIGAN.**

No. 91-1300.

Argued Dec. 2, 1992.Decided Feb. 23, **1993**.

## Synopsis

Defendant was convicted in the **United** **States** District Court for the Southern District of West Virginia, [John T. Copenhaver, Jr.](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0144338801&originatingDoc=Iaf664dbe9c7e11d9bdd1cfdd544ca3a4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Iaf664dbe9c7e11d9bdd1cfdd544ca3a4), J., of conspiracy to distribute cocaine, and she appealed. The Court of Appeals for the Fourth Circuit, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ib27c199181ed11d98c82a53fc8ac8757&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=27ae9de26b764c668bf7afcbc06ea497&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[944 F.2d 178,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991148213&pubNum=350&originatingDoc=Iaf664dbe9c7e11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))rehearing denied[950 F.2d 149,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991195413&pubNum=350&originatingDoc=Iaf664dbe9c7e11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed defendant's conviction, but vacated her sentence. Certiorari was granted. The Supreme Court, Justice [Kennedy](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0243105201&originatingDoc=Iaf664dbe9c7e11d9bdd1cfdd544ca3a4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Iaf664dbe9c7e11d9bdd1cfdd544ca3a4), held that: (1) evidence supported determination that defendant committed perjury at trial, and (2) obstruction of justice enhancement to defendant's sentence for her perjury at trial did not undermine defendant's right to testify.

Court of Appeals reversed.

# United States v. Grayson

#### United States Supreme Court 438 U.S. 41 (1978)

#### Rule of Law

**It is permissible for a sentencing judge to enhance a convicted defendant’s sentence on the basis of the judge’s belief that the defendant committed perjury in his trial testimony.**

**Rogers v. United States**

71 S.Ct. 438

Supreme Court of the **United** **States**

**ROGERS**

**v.**

**UNITED STATES.**

No. 20.

Argued Nov. 7, 1950.Decided Feb. 26, **1951**.Rehearing Denied April 16, **1951**.

See [341 **U.S**. 912, 71 S.Ct. 619](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1951200368&pubNum=708&originatingDoc=I0a41eff29bf011d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

**Synopsis**

Contempt proceedings by the **United** **States** of America against Jane **Rogers** and others based on refusal to answer questions propounded by grand jury and by the court.

 The **United** **States** Court of Appeals for the Tenth Circuit, Huxman, Circuit Judge, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I3b97215f8e4811d9a707f4371c9c34f0&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=6d261274cd5c47fe825351256d7cec3d&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[179 F.2d 559,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1950118885&pubNum=350&originatingDoc=I0a41eff29bf011d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed the judgment of the **United** **States** District Court for the District of Colorado, J. Foster Symes, District Judge, in so far as it found named defendant and others guilty of contempt, and named defendant brought certiorari. The Supreme Court, Mr. Chief Justice Vinson, held that since named defendant had testified before grand jury that she had been treasurer of Communist Party until stated date at which time she had turned over books and records of party to another person, she could not justify refusal to answer further inquiry as to identity of person to whom she had delivered the books on ground of privilege against self-incrimination, since answer to such inquiry would not further incriminate her.

Affirmed.

Mr. Justice Black, Mr. Justice Frankfurter, and Mr. Justice Douglas, dissented.

**Estelle v. Williams**

96 S.Ct. 1691

Supreme Court of the United States

**W. J. ESTELLE, Jr., Director, Texas Department of Corrections, Petitioner,**

**v.**

**Harry Lee WILLIAMS.**

No. 74-676.

Argued Oct. 7, 1975.Decided May 3, 1976.Rehearing Denied June 21, 1976.

See [426 U.S. 954, 96 S.Ct. 3182](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1976216518&pubNum=708&originatingDoc=Ic1e6a36e9c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

**Synopsis**

After he was convicted by a Texas court of assault with intent to murder with malice and the conviction was affirmed on appeal by the Texas Court of Criminal Appeals, petitioner sought federal habeas corpus relief, alleging that he had appeared at trial in clothes that were distinctly marked as prison issue. The District Court denied relief on the ground that the error was harmless, but the Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I211cd2d6905411d9a707f4371c9c34f0&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[500 F.2d 206,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1974111358&pubNum=350&originatingDoc=Ic1e6a36e9c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) reversed. On grant of certiorari, the Supreme Court, Mr. Chief Justice Burger, held that although the state cannot, consistent 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 as to being tried in such clothes, for whatever reason, is sufficient to negate the presence of compulsion necessary to establish a constitutional violation.

Reversed and remanded.

Mr. Justice Powell concurred and filed opinion in which Mr. Justice Stewart joined.

Mr. Justice Brennan dissented and filed opinion in which Mr. Justice Marshall concurred.

# Griffin v. California

#### United States Supreme Court 380 U.S. 609 (1965)

#### Rule of Law

**It is a violation of the Fifth Amendment for the prosecution to comment on the defendant’s silence or for the trial judge to instruct the jury that the defendant’s silence can be evidence of guilt.**

**Baxter v. Palmigiano**

96 S.Ct. 1551

Supreme Court of the United States

**Joseph BAXTER et al., Petitioners,**

**v.**

**Nicholas A. PALMIGIANO.**

**Jerry J. ENOMOTO et al., Petitioners,**

**v.**

**John Wesley CLUTCHETTE et al.**

Nos. 74-1187 and 74-1194.

Argued Dec. 15, 1975.Decided April 20, 1976.

## Synopsis

Actions were brought by state prison inmates alleging that procedures used in prison disciplinary proceedings violated their constitutional rights. In one action, the District Court, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I15aa0918550611d997e0acd5cbb90d3f&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[328 F.Supp. 767,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1971105770&pubNum=345&originatingDoc=Id4c11acd9c1d11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) granted substantial relief, and the Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Iceab1d34905911d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[497 F.2d 809,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1974110729&pubNum=350&originatingDoc=Id4c11acd9c1d11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))[](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ice8df850905911d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[510 F.2d 613,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1974113263&pubNum=350&originatingDoc=Id4c11acd9c1d11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed. In the other, the district court denied relief and the Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I5dcef68d902311d9bc61beebb95be672&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[487 F.2d 1280,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1973112393&pubNum=350&originatingDoc=Id4c11acd9c1d11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) reversed. On remand by the Supreme Court, [418 U.S. 908, 94 S.Ct. 3200, 41 L.Ed.2d 1155,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1974246224&pubNum=708&originatingDoc=Id4c11acd9c1d11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) the Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I7636a691906511d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[510 F.2d 534,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1974113261&pubNum=350&originatingDoc=Id4c11acd9c1d11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed prior decision but modified opinion, and the Supreme Court granted certiorari in both actions. The Supreme Court, Mr. Justice White, held that prison inmates do not have right to either retained or appointed counsel in disciplinary hearings; that permitting adverse inference to be drawn from inmate's silence at his disciplinary proceeding is not, on its face, invalid practice; that mandating confrontation and cross-examination of witnesses at prison disciplinary proceedings effectively preempts area that has been left to sound discretion of prison officials; and that where there was no evidence that prison inmates in one action were subject to “lesser penalty” of loss of privileges, but rather it appeared that all were charged with “serious misconduct,” requiring procedures such as notice and opportunity to respond even when inmate is faced with temporary suspension of privileges was premature.

Judgments of Courts of Appeals reversed.

Mr. Justice Brennan filed opinion concurring in part and dissenting in part in which Mr. Justice Marshall joined.

**Ohio Adult Parole Authority v. Woodward**

118 S.Ct. 1244

Supreme Court of the United States

**OHIO ADULT PAROLE AUTHORITY, et al., Petitioners,**

**v.**

**Eugene WOODARD.**

No. 96–1769.

Argued Dec. 10, 1997.Decided March 25, **1998**.

**Synopsis**

State prisoner under sentence of death filed suit under § 1983, alleging that **Ohio's** clemency process violated his Fourteenth Amendment due process right and his Fifth Amendment right to remain silent. The District Court granted judgment on the pleadings to the state, and the Sixth Circuit Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I76a5ff21941311d9bdd1cfdd544ca3a4&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&DocSource=8adc401f853f4322ab2c219dc0fa6422&Rank=1&RuleBookModeDisplay=False&contextData=(sc.Search))[107 F.3d 1178,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997062008&pubNum=506&originatingDoc=Ibdcbbfb19c2511d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search))affirmed in part and reversed in part. On petition for writ of certiorari, the Supreme Court, Chief Justice [Rehnquist](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0238463201&originatingDoc=Ibdcbbfb19c2511d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ibdcbbfb19c2511d9bc61beebb95be672), held that: (1) **Ohio's** clemency procedures do not violate due process, and (2) **Ohio's** voluntary clemency interview does not violate Fifth Amendment privilege against compelled self-incrimination.

Reversed.

Justice [O'Connor](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0209675601&originatingDoc=Ibdcbbfb19c2511d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ibdcbbfb19c2511d9bc61beebb95be672) filed opinion concurring in part and concurring in the judgment which was joined by Justices [Souter](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0263202201&originatingDoc=Ibdcbbfb19c2511d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ibdcbbfb19c2511d9bc61beebb95be672), [Ginsburg](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=Ibdcbbfb19c2511d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ibdcbbfb19c2511d9bc61beebb95be672), and [Breyer](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=Ibdcbbfb19c2511d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ibdcbbfb19c2511d9bc61beebb95be672).

Justice [Stevens](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0156277701&originatingDoc=Ibdcbbfb19c2511d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=Ibdcbbfb19c2511d9bc61beebb95be672) filed opinion concurring in part and dissenting in part.

**Procedural Posture(s):** Motion for Judgment on the Pleadings.

**Ullmann v. United States**

76 S.Ct. 497

Supreme Court of the **United** **States**

**William Ludwig ULLMANN, Petitioner,**

**v.**

**UNITED STATES of America.**

No. 58.

Argued Dec. 6, 1955.Decided March 26, **1956**.

**Synopsis**

Defendant was convicted in the **United** **States** District Court for the Southern District of New York of contempt in failing to answer questions propounded before grand jury, and he appealed. The **United** **States** Court of Appeals for the Second Circuit, [221 F.2d 760,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1955121560&pubNum=350&originatingDoc=I72f055359c9a11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed the conviction and defendant brought certiorari. The Supreme Court, Mr. Justice Frankfurter, held that the Immunity Act of 1954 was valid.

Affirmed.

Mr. Justice Douglas and Mr. Justice Black dissented, and Mr. Justice Reed dissented in part.

See also [128 F.Supp. 617](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1901102647&pubNum=345&originatingDoc=I72f055359c9a11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

# White v. Woodall

#### United States Supreme Court 134 S. Ct. 1697 (2014)

#### Rule of Law

**To obtain habeas corpus from a federal court, a state prisoner must show that the state-court’s ruling on the claim was an objectively unreasonable application of clearly established federal law.**

#### Facts

Robert Woodall (defendant) pled guilty to the murder, rape, and kidnapping of a 16-year-old girl. During the sentencing phase, Woodall declined to testify. The trial court denied Woodall’s motion for a jury instruction that Woodall was not required to testify and that the jury was not to make an adverse inference for his decision to not do so. The Kentucky Supreme Court affirmed. Woodall filed a federal petition for habeas corpus, arguing that the denial violated his Fifth Amendment right against self-incrimination. The district court granted the petition. The United States Court of Appeals for the Sixth Circuit affirmed. The United States Supreme Court granted certiorari.

#### Issue

To obtain habeas corpus from a federal court, must a state prisoner show that the state-court’s ruling on the claim was an objectively unreasonable application of clearly established federal law?

#### Holding and Reasoning (Scalia, J.)

Yes. To obtain habeas corpus from a federal court, a state prisoner must show that the state-court’s ruling on the claim was an objectively unreasonable application of clearly established federal law. This standard is difficult to meet as it is not enough to show that the state court merely declined to extend Supreme Court precedent to its logical conclusion. Rather, the petitioner must show that the state court’s holding was contrary to an actual Supreme Court holding. In this case, the court of appeals erred in finding that the Kentucky Supreme Court’s ruling on Woodall’s Fifth Amendment claim was an objectively unreasonable application of clearly established federal law. The relevant federal law claimed to be clearly established comes from three Supreme Court cases. In *Carter v. Kentucky*, 450 U.S. 288 (1981), the Court held that the Fifth Amendment requires, upon request, a no-adverse-inference jury instruction at the guilt phase. In *Estelle v. Smith*, 451 U.S. 454 (1981), the Court ruled on introduction of a pretrial psychiatric examination, discussing broader Fifth Amendment principles only in dicta. In *Mitchell v. United States*, 526 U.S. 314 (1999), the Court held that courts cannot draw an adverse inference from a defendant’s failure to testify at sentencing with respect to factual determinations about the crime (in that case, the fact inferred was the quantity of the defendant’s drugs). In none of these cases did the Court hold that the Fifth Amendment requires a no-adverse-inference jury instruction at the penalty phase. Woodall essentially seeks relief on the ground that the Kentucky Supreme Court failed to extend Supreme Court precedent. Under the deferential standard applicable to Woodall’s request for relief, however, such relief cannot be granted. While it is possible that a no-adverse inference could be deemed required at the penalty phase if that question came to this Court through the ordinary course, the Court need not address that question in this case. Rather, the question is only whether the Kentucky Supreme Court’s determination that a no-adverse inference was not required at the penalty phase was an objectively unreasonable application of clearly established federal law. This Court has not clearly established via a holding that the Fifth Amendment requires, upon request, a no-adverse-inference jury instruction at the penalty phase. The judgment of the court of appeals is reversed, and the case is remanded.

#### Dissent (Breyer, J.)

Under clearly established Supreme Court precedent, a defendant has a Fifth Amendment right to a jury instruction that the defendant was not required to testify at the sentencing phase of trial and that the jury was not to make an adverse inference against him for his decision to not do so. The Kentucky Supreme Court’s judgment to the contrary was an objectively unreasonable application of clearly established federal law. In *Carter*, the Court held that the Fifth Amendment requires, upon request, a no-adverse-inference jury instruction at the guilt phase. And in *Estelle*, the Court stated that for Fifth Amendment purposes, there is no basis to differentiate the guilt and penalty phases of a murder trial. Given these holdings, there can be no logical claim that the Fifth Amendment requires, upon request, a no-adverse-inference jury instruction at the penalty phase. The Kentucky Supreme Court unreasonably applied these cases.

**Key Terms:**

**Writ of Habeas Corpus** - Enables a detainee or prisoner to challenge the legality of his detention by the government.

**Collateral Attack** - An attempt to defeat a judgment through a separate action instead of an appeal or other direct attack.

**Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) -** Federal statute that limits the ability of federal courts to grant habeas corpus relief and provides for the designation of certain entities as foreign terrorist organizations to which various domestic sanctions may apply.

**Estelle v. Smith**

101 S.Ct. 1866

Supreme Court of the United States

**W. J. ESTELLE, Jr., Director, Texas Department of Corrections, Petitioner,**

**v.**

**Ernest Benjamin SMITH.**

No. 79–1127.

Argued Oct. 8, 1980.Decided May 18, 1981.

## Synopsis

Texas prisoner sought federal habeas corpus relief. The United States District Court for the Northern District of [Texas, Robert W. Porter, J., 445 F.Supp. 647,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1978197561&pubNum=345&originatingDoc=Id4bbc38c9c1d11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) issued writ, and the state appealed. The Court of Appeals, [602 F.2d 694,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979113880&pubNum=350&originatingDoc=Id4bbc38c9c1d11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))affirmed. Certiorari was granted. The Supreme Court, Chief Justice Burger, held that: (1) where prior to in-custody court-ordered psychiatric examination to determine competency to stand trial defendant had not been warned that he had right to remain silent and that any statement made could be used against him at capital sentencing proceeding, admission at penalty phase of capital felony trial of psychiatrist's damaging testimony on crucial issue of future dangerousness violated Fifth Amendment privilege against compelled self-incrimination; because of lack of appraisal of rights and a knowing waiver thereof death sentence could not stand, and (2) Sixth Amendment right to counsel was violated as defense counsel was not notified in advance that the psychiatric examination would encompass issue of future dangerousness.

Decision of Court of Appeals affirmed.

Justice Brennan filed a concurring statement.

Justice Marshall filed a statement concurring in part.

Justice Stewart filed an opinion concurring in the judgment, in which Mr. Justice Powell joined.

Justice Rehnquist filed an opinion concurring in the judgment.

# Carter v. Kentucky

#### United States Supreme Court 450 U.S. 288 (1981)

#### Rule of Law

**A trial court judge has a constitutional obligation to instruct the jury that it may draw no adverse inference from a defendant’s decision not to testify when the defendant requests such an instruction.**

# Williams v. New York

#### United States Supreme Court 337 U.S. 241 (1949)

#### Rule of Law

**The Due Process Clause of the Fourteenth Amendment does not prohibit sentencing judges from acquiring information about the defendant from out-of-court sources even though the defendant does not have the opportunity to confront or cross-examine the sources.**

# McMillan v. Pennsylvania

#### United States Supreme Court 477 U.S. 79 (1986)

#### Rule of Law

**The Due Process Clause of the Fourteenth Amendment is not violated where a state statute subjects a convicted defendant to a mandatory minimum sentence, not exceeding that otherwise permitted without the act, if the sentencing judge finds, by a preponderance of the evidence, that a certain fact existed at the time of the crime.**

#### Facts

A state statute required a judge to sentence a defendant convicted of an enumerated crime to a mandatory minimum sentence of at least five years if the judge found by a preponderance of the evidence that the defendant visibly possessed a firearm during the commission of the offense. The act did not permit a judge to sentence the defendant to a term exceeding that otherwise allowed for the specific offence of which the defendant was convicted. The state legislature specifically explained that visible possession was not an element of the crime. McMillan (defendant) was convicted of one of these enumerated felonies. However, McMillan was convicted to a term less than that minimally required by the act because each of the sentencing judges who heard the case found the act unconstitutional. On appeal, the state supreme court upheld the act as constitutional. The United States Supreme Court granted certiorari.

#### Issue

Is it a violation of the Due Process Clause for a state statute to subject a convicted defendant to a mandatory minimum sentence if the sentencing judge finds, by a preponderance of the evidence, that a certain fact was present at the time of the crime?

#### Holding and Reasoning (Rehnquist, J.)

No. The Due Process Clause is not violated where a state statute allows the sentencing judge to impose a minimum sentence where he finds by a preponderance of the evidence that a certain fact existed during the commission of the crime. Precedence shows that the Due Process Clause requires the prosecution to prove each element of a crime beyond a reasonable doubt before the defendant may be convicted. However, in *Patterson v. New York*, 432 U.S. 197 (1977), the Court pointed out that when the prosecution links the severity of the punishment to the presence or absence of a certain fact, this identified fact is not an element of the crime and therefore need not be proven beyond a reasonable doubt. In this case, the state legislature made clear that the visible possession of a firearm is not an element of the crime. Instead, it is a factor to be taken into consideration during sentencing, only after the defendant has been convicted by a jury. Furthermore, the act does not impose a harsher penalty than a defendant convicted of one of the enumerated crimes would otherwise face without the act. Rather, the act simply takes away some of the discretion generally given to the sentencing judge by dictating the weight of one factor, the possession of a firearm, that judges normally consider in their sentencing determinations. Therefore, the Due Process Clause does not require that the state prove visible possession beyond a reasonable doubt and the act is constitutional.

#### Dissent (Stevens, J.)

The Court’s holding is misplaced because the Court misunderstands its own precedent. Under both *Patterson* and *In re Winship*, 397 U.S. 358 (1970), a state cannot advance any of its criminal laws at the expense of accurate and constitutional fact finding. *Winship* requires that there be limits to the ability of a state to define the elements of a crime. As such, any fact that serves to increase the defendant’s punishment should be considered as an element of the crime, and must be proven beyond a reasonable doubt. In addition, *Patterson* requires that the state prove beyond a reasonable doubt any conduct which will subject the defendant to harsher punishment but which will not result in a reduced sentence if the conduct goes unproven. The possession of a firearm during the commission of an enumerated crime, as outlined by the state statute, is an element of the crime because it serves only to punish the defendant further. It is not considered as a mitigating factor if the defendant is found not to have been in visible possession of a firearm. Here, the state wrongly seeks to increase the deterrent effect of its laws by imposing a mandatory minimum sentence. Accordingly, the possession of firearms must be proven beyond a reasonable doubt.

**Key Terms:**

**Fourteenth Amendment Due Process** **Clause** - The provision set forth at Amendment XIV, Section 1 of the United States Constitution prohibiting states from depriving any person of life, liberty, or property by means that are arbitrary or fundamentally unfair.

# Roberts v. United States

#### United States Supreme Court 445 U.S. 552 (1980)

#### Rule of Law

**It is not error for a judge to consider a defendant’s refusal to cooperate with the government in a sentencing determination when the defendant has not invoked the Fifth Amendment privilege against self-incrimination.**

#### Facts

Roberts (defendant) traveled with Payne to the office of the federal district attorney in a car owned by Payne. Federal investigators knew from surveillance activities that Payne’s car had previously been used to transport heroin. Payne told investigators that she sometimes lent her car to Roberts and suggested that they question Roberts. Roberts voluntarily agreed to answer questions. He was given *Miranda*warnings and told that he was free to leave. Roberts admitted to having delivered heroin and discussed phone conversations related to drug transactions. Roberts refused to give names of suppliers and refused to provide that information during the entire course of the ongoing investigation. After pleading guilty to charges of using a telephone to facilitate the delivery of heroin, the federal district court imposed a sentence which it based, in part, on Roberts’ refusal to cooperate with the government’s investigation.

#### Issue

Is it error for a judge to consider a defendant’s refusal to cooperate with the government in a sentencing determination when the defendant has not invoked the Fifth Amendment privilege against self-incrimination?

#### Holding and Reasoning (Powell, J.)

No. It is not error for a judge to consider a defendant’s refusal to cooperate with the government in a sentencing determination when the defendant has not invoked the Fifth Amendment privilege against self-incrimination. Roberts does not dispute that he refused to cooperate and does not contend that he was unable to cooperate with the government’s investigation. His silence, without explanation, permits the inference that Roberts has little regard for his obligations to society. Roberts contends that he remained silent out of fear for his safety, but he never raised that concern before the trial court. Likewise, Roberts never invoked his Fifth Amendment privilege against self-incrimination. The privilege is not self-executing, especially when the defendant’s silence gives the court no reason to believe that his testimony would be self-incriminating. A defendant’s silence in the absence of explanation or an invocation of Fifth Amendment rights may be relevant to a sentencing determination. The court is entitled to draw an adverse inference from silence under those circumstances. The sentence is affirmed.

#### Concurrence (Brennan, J.)

I agree that the court is entitled to draw an adverse inference from a defendant’s refusal to cooperate in the absence of any evidence of a neutral basis for refusal. We should nonetheless take caution against allowing defendants to be penalized on speculative inferences arising from silence. An inquiry into the defendant’s reason for silence prior to sentencing would at least provide an additional opportunity to avoid impermissible inference.

**Key Terms:**

**Miranda Warnings** - The notices of constitutional rights set forth in the opinion of the United States Supreme Court in *Miranda v. Arizona*, 384 U.S. 436(1966) that law enforcement authorities must provide to a suspect in a criminal investigation prior to initiation of a custodial interrogation. The suspect must be advised that the suspect has the right to remain silent, anything the suspect says may be used against the suspect, and the suspect has the right to an attorney.

**Fifth Amendment** - An amendment added to the U.S. Constitution as part of the Bill of Rights that provides important protections from government actions, including a guarantee that no person will be required to answer for a capital crime unless first indicted by a grand jury; no one will suffer double jeopardy; no one must testify against himself or herself; no one will be deprived of life, liberty, or property without due process of law; and no property will be taken for public use without just compensation.

# Blakely v. Washington

#### United States Supreme Court 542 U.S. 296 (2004)

#### Rule of Law

**Any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt.**

#### Facts

Blakely (defendant) was charged with first-degree kidnapping. After reaching a plea agreement, the prosecutor reduced Blakely’s charge to second-degree kidnapping. Washington’s Sentencing Reform Act specified a “standard range” sentence for second-degree kidnapping with a firearm as 49 to 53 months imprisonment. Pursuant to the plea agreement, the prosecutor recommended a sentence within the standard range; however, the judge rejected the recommendation and imposed an “exceptional sentence” of 90 months on the ground that Blakely had acted with “deliberate cruelty.” Blakely objected to the higher sentence and a three-day bench trial was held where the judge issued 32 findings of fact and reiterated his position that Blakely had acted with “deliberate cruelty.” Blakely appealed, arguing that the sentencing procedure deprived him of his federal constitutional right to have a jury determine, beyond a reasonable doubt, all facts legally essential to his sentence, specifically that he had acted with “deliberate cruelty.” The United States Supreme Court granted certiorari.

#### Issue

Must any fact that increases the penalty for a crime beyond the prescribed statutory maximum be submitted to a jury and proved beyond a reasonable doubt?

#### Holding and Reasoning (Scalia, J.)

Yes. A judge has the discretion to impose a sentence above the maximum range if he finds substantial and compelling reasons justifying an exceptional sentence. However, if a judge imposes a stricter sentence, he must set forth findings of fact and conclusions of law supporting it. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court reiterated the long-standing tenet that every fact and accusation against a defendant must be confirmed by a jury. Therefore, any fact which increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. Here, the State contends that there is no *Apprendi* violation because the relevant “statutory maximum” is the 10-year-maxium for class B felonies. However, under *Apprendi*, the “statutory maximum” referred to is the maximum sentence a judge may impose as reflected by a jury’s verdict, without any additional findings. The judge in this case could not have imposed the 90-month sentence solely on the basis of the facts admitted in Blakely’s guilty plea because a reason offered to justify an exceptional sentence can be considered only if it takes into account factors other than those which are used in computing the standard range sentence for the offense. Because the State’s sentencing procedure did not comply with the Sixth Amendment, Blakely’s sentence is invalid.

#### Dissent (O’Connor, J.)

The majority’s decision exacts a substantial constitutional tax. Facts traditionally considered by a judge in the sentencing phase must now be charged in the indictment and submitted to a jury if an increased sentence is to be lawful. If a legislature desires uniform consideration of such factors at sentencing, but does not want them to impact a jury’s initial determination of guilt, the State may have to bear the additional expense of a separate, full-blown jury trial during a penalty phase proceeding. Simple economics dictate that the states will not and cannot bear these costs.

#### Dissent (Kennedy, J.)

Sentencing guidelines are a good example of the collaborative process between the courts and legislatures. The Constitution does not prohibit the dynamic and fruitful dialogue between the judicial and legislative branches of government.

#### Dissent (Breyer, J.)

As a result of the majority’s rule, sentencing must now take one of three forms, each of which risks either impracticality, unfairness, or harm to the jury trial right. The first form is a “determinate” sentencing system. Every person who committed a specific crime would receive the same set sentence, which ensures uniformity, but imposes identical punishments on individuals who committed their crimes differently. The second form is a return to indeterminate sentencing where alleged sentencing disparities existed.  While the judge’s authority to sentence would formally derive from the jury’s verdict, the jury would exercise little or no control over the sentence itself. Third, judges would be able to depart downward from sentences upon finding that mitigating factors were present, but would not be able to depart upward unless the prosecutor charged the aggravating fact to a jury and proved it beyond a reasonable doubt. This system prejudices defendants who seek trial. Any fair sentencing system must involve efforts to make practical compromises among competing goals. The majority’s decision now makes those efforts virtually impossible.

**Key Terms:**

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

**Plea Bargain -** A negotiation between a criminal defendant via his attorney and the prosecutor in which the defendant agrees to plead guilty to a crime in exchange for a reduction of the severity of the charges.

# Apprendi v. New Jersey

#### United States Supreme Court 530 U.S. 466 (2000)

#### Rule of Law

**Any fact, other than a prior conviction, that increases the maximum penalty for a crime must be submitted to a jury and proven beyond a reasonable doubt by the prosecution.**

#### Facts

Under a state statute, a defendant can be sentenced between five and ten years imprisonment for possessing a firearm for an unlawful purpose. Under a separate “hate crime” statute, a defendant can be sentenced to an “extended term” if the trial judge finds by a preponderance of the evidence that the defendant committed a crime with the express purpose of intimidating a person or group because of race, gender, handicap, religion, sexual orientation or ethnicity. Pursuant to this hate crime statute, Apprendi (defendant) was sentenced to 12 years of imprisonment.

#### Issue

May a factual determination authorizing an increase in the maximum prison sentence be made by a judge based on a preponderance of the evidence?

#### Holding and Reasoning (Stevens, J.)

No. The Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence be made by a jury on the basis of proof beyond a reasonable doubt. History shows that a defendant has a constitutional right to have his case heard by a jury; that the prosecution must establish the defendant’s guilt beyond a reasonable doubt; and that judges’ discretion during sentencing has always been limited within a statutory framework. Precedence also supports a finding that the New Jersey hate crime statute is unconstitutional. *In re Winship*, 397 U.S.358 (1970), and *Mullaney v. Wilbur*, 421 U.S. 684 (1975), make clear that the “beyond a reasonable doubt” standard, and the protections afforded by a jury, extend to determinations of the length of the defendant’s sentence. Specifically, *Mullaney* pointed out that these protections are paramount where the consequences of one offense are more severe than another for which the defendant could also be tried. In addition, this case is also different from the situation in *Almendarez-Torres v. United States*, 523 U.S. 224 (1998). In that case, the defendant was sentenced to an extended term because of prior convictions. This extended term was upheld as constitutional because the extended term was based on facts that were subject to their own proceedings and procedural safeguards. This is not the case here where Apprendi is subject to a more severe punishment simply because the judge decided that Apprendi’s motive for committing the crime was established by a preponderance of the evidence. Finally, the distinction between the elements constituting the offense and a factor to be considered during sentencing did not exist at common law. This distinction was only established in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), where the concept of a “sentencing factor,” as distinct from an element of the crime, was created. However, *McMillan* recognized that there are limits to the state’s authority to simply classify facts as an element of the crime or merely a sentencing factor. Furthermore, in *McMillan* the defendant could not be sentenced to a term exceeding the maximum allowed for the offense for which he was convicted. In this case, the state act is a violation of due process because it allows a defendant to be sentenced for a term exceeding the maximum allowed for the substantive offense without a finding of probable cause by a jury. Accordingly, the judgment of the state supreme court is reversed.

#### Concurrence (Thomas, J.)

Today’s holding is a return to the status quo. History shows that the elements of crime are those facts that serve as a basis for imposing or increasing punishment. Therefore, the Court correctly holds the New Jersey statute unconstitutional. However, the Court needs to reconsider some of its prior holdings. Specifically, *Almendarez-Torres* should be reconsidered. If prior convictions serve to increase the time a convicted defendant can spend in jail, they are elements of the crime and must be presented to the jury for consideration. Similarly, *McMillan* must be reversed. Even where a defendant cannot face a longer term than he could for the substantive offense, prosecutors use mandatory minimums to make a defendant’s punishment more severe.

#### Concurrence (Scalia, J.)

The right to a trial by jury is the right to have a jury decide those facts that determine the maximum sentence permitted by law. The dissent wrongly assumes that the Constitution means what people think it should mean. Instead, the plain language is clear and defendants have the right to have their cases heard by a jury.

#### Dissent (Breyer, J.)

Traditionally, judges have determined the presence or absence of facts affecting the severity of a convicted defendant’s sentence. This is simply because there are often too many such factors for a jury to consider. Furthermore, these facts could easily prejudice a jury against the defendant as they work to decide his guilt or innocence. In addition, legislatures have traditionally been permitted to define the elements of a crime, free from the Court’s interference. The Court’s holding today has two consequences. First, the holding distorts these two established principles by treating sentencing statutes differently than the traditional sentencing factors a judge takes into consideration. Second, by upholding the constitutionality of minimum sentences, the Court is simply encouraging legislatures to adopt such policies in an effort to exert control over sentencing procedures. This results in less procedural fairness, not more.

#### Dissent (O’Connor, J.)

The issue here is whether a fact that impacts the defendant’s punishment, but is not an express element of the crime as defined by the legislature, should nevertheless be treated as an element of the offense. The history that the Court invokes in supporting its holding does not address this issue at all. Instead, the precedence that the Court points to only addresses the state’s burden of proof for specific elements of the crime. Furthermore, the court fails to mention *Patterson v. New York*, 432 U.S 197 (1977), which held that *Mullaney* should not be read so broadly and that facts impacting the severity of punishment need not be proven beyond a reasonable doubt. Finally, the Court does not fully explain why its holding is required by the due process clauses of the Fifth and Fourteenth Amendments, and by the Sixth Amendment right to a trial by jury. Rather, it appears that state legislatures could easily comply with the Court’s new rule and still manage to achieve the same sentencing structure.

**Key Terms:**

**Fifth Amendment** - An amendment added to the U.S. Constitution as part of the Bill of Rights that provides important protections from government actions, including a guarantee that no person will be required to answer for a capital crime unless first indicted by a grand jury; no one will suffer double jeopardy; no one must testify against himself or herself; no one will be deprived of life, liberty, or property without due process of law; and no property will be taken for public use without just compensation.

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

**Fourteenth Amendment Due Process** **Clause** - The provision set forth at Amendment XIV, Section 1 of the United States Constitution prohibiting states from depriving any person of life, liberty, or property by means that are arbitrary or fundamentally unfair.

**Mens Rea -** A guilty mind. Mens rea is an element of criminal responsibility; other terms for mens rea are criminal intent, culpability, mental state, and fault.

**Almendarez-Torres v. United States**

118 S.Ct. 1219

Supreme Court of the United States

**Hugo Roman ALMENDAREZ–TORRES, Petitioner,**

**v.**

**UNITED STATES.**

No. 96–6839.

Argued Oct. 14, 1997.Decided March 24, 1998.

## Synopsis

Defendant was convicted of illegally reentering the United States after having been previously deported following his conviction of aggravated felonies by the United States District Court for the Northern District of Texas, [John H. McBryde](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0247936801&originatingDoc=Ice97e9c09c9611d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ice97e9c09c9611d993e6d35cc61aab4a), J., and he appealed. The Court of Appeals, [113 F.3d 515,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1997110433&pubNum=506&originatingDoc=Ice97e9c09c9611d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))affirmed. On certiorari, the Supreme Court, Justice [Breyer](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=Ice97e9c09c9611d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ice97e9c09c9611d993e6d35cc61aab4a), held that: (1) statutory subsection authorizing a sentence of up to 20 years for any alien who illegally returned to the United States after having previously deported following conviction of aggravated felony was mere penalty provision, and did not serve to define a separate immigration-related offense, and (2) Congress' decision to treat recidivism, and in particular the fact that alien is deported following his conviction of aggravated felony, merely as a sentencing factor upon alien's subsequent conviction of illegal reentry offense, rather than as an element of that offense, did not exceed due process or other constitutional limits on Congress' power to define elements of crime.

Affirmed.

Justice [Scalia](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254763301&originatingDoc=Ice97e9c09c9611d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ice97e9c09c9611d993e6d35cc61aab4a) filed a dissenting opinion in which Justices [Stevens](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0156277701&originatingDoc=Ice97e9c09c9611d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ice97e9c09c9611d993e6d35cc61aab4a), [Souter](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0263202201&originatingDoc=Ice97e9c09c9611d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ice97e9c09c9611d993e6d35cc61aab4a), and [Ginsburg](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=Ice97e9c09c9611d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ice97e9c09c9611d993e6d35cc61aab4a) joined.

# McMillan v. Pennsylvania

#### United States Supreme Court 477 U.S. 79 (1986)

#### Rule of Law

**The Due Process Clause of the Fourteenth Amendment is not violated where a state statute subjects a convicted defendant to a mandatory minimum sentence, not exceeding that otherwise permitted without the act, if the sentencing judge finds, by a preponderance of the evidence, that a certain fact existed at the time of the crime.**

# Ring v. Arizona

#### United States Supreme Court 536 U.S. 584 (2002)

#### Rule of Law

**A jury must determine the existence of any aggravating factor that could increase the severity of a criminal defendant's sentence.**

#### Facts

The State of Arizona (plaintiff) prosecuted Timothy Ring (defendant) for murder, a crime for which the penalty was either life imprisonment or death. The jury convicted Ring. Arizona's sentencing statute provided that a death penalty could be imposed only if the trial judge found aggravating factors in the case. The judge found such factors and sentenced Ring to death. Ring appealed, and the Arizona Supreme Court affirmed Ring's death sentence. The United States Supreme Court granted certiorari to consider whether two relevant Sixth Amendment cases, *Walton v. Arizona*, 497 U.S. 639 (1990), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), were compatible. *Walton*held that, so long as the jury was the factfinder as to the defendant's guilt, the judge could be the factfinder as to aggravating-sentencing factors. *Apprendi*held that a jury must be the factfinder if the aggravating factors increase the defendant's penalty beyond the sentencing range for his underlying offense. Arizona argued that: (1) *Apprendi*did not control Ring's case because the death penalty was within the sentencing range for murder, and *Walton*permitted the judge to determine the existence of aggravating factors; (2) Arizona's sentencing law was a permissible way for the state to comply with Eighth Amendment requirements; and (3) it is fairer and more efficient for judges than juries to determine the existence of aggravating factors.

#### Issue

Must a jury determine the existence of any aggravating factor that could increase the severity of a criminal defendant's sentence?

#### Holding and Reasoning (Ginsburg, J.)

Yes. A jury must determine the existence of any aggravating factor that could increase the severity of a criminal defendant's sentence. This extends the defendant's right to have a jury acquit or convict him of the underlying offense, because determining the existence of an aggravating factor is the functional equivalent of acquitting or convicting the defendant of a greater offense. The right to a jury trial is guaranteed by the Sixth Amendment. The Sixth Amendment was one of the least controversial provisions in the Bill of Rights, because the framers of that document believed that justice demands that a defendant's fate be entrusted to his peers rather than to the state. Here, Arizona argues that *Apprendi*is inapplicable and *Walton*controls. Even if true, to the extent *Walton*would allow the judge to find facts affecting whether Ring lives or dies, *Walton*must be overruled. Arizona argues that its sentencing statute is a permissible way for the state to comply with the Eighth Amendment, but compliance with the Eighth Amendment is no justification for watering down Sixth-Amendment guarantees. Finally, Arizona argues that it is fairer and more efficient to place fact-finding relating to aggravating factors in the hands of the judge rather than the jury. Even if true, the applicability of the Sixth Amendment does not turn on the relative rationality, fairness, or efficiency of potential factfinders. Because the judge made fact findings that should have been made by the jury, and those findings were essential to the imposition of Ring's death sentence, the sentence is reversed, and the case is remanded.

#### Dissent (O'Connor, J.)

*Apprendi*was wrongly decided. It ignored our history of discretionary sentencing by judges and cast doubt on the validity of countless criminal sentences. This case will exacerbate the harm done by *Apprendi*. It is *Apprendi*, not *Walton*, that the majority should overrule.

**Key Terms:**

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

**Eighth Amendment** - Prohibits the imposition of excessive bail, excessive fines, or cruel and unusual punishments on criminal defendants.

**Aggravating Circumstances -** Certain facts that increase the severity of a criminal act so that it warrants a greater criminal charge or a greater punishment.

**Oregon v. Ice**

129 S.Ct. 711

Supreme Court of the United States

**OREGON, Petitioner,**

**v.**

**Thomas Eugene ICE.**

No. 07–901.

Argued Oct. 14, 2008.Decided Jan. 14, 2009.

## Synopsis

**Background:** Defendant was convicted in the Circuit Court, Marion County, [Dennis J. Graves](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0183908201&originatingDoc=I05acbee9e24911ddb77d9846f86fae5c&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I05acbee9e24911ddb77d9846f86fae5c), J., of two counts of burglary and four counts of sexual abuse. Defendant appealed. The Court of Appeals, [178 Ore.App. 415, 39 P.3d 291](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&pubNum=0004645&cite=39PC3D291&originatingDoc=I05acbee9e24911ddb77d9846f86fae5c&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), affirmed without opinion. Defendant filed petition for review. The Oregon Supreme Court, W. Michael Gillette, J., [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Iff34162d782c11dc8200d0063168b01f&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[343 Ore. 248, 170 P.3d 1049](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2013601805&pubNum=0004645&originatingDoc=I05acbee9e24911ddb77d9846f86fae5c&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), reversed and remanded. Certiorari was granted.

[**Holding:**](https://1.next.westlaw.com/Document/I05acbee9e24911ddb77d9846f86fae5c/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_anchor_F22017879539) The Supreme Court, Justice [Ginsburg](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I05acbee9e24911ddb77d9846f86fae5c&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I05acbee9e24911ddb77d9846f86fae5c), held that in light of historical practice and States' authority over administration of their criminal justice systems, Sixth Amendment does not inhibit States from assigning to judges, rather than to juries, finding of facts necessary to imposition of consecutive, rather than concurrent, sentences for multiple offenses, abrogating [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I633d7e74aac311daa20eccddde63d628&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[State v. Foster, 109 Ohio St.3d 1, 845 N.E.2d 470](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2008581434&pubNum=0000578&originatingDoc=I05acbee9e24911ddb77d9846f86fae5c&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

Reversed and remanded.

Justice [Scalia](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254763301&originatingDoc=I05acbee9e24911ddb77d9846f86fae5c&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I05acbee9e24911ddb77d9846f86fae5c) filed dissenting opinion in which Chief Justice [Roberts](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0258116001&originatingDoc=I05acbee9e24911ddb77d9846f86fae5c&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I05acbee9e24911ddb77d9846f86fae5c) and Justices [Souter](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0263202201&originatingDoc=I05acbee9e24911ddb77d9846f86fae5c&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I05acbee9e24911ddb77d9846f86fae5c) and [Thomas](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I05acbee9e24911ddb77d9846f86fae5c&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I05acbee9e24911ddb77d9846f86fae5c) joined.

# Williams v. New York

#### United States Supreme Court 337 U.S. 241 (1949)

#### Rule of Law

**The Due Process Clause of the Fourteenth Amendment does not prohibit sentencing judges from acquiring information about the defendant from out-of-court sources even though the defendant does not have the opportunity to confront or cross-examine the sources.**

**Harris v. United States**

122 S.Ct. 2406

Supreme Court of the **United** **States**

**William Joseph HARRIS, Petitioner,**

**v.**

**UNITED STATES.**

No. 00–10666.

Argued March 25, **2002**.Decided June 24, **2002**.

## Synopsis

Defendant was convicted pursuant to his plea of guilty to one count of distributing marijuana and, after bench trial, was found guilty of carrying a firearm in relation to drug trafficking offense. At sentencing, the **United** **States** District Court for the Middle District of North Carolina determined that defendant had “brandished” the gun and consequently sentenced defendant to mandatory minimum sentence of seven years' imprisonment. The **UnitedStates** Court of Appeals for the Fourth Circuit, [243 F.3d 806,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001232324&pubNum=506&originatingDoc=I6b3923549c2511d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)) affirmed. Certiorari was granted. The Supreme Court, Justice [Kennedy](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0243105201&originatingDoc=I6b3923549c2511d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I6b3923549c2511d9bc61beebb95be672), held that: (1) “brandishing” firearm was sentencing factor, rather than element of crime, and (2) allowing judge to find that factor did not violate defendant's constitutional rights.

Affirmed.

Justice [O'Connor](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0209675601&originatingDoc=I6b3923549c2511d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I6b3923549c2511d9bc61beebb95be672) filed a concurring opinion.

Justice [Breyer](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I6b3923549c2511d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I6b3923549c2511d9bc61beebb95be672) filed an opinion concurring in part and concurring in judgment.

Justice [Thomas](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I6b3923549c2511d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I6b3923549c2511d9bc61beebb95be672) filed a dissenting opinion in which Justices [Stevens](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0156277701&originatingDoc=I6b3923549c2511d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I6b3923549c2511d9bc61beebb95be672), [Souter](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0263202201&originatingDoc=I6b3923549c2511d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I6b3923549c2511d9bc61beebb95be672), and [Ginsburg](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I6b3923549c2511d9bc61beebb95be672&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)&analyticGuid=I6b3923549c2511d9bc61beebb95be672) joined.

# Alleyne v. United States

#### United States Supreme Court 570 U.S. 99 (2013)

#### Rule of Law

**Under the Sixth Amendment, any fact that increases the mandatory minimum sentence of a crime is an element of the crime that must be submitted to the jury and proven beyond a reasonable doubt.**

#### Facts

Allen Ryan Alleyne (defendant) was charged with holding up a storeowner, while the storeowner was driving his store’s deposits to the bank. Alleyne’s accomplice had approached the car with a gun. The federal statute prohibiting using or carrying a firearm in relation to a crime of violence provided for the following minimum sentences, depending on the nature of the use of the gun: (1) five years for simply carrying the gun, (2) seven years for brandishing the gun, and (3) ten years for discharging the gun. The jury found that Alleyne had used or carried the firearm as part of the crime, but did not specify which level of mandatory minimum sentencing applied. During sentencing, the district court judge found that Alleyne had brandished the gun and sentenced him to seven years in prison. Alleyne appealed, arguing that the sentence violated his Sixth Amendment right to trial by jury, because the jury had not found that he brandished the gun. The United States Court of Appeals for the Fourth Circuit affirmed, based on*Harris v. United States*, 536 U.S. 545 (2002). The United States Supreme Court granted certiorari.

#### Issue

Is a fact that increases the mandatory minimum sentence of a crime an element of the crime that must be submitted to the jury and proven beyond a reasonable doubt?

#### Holding and Reasoning (Thomas, J.)

Yes. In *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Court held that facts constitute elements of a crime and thus must be submitted to the jury if they “increase the prescribed range of penalties to which a criminal defendant is exposed.” Subsequently, *Harris* distinguished facts that increase the mandatory minimum sentence from facts that increase the mandatory maximum sentence. The *Harris*Court held that facts that increase the mandatory minimum sentence of a crime need not be submitted to a jury.The Court’s holding in *Harris* is inconsistent with its holding in *Apprendi*. A fact that increases a mandatory minimum sentence “increase[s] the prescribed range of penalties to which a criminal defendant is exposed.” Accordingly, *Harris*is hereby overruled. Any fact that increases the mandatory minimum sentence of a crime is an element of the crime that must be submitted to the jury and proven beyond a reasonable doubt. In this case, the fact that Alleyne’s accomplice brandished the gun increased Alleyne’s mandatory minimum sentence from five to seven years. As a result, under the Sixth Amendment and *Apprendi*, that fact was an element of the crime and was required to be found by a jury beyond a reasonable doubt. The jury did not make such a finding, but rather the district court judge made the finding. This violated Alleyne’s Sixth Amendment right. The judgment of the court of appeals is vacated, and the case is remanded for a jury determination of whether Alleyne’s accomplice brandished the gun.

#### Concurrence (Breyer, J.)

*Apprendi*was incorrect, because it improperly removed a distinction between elements of a crime and sentencing facts. However, *Harris* and *Apprendi* have now been in existence for over a decade, despite the legal anomaly that these cases created. Overruling of *Harris*is appropriate to eliminate this anomaly.

#### Concurrence (Sotomayor, J.)

Under *Apprendi*, facts that increase the statutory minimum of a sentence are no different than facts that increase the statutory maximum of a sentence: they must be proven beyond a reasonable doubt as determined by a jury.

#### Dissent (Alito, J.)

*Apprendi* should be overruled. *Apprendi* was based on a misconstruction of the intent of the Sixth Amendment.

#### Dissent (Roberts, J.)

Five years was a minimumsentence for the crime of using or carrying a firearm in relation to a crime of violence. Accordingly, based on the jury’s fact finding, the judge could have sentenced Alleyne to seven years in prison whether or not the judge found that his accomplice had brandished the gun. That the judge happened to determine that the gun was brandished before he imposed a seven-year sentence is irrelevant to Alleyne’s Sixth Amendment right, because the judge was fully entitled under the statute to impose a sentence of seven years, regardless. The intent of the Sixth Amendment was to protect criminal defendants from the power of the government. The majority transforms this protection into a protection from the legislature that wrote the law imposing the mandatory minimum sentences.

**Key Terms:**

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

**Right to Trial by Jury Clause** - Guarantee contained in the Sixth Amendment that any criminal defendant is entitled to have his case heard by an unbiased, local jury.

**Schriro v. Summerlin**

124 S.Ct. 2519

Supreme Court of the United States

**Dora B. SCHRIRO, Director, Arizona Department of Corrections, Petitioner,**

**v.**

**Warren Wesley SUMMERLIN.**

No. 03-526.

Argued April 19, 2004.Decided June 24, 2004.

## Synopsis

**Background:** Following affirmance, [138 Ariz. 426, 675 P.2d 686,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1984104000&pubNum=661&originatingDoc=I72f202e19c9a11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) of his convictions for first degree murder and sexual assault, and his sentence of death, defendant sought habeas corpus relief. The United States District Court for the District of Arizona, [Roslyn O. Silver](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0112798901&originatingDoc=I72f202e19c9a11d991d0cc6b54f12d4d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I72f202e19c9a11d991d0cc6b54f12d4d), J., denied the writ. The United States Court of Appeals for the Ninth Circuit, [Thomas](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I72f202e19c9a11d991d0cc6b54f12d4d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I72f202e19c9a11d991d0cc6b54f12d4d), Circuit Judge, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Icf84dfb689e811d9903eeb4634b8d78e&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[341 F.3d 1082,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2003598472&pubNum=506&originatingDoc=I72f202e19c9a11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed the district court's judgment as to the conviction but invalidated death penalty. Certiorari was granted.

**Holdings:** The Supreme Court, Justice [Scalia](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254763301&originatingDoc=I72f202e19c9a11d991d0cc6b54f12d4d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I72f202e19c9a11d991d0cc6b54f12d4d), held that:

[1](https://1.next.westlaw.com/Document/I72f202e19c9a11d991d0cc6b54f12d4d/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_anchor_F82004622663) Supreme Court's decision in [Ring v. Arizona](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002390142&originatingDoc=I72f202e19c9a11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) was properly classified as procedural rather than substantive, and thus did not apply retroactively to death penalty case already final on direct review, and

[2](https://1.next.westlaw.com/Document/I72f202e19c9a11d991d0cc6b54f12d4d/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_anchor_F102004622663) [Ring v. Arizona](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2002390142&originatingDoc=I72f202e19c9a11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) did not announce a watershed rule of criminal procedure.

Reversed and remanded.

Justice [Breyer](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I72f202e19c9a11d991d0cc6b54f12d4d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I72f202e19c9a11d991d0cc6b54f12d4d), with whom Justice [Stevens](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0156277701&originatingDoc=I72f202e19c9a11d991d0cc6b54f12d4d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I72f202e19c9a11d991d0cc6b54f12d4d), Justice [Souter](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0263202201&originatingDoc=I72f202e19c9a11d991d0cc6b54f12d4d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I72f202e19c9a11d991d0cc6b54f12d4d), and Justice [Ginsburg](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I72f202e19c9a11d991d0cc6b54f12d4d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I72f202e19c9a11d991d0cc6b54f12d4d) joined, dissented and filed opinion.

# United States v. Booker

#### United States Supreme Court 543 U.S. 220 (2005)

#### Rule of Law

**(1) The enhancement of a sentence under the Federal Sentencing Guidelines based on judicial findings of fact by a preponderance of the evidence violates the Sixth Amendment.  
(2) The United States Sentencing Guidelines are not mandatory.**

# Mistretta v. United States

#### United States Supreme Court 488 U.S. 361 (1989)

#### Rule of Law

**Congress may delegate authority to set sentencing guidelines to a judicial commission, provided that it gives an intelligible principle to guide the commission and does not aggrandize the judicial branch at the expense of another branch.**

#### Facts

Congress enacted the Sentencing Reform Act of 1984 (the Act) to combat serious disparities in sentencing for criminal punishment. The Act: (1) rejects rehabilitation and declares that punishment should be “retributive, educational, deterrent, and incapacitative”; (2) creates the United States Sentencing Commission (Commission), which sets sentencing guidelines (Guidelines); (3) makes sentences essentially final; (4) imposes the Guidelines on federal courts; and (5) authorizes limited appellate review of sentences. The Commission is an independent body in the judicial branch comprised of members appointed by the president. At least three members must be judges. The Commission must set, review, and revise the Guidelines, report to Congress, set policies, and monitor and train judicial actors. Here, John Mistretta (defendant) was indicted in federal court on drug charges. Mistretta moved for a declaration that the Guidelines were unconstitutional on the grounds that the Act violated the separation of powers and nondelegation doctrines. The district court concluded that the Commission should be treated as an executive branch entity and the Guidelines as agency rules. Though the court expressed reservations about the Act, it rejected Mistretta’s argument. Mistretta pled guilty and was sentenced to prison, pursuant to the Guidelines. Mistretta filed notice of appeal. Before the Eighth Circuit ruled, Mistretta and the government petitioned the United States Supreme Court for certiorari, which was granted on the basis of “imperative public importance.”

#### Issue

Is the creation of a judicial commission to set mandatory sentencing guidelines for federal criminal convictions constitutional?

#### Holding and Reasoning (Blackmun, J.)

Yes. The Constitution vests legislative authority in Congress. U. S. Const., Art. I, § 1. Under the nondelegation doctrine, Congress may not delegate its legislative authority to other branches. That said, it would be impossible for Congress to do its job without some delegation. Congress may delegate authority, so long as it provides an “intelligible principle” to control the agency or actor. J*. W. Hampton, Jr., & Co. v. United States*, 276 U. S. 394 (1928). There is a long line of cases upholding such delegations. Next, separation of powers between branches is necessary to ensure liberty, *see*The Federalist No. 47 (James Madison), but this does not mean the branches must be hermetically sealed. The branches may cooperate and work together, but a system of checks and balances ensures that one branch does not aggrandize itself to the detriment of another. *See Buckley v. Valeo*, 424 U. S. 1 (1976). The Court has had no difficulty striking down attempts by one branch to usurp another’s power. With respect to the judicial branch, the Court has been weary of duties that would be more appropriate for political branches or threats to judicial integrity. Here, Congress’s delegation to the Commission was constitutional. Congress outlined the goals and purposes of the Commission and the means for accomplishing them. Congress provided factors for the Commission’s consideration in setting the Guidelines. Though the Commission has a great deal of discretion, there are standards for guiding its judgment. *See Yakus v. United States*, 321 U. S. 414 (1944). Congress has given the Commission an intelligible principle. This “intricate, labor-intensive task” is exactly the sort that ought to be delegated. Though the Commission does raise separation of powers concerns, the principle is not violated. While executive or administrative duties may not be imposed on judges, *Morrison v. Olsen*, 487 U.S. 654 (1988), judicial rulemaking is not per se invalid. *See Sibbach v. Wilson & Co.*, 312 U. S. 1 (1941). The judicial power under the Constitution is limited to cases and controversies, but it is proper to vest judges with rulemaking authority over inherently judicial functions. Responsibility for sentencing is uniquely shared among the branches, but Congress’s determination that judges should be given authority to set the Guidelines comports with the principally judicial nature of the activity. The Commission is independent of the courts and accountable to Congress. Judges make sentencing decisions everyday; creating the Commission did not “aggrandize” the judicial branch. In light of all this, the Act is constitutional. The ruling of the district court is affirmed.

#### Dissent (Scalia, J.)

The so-called guidelines set by the Commission have the force of law. Congress has no right to delegate law-making power to an outside commission, and the Act is thus unconstitutional. The Commission was vested with power over individual rights. Though Congress provided guidance for the Commission, the Commission could and did stray from previous statutory punishments. The nondelegation doctrine is essential to a democratic form of government. Such delegations are not well suited to review by courts. The Court is loath to “second-guess Congress regarding the permissible degree of policy judgment” that may be delegated. The problem here is not the lack of an intelligible guiding principle. The executive and legislative branches must naturally exercise some amount of discretion, which is really a type of lawmaking, ancillary to their traditional functions. Congress’s authority to delegate is really about setting limits on that discretion. Congress has no right to delegate any of its legislative authority, but that is what has happened here. No guiding principle can legitimate that. The idea that the Commission is located within the judicial branch is in and of itself problematic. The Commission is not a court nor subject to the courts’ control. The Constitution provides the structure of our government and sets the permissible ways in which the branches may commingle. The Act goes far beyond this and creates “a sort of junior-varsity Congress.” The judgment of the district court should be reversed.

**Key Terms:**

**Separation of Powers -** The doctrine, based on the constitutional division of power among the executive, legislative, and judicial branches of government, that prevents any one branch from exercising an excessive amount of power. Through checks and balances, each branch of government has some ability to restrain the other two.

**United States Sentencing Commission -** An independent agency of the federal judiciary responsible for promulgating the federal sentencing guidelines.

**Nondelegation Doctrine -** Congress cannot delegate its legislative powers to administrative agencies. When authorizing agencies to regulate, Congress must provide them with an “intelligible principle” upon which to base their regulations.

# \*\*MCCLESKY v. KEMP\*\*

#### United States Supreme Court 481 U.S. 279 (1987)

#### Rule of Law

**A criminal defendant alleging an equal protection violation must prove the existence of a discriminatory purpose and a racially disproportionate and discriminatory effect.**

#### Facts

McCleskey (defendant), an African American man, was convicted of two counts of armed robbery and one count of murdering a Caucasian police officer in Atlanta, Georgia. At trial, the jury recommended that McCleskey be sentenced to death on the murder charge and two consecutive life sentences on the armed robbery charges. The court followed this recommendation and sentenced McCleskey to death. McCleskey filed a petition for a writ of habeas corpus in federal district court, alleging that Georgia’s capital sentencing process was administered in a racially discriminatory manner in violation of the Eighth and Fourteenth Amendments to the United States Constitution. To support his claim, McCleskey offered a statistical study that purported to prove a disparity in the imposition of death sentences in Georgia based on the race of the murder victim and the race of the defendant. For example, the study concluded that in instances where a Caucasian victim was killed by an African American defendant, the defendant was twenty-two times more likely to be sentenced to death than if the victim was also African American. The study also suggested that prosecutors were significantly more likely to seek the death penalty for African American defendants than for Caucasian defendants. The district court denied McCleskey’s claim based on the study, and the court of appeals affirmed. The United States Supreme Court granted certiorari.

#### Issue

Does statistical data that suggests racial motivations enter into capital sentencing determinations constitute an equal protection violation if a jury convicts the defendant?

#### Holding and Reasoning (Powell, J.)

No. A criminal defendant alleging an equal protection violation has the burden of proving the existence of purposeful discrimination and that the purposeful discrimination had a discriminatory effect on him. McCleskey must prove that the decisionmakers in his case acted with a discriminatory purpose. McCleskey offers no evidence to prove this claim, relying entirely on the study results. If the study findings are accepted as evidence, then an equal protection violation would occur in every instance in which an African American defendant is sentenced to death for murdering a Caucasian victim. McCleskey argues that the study proves that the State of Georgia, as a whole, acted with a discriminatory purpose in adopting the capital punishment statute and allowing it to remain in force despite its allegedly discriminatory application. A discriminatory purpose implies that the decisionmaker selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group. McCleskey offers no evidence that the Georgia state legislature enacted the death penalty statute because of an anticipated racially discriminatory effect. The decision of the court of appeals is affirmed.

#### Dissent (Brennan, J.)

The majority simply cannot ignore the overwhelming statistical significance of the death penalty study, which confirms that race plays a major role in determining whether a defendant will be sentenced to death. History confirms that Georgia practices a race-conscious criminal justice system dating back to the Civil War era. Portions of the Georgia capital sentencing system already have been invalidated for furthering racial discrimination three times over the past fifteen years.

#### Dissent (Blackmun, J.)

The majority upholds discriminatory practices pervasive in the Georgia criminal justice system as a whole. Fourteenth Amendment protections against racial discrimination are particularly important for criminal defendants in the courtroom because they are necessary to maintain the appearance of justice and the integrity of the judicial process. Preventing racial discrimination in the criminal justice process was one of the primary concerns of the drafters when enacting the Fourteenth Amendment, as the consequences of allowing racial bias to influence criminal sentencing decisions is particularly harmful.

# United States v. Booker

#### United States Supreme Court 543 U.S. 220 (2005)

#### Rule of Law

**(1) The enhancement of a sentence under the Federal Sentencing Guidelines based on judicial findings of fact by a preponderance of the evidence violates the Sixth Amendment.  
(2) The United States Sentencing Guidelines are not mandatory.**

# Rita v. United States

#### United States Supreme Court 551 U.S. 338 (2007)

#### Rule of Law

**A court of appeals may apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Federal Sentencing Guidelines.**

#### Facts

Rita (defendant) was convicted of charges related to the obstruction of a federal investigation. At sentencing, the judge considered a presentence report and the evidence and arguments of the parties. The judge sentenced Rita to the minimum sentence set forth in the applicable federal sentencing guidelines. Rita appealed on grounds that the sentence was unreasonable because it failed to take account of his personal history and character and because it was excessive relative to the goals of the federal sentencing statute. The court of appeals acknowledged precedent requiring it to set aside an unreasonable sentence, but afforded a presumption of reasonableness to any sentence imposed within the parameters of established sentencing guidelines. The court of appeals upheld Rita’s sentence and Rita petitioned the United States Supreme Court for review.

#### Issue

May a court of appeals apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Federal Sentencing Guidelines?

#### Holding and Reasoning (Breyer, J.)

Yes. A court of appeals may apply a presumption of reasonableness to a district court sentence that reflects a proper application of the Federal Sentencing Guidelines. The presumption reflects the fact that the sentencing judge reached the same conclusion as the United States Sentencing Commission and that duplicate approval increases the likelihood that the sentence is reasonable. The Commission was directed to implement guidelines that promote fairness and reduce disparity in sentencing. The Commission engaged in extensive research and cooperation with interested agencies to develop guidelines that would achieve those goals. The district court is required to consider the guidelines in its sentencing determination, but is not entitled to apply a presumption of reasonableness at sentencing. The district court must take into account all the evidence presented by the parties and in a presentence report. The sentencing determination is subject to the full adversarial process. The presumption arises only upon appellate review, at which stage the “reasonableness” standard reflects an inquiry into whether the district court abused its discretion. Rita argues that affording a presumption of reasonableness to application of the guidelines will lead to an increase in judges’ reliance on facts not proved to the jury to unfairly apply penalty enhancements under the guidelines. Rita’s Sixth Amendment concerns are unfounded. The Constitution does not forbid a judge from considering factual matters outside the realm of the jury when determining an appropriate sentence. A defendant’s Sixth Amendment right to a jury trial is violated only when the force of law requires a judge to consider facts not proved to the jury as grounds for increasing a sentence. The district judge properly analyzed the relevant sentencing factors and sufficiently stated the reasons for his sentencing decision on the record. The need for a judge to elaborate on a sentencing decision is reduced when the judge has based the decision on the considerations embodied in the guidelines. The judge considered Rita’s background and personal circumstances and heard the arguments of both parties. The judge concluded that the bottom end of the applicable sentencing guidelines was appropriate. The judgment of the court of appeals is affirmed.

#### Concurrence (Stevens, J.)

In *United States v. Booker*, 543 U.S. 220 (2005), we invalidated a statutory imposition of *de novo*review of a district court’s sentencing decision and replaced it with today’s standard of reasonableness review. The reasonableness review affords deference to the trial court’s findings of fact and amounts to an abuse-of-discretion standard. I disagree with the view of Justices Scalia and Souter that the reasonableness standard is merely a procedural review standard. I believe it encompasses a substantive aspect that requires the appellate court to consider all the factors that the district court is authorized to consider in its sentencing decision. I believe the district court erred in not giving any consideration to certain aspects of Rita’s background, such as his long and distinguished history of military service. Nonetheless, I agree that adherence to the guidelines is deserving of some weight and I join the court’s opinion in the interest of affording due respect to the considerations of the trial court.

#### Dissent (Scalia, J.)

The majority opinion does nothing to explain what the reasonableness standard of review entails. This opinion also does nothing to distinguish a permissible sentence under the guidelines from one that could be made outside the guidelines by a judge relying exclusively on facts admitted by the defendant or proved to a jury. We addressed this issue in *Booker* at which time I recommended keeping the mandatory guidelines in place and remedying the Sixth Amendment violations by requiring proof to a jury of every fact necessary to sustain a sentence under the applicable guidelines. The judge is now required to find facts outside the jury, such as use of a deadly weapon or the infliction of serious injury, in order to sustain a conviction at the maximum end of the guidelines. A judge’s decision to impose a maximum sentence in the absence of reliance upon and explanation of those exacerbating factors would certainly be reversed. The Sixth Amendment does not require facts to be proved to a jury in order for a judge to permissibly consider those facts as relevant to a sentencing decision. I do not suggest that affording a presumption of reasonableness to a decision based on the sentencing guidelines makes judge-found facts unconstitutionally essential to a sentence imposed in accordance with the guidelines. I do believe, however, that a standard of substantive reasonableness will inevitably result in some cases in which the reasonableness of a sentencing decision depends entirely upon judge-found facts. In that event, the judge-found fact becomes a legal necessity to the sentence imposed, which is precisely the condition this Court deemed a violation of the Sixth Amendment right to trial by jury in *Booker*and in *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Court’s imposition of a substantive reasonableness review standard poses the same constitutional infirmities as the mandatory guideline legislation we have already struck down. Restricting the analysis to procedural review would reconcile the *Booker* opinion and advance the goal of promoting uniformity in sentencing.

#### Dissent (Souter, J.)

In *Apprendi v. New Jersey,* 530 U.S. 466 (2000), we held that any fact necessary to support a deviation from a statutory maximum penalty must be proved to the jury beyond a reasonable doubt. The Federal Sentencing Guidelines establish sentencing ranges for various crimes and divide those ranges into subranges based on the facts of the case and the defendant’s background. In *Blakely v. Washington*, 542 U.S. 296 (2004), we applied the holding of *Apprendi* to mandatory sentencing guidelines. In *Booker*, we applied the holding of *Blakely* to conclude that the Federal Sentencing Guidelines impermissibly subjected defendants to sentencing at the high end of subranges based upon evidence not proved to a jury. In order to preserve a system of sentencing guidelines, we had to choose between imposing the requirement that all facts necessary to support a sentence be proved to the jury and invalidating the provisions of the law that made adherence to the guidelines mandatory. We chose to declare the guidelines advisory, with the result that any judge-found fact relevant to a sentencing decision could now be deemed one of many discretionary factors as opposed to a legal requirement essential to the sentencing determination. Unfortunately, that decision led back toward the path of disuniformity in sentencing that Congress attempted to remedy with mandatory guidelines. To afford a presumption of reasonableness to the guidelines once again imposes a requirement upon judges to find additional facts in support of a high-range sentence and threatens the same diminution of the right to a jury trial that we cited as grounds for striking down sentencing mandates. We cannot retain the Sixth Amendment protections we strove to achieve in *Apprendi* while affording a presumption in favor of the guidelines. I reject the presumption and hope that Congress will act to remedy the statutory scheme by passing a legislative requirement that sentences be supported by facts proved to a jury.

**Key Terms:**

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

# Loving v. Virginia

#### United States Supreme Court 388 U.S. 1 (1967)

#### Rule of Law

**A state may not restrict marriages between persons solely on the basis of race under the Equal Protection and Due Process Clauses of the Fourteenth Amendment.**

#### Facts

In June 1958, Mildred Jeter, an African American woman, and Richard Loving, a Caucasian man (defendants), were married in the District of Columbia pursuant to its laws. They later moved to Virginia (plaintiff) and resided in Caroline County. The laws of Virginia, however, banned interracial marriages within the state. In October 1958, the Lovings were indicted for violating the Virginia law. They plead guilty and were sentenced to one year in jail, but the trial court suspended the sentence for twenty-five years on the condition that the Lovings would leave Virginia and not return to the state together for twenty-five years. The Lovings then moved to the District of Columbia, but filed suit in state trial court to vacate the judgment against them on the grounds that it violated the Equal Protection and Due Process Clauses of the Fourteenth Amendment. The Supreme Court of Appeals affirmed the constitutionality of the Virginia statutes and upheld the convictions. The Lovings appealed to the United States Supreme Court.

#### Issue

May a state enact a statute that prevents marriages between persons solely on the basis of racial classification without violating the Equal Protection and Due Process Clauses of the Fourteenth Amendment?

#### Holding and Reasoning (Warren, C.J.)

No. State bans on interracial marriages were passed as a reaction to slavery and have been present since the colonial period. Such bans were affirmed by the Racial Integrity Act of 1924, passed during a period of extreme nativism following World War I. However, in the fifteen years preceding the Lovings’ case, fourteen states had repealed their own similar bans on interracial marriage. In the present case, the Commonwealth of Virginia seeks to uphold its interracial marriage ban on the grounds that it furthers a legitimate state purpose of preserving racial integrity and preserving racial pride. Virginia also argues that the regulation of marriage has traditionally been left to the states under the Tenth Amendment. Finally, Virginia argues that the meaning of the Equal Protection Clause suggested that it is only obligated to apply its laws equally among different groups of people. Thus, it argues that it is complying with its obligation by preventing interracial marriage for all people, not just Caucasians. The argument that the mere equal application of a law is enough to overcome the Fourteenth Amendment’s prohibition on invidious racial discrimination is rejected. Virginia’s statute is motivated solely to restrict marriage based on race, and by precedent, such laws have been found to be a threat to equality. At the very least such race-based classifications are subject to strict scrutiny and cannot be upheld unless they are shown to accomplish a permissible state objective independent of the racial discrimination. In the present case, there is no legitimate overriding purpose independent of invidious racial discrimination that justifies Virginia’s classification. The Virginia statutes violate the Equal Protection and Due Process Clauses of the Fourteenth Amendment, and the judgment of the court of appeals is reversed.

#### Concurrence (Stewart, J.)

As expressed in *McLaughlin v. Florida*, 379 U.S. 184 (1964), and restated here, “it is simply not possible for a state law to be valid under our Constitution which makes the criminality of an act depend on the race of the actor.”

**Key Terms:**

**Fourteenth Amendment Due Process** **Clause** - The provision set forth at Amendment XIV, Section 1 of the United States Constitution prohibiting states from depriving any person of life, liberty, or property by means that are arbitrary or fundamentally unfair.

**Strict Scrutiny -** The most demanding standard of judicial review used by courts. Strict scrutiny review requires that the law or policy being challenged supports a compelling governmental interest, is narrowly tailored to achieve that interest, and is the least restrictive means available to achieve that interest.

# McGowan v. Maryland

#### Supreme Court of the United States 366 U.S. 420 (1961)

#### Rule of Law

**A state law that criminalizes engaging in certain employment and commercial activities on Sunday does not violate the First Amendment when its purpose is not to aid religion.**

#### Facts

McGowan (defendant) and six other employees of a discount retail store were indicted under a law of the state of Maryland (plaintiff) that prohibited the sale of all merchandise on Sunday except for a limited list of permissible items. The employees appealed the indictment on grounds that the law violated the separation of church and state and the Establishment Clause of the First Amendment. The indictments were upheld by the state supreme court. The employees petitioned the United States Supreme Court for review.

#### Issue

Does a state law that criminalizes engaging in certain employment and commercial activities on Sunday violate the First Amendment when its purpose is not to aid religion?

#### Holding and Reasoning (Warren, J.)

No. A state law that criminalizes engaging in certain employment and commercial activities on Sunday does not violate the First Amendment when its purpose is not to aid religion. Historically, laws restricting Sunday labor had a religious purpose, but the question is whether the current laws still retain that religious character. The title of the applicable section of the state code is “Sabbath Breaking”, and certain sections prohibit activities on the “Lord’s Day” and refer to Sunday as the “Sabbath Day”. The laws also impose prohibitions on particular activities at certain times of the day on Sundays, which happen to correspond to the typical hours during which Christian church services are held. In addition, the laws prohibit the practice of even those activities allowed under the Sunday law within 100 feet of any ongoing religious service in certain locations. There is no other evidence that the laws are intended to promote a religious purpose and, on the whole, it cannot be said that the current laws are a reiteration of their religiously oriented predecessors. One section of the law does refer to “profaning the Lord’s day”, but other sections of the law actually permit activities historically regarded as profane. The state supreme court determined that the purpose of the law was not to promote religion, but to recognize a day for rest and recreation. The state court’s view finds support in the fact that the current laws provide a host of exemptions for activities that formerly were prohibited. The state could have left the choice of a day of rest to the individual, but its purpose was to designate one particular day of the week in which the community as a whole could enjoy general quiet and the opportunity to engage with friends and family. The state supreme court decision is affirmed.

#### Concurrence (Frankfurter, J.)

The analysis of state law turns on the actual effect of the law, not the mindset of legislators. If the primary effect of a law is to promote religion, the law exceeds the scope of state authority. Likewise, if a law serves both secular and religious purposes when the secular purposes could be accomplished without also advancing the religious purposes, the law must be held void. The state may, however, extend to religious pursuits the same benefits it extends to all. We cannot assume the existence of improper motive underlying a constitutionally valid exercise of state power.

#### Dissent (Douglas, J.)

The Establishment Clause protects citizens from any law that advances a particular religious ideology through the exercise of state power. The government cannot criminalize the failure to observe religious proscriptions any more than it can mandate adherence to particular religious observances.

**Key Terms:**

**Establishment Clause -** The provision of the First Amendment of the United States Constitution that prohibits the government from making laws that establish or favor a religion, or no religion

**First Amendment** - Guarantees that the government will not abridge freedoms of the press, religion, and speech; the right to peacefully assemble; and the right to petition the government to remedy grievances.

**Oyler v. Boles**

82 S.Ct. 501

Supreme Court of the United States

**James W. OYLER, Petitioner,**

**v.**

**Otto C. BOLES, Warden.**

**Paul H. CRABTREE, Petitioner,**

**v.**

**Otto C. BOLES, Warden.**

Nos. 56 and 57.

Argued Dec. 4, 1961.Decided Feb. 19, 1962.

## Synopsis

State prisoners' habeas corpus proceedings commenced in the Supreme Court of Appeals of West Virginia challenging validity of proceedings, under recidivist statute, against them. After relief was denied in the state proceedings, certiorari was granted in each case. The Supreme Court, Mr. Justice Clark, held, inter alia, that conscious exercise of some selectivity by state prosecuting authorities in application of West Virginia recidivist statute was not, in itself, a violation of equal protection of laws absent selection deliberately based upon unjustifiable standards such as race, religion, or other arbitrary classification.

Affirmed.

Mr. Chief Justice Warren, Mr. Justice Douglas, Mr. Justice Black and Mr. Justice Brennan dissented.

# Batson v. Kentucky

#### United States Supreme Court 476 U.S. 79 (1986)

#### Rule of Law

**The Equal Protection Clause of the Fourteenth Amendment prohibits prosecutors from using peremptory challenges to remove prospective jurors based on their race.**

# Gregg v. Georgia

#### United States Supreme Court 428 U.S. 153 (1976)

#### Rule of Law

**The death penalty is not a per se violation of the Eighth and Fourteenth Amendments to the federal constitution but should be imposed under sentencing procedures to avoid capricious or indiscriminate use.**

#### Facts

Gregg (defendant) was convicted by a jury on two counts of armed robbery and two counts of murder. After the verdicts were handed down, a penalty hearing was conducted before the same jury, which imposed the death penalty. The Georgia Supreme Court set aside the death sentence for armed robbery on the ground that capital punishment had rarely been utilized for that crime, but upheld the death penalty for the murder conviction. The U.S. Supreme Court granted certiorari to review.

#### Issue

Is the death penalty a per se violation of the Eighth and Fourteenth Amendments to the federal constitution?

#### Holding and Reasoning (Stewart, J.)

No. The punishment of death for the crime of murder, under all circumstances, does not constitute “cruel and unusual” punishment in violation of the Eighth and Fourteenth Amendments to the federal constitution. Precedent dictates, however, that what is and what is not “cruel and unusual” is a fluid concept and must be analyzed against the evolving standards of decency that mark the progress of a maturing society. *See* *Trop v. Dulles*, 356 U.S. 86, 101 (1958). A penalty must also accord with “the dignity of man,” and must not be “excessive.” *Id.* at 100. To determine “excessive,” the punishment must not involve the unnecessary and wanton infliction of pain and must not be grossly out of proportion to the severity of the crime. Despite claims that the “standards of decency” in the United States are to the point where the death penalty should not be tolerated, a large proportion of American society continues to regard it as an appropriate and necessary sanction. At least 35 state legislatures currently have laws endorsing the death penalty as punishment for the murder of an individual. It is often the reluctance of juries to impose the death penalty as punishment reflects the feeling that it should be reserved in the most extreme of cases. The death penalty serves two social purposes: retribution and deterrence of capital crimes by others. Retribution reflects society’s outrage at particular conduct and is often essential in an ordered society. Statistical attempts to evaluate the deterrence effect of the death penalty have proven inconclusive. The concept of deterrence is a complex factual issue which should reside with the legislatures. Moreover, legislatures should carefully draft any death penalty law so as to avoid the punishment being carried out in a capricious or arbitrary manner. Georgia’s capital punishment law states that all persons convicted of murder “shall be punished by death or by imprisonment for life.” Georgia further narrowed applicability of the death penalty by adding 10 statutory aggravating circumstances, one of which must be found by the jury to exist beyond a reasonable doubt before the penalty may be imposed. Additionally, the jury is authorized to consider any other appropriate aggravating or mitigating circumstances. Georgia’s requirements satisfy the concerns of avoiding arbitrary imposition of the death penalty as required by *Furman v. Georgia*, 408 U.S. 238 (1972). The Court in *Furman* held only that, in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders, the decision to impose it had to be guided by standards so that the sentencing authority would focus on the particularized circumstances of the crime and the defendant. The statutory system under which Gregg was sentenced is constitutional. The judgment of the Georgia Supreme Court is affirmed.

#### Dissent (Marshall, J.)

The constitutionality of the death penalty turns on the opinion of an informed citizenry. Currently, the American people are largely unaware of the information critical to a judgment on the morality of the death penalty. If the citizenry were better informed, it would be shocked and would deem the death penalty unacceptable. The Court proffers two purposes to retain implementation of the death penalty, namely general deterrence and retribution. However, both arguments are unconvincing. To be sustained under the Eighth Amendment, the death penalty must “comport with the basic concept of human dignity at the core of the Amendment.” Under this standard, the taking of a life out of retribution fails the basic test because it denies the wrongdoer’s dignity and worth.

**Key Terms:**

**Cruel and Unusual Punishment -** Any criminal sanction that is barbaric, torturous, inhumane, or so disproportionate to the offense committed as to shock the conscience of the community.

# Furman v. Georgia

#### United States Supreme Court 408 U.S. 238 (1972)

#### Rule of Law

**The sentencing and execution of the death penalty in the petitioners' cases violate the Eighth Amendment prohibition of cruel and unusual punishment.**

#### Facts

Furman and others (defendants) were given the death penalty following convictions for murder and rape. The United States Supreme Court granted certiorari to determine whether imposition of the death penalty in the cases constituted cruel and unusual punishment.

#### Issue

Does the sentencing and execution of the death penalty in the petitioners' cases violate the Eighth Amendment prohibition of cruel and unusual punishment?

#### Holding and Reasoning (Per Curiam)

Yes. The application of the death penalty in these cases violates the Eighth Amendment's ban on cruel and unusual punishment. The judgments are reversed, and the cases are remanded for further proceedings.

#### Concurrence (Brennan, J.)

There are several principles that guide courts in determining whether a particular punishment is cruel and unusual. First, the punishment cannot be so severe that it degrades human dignity. This encompasses more than merely the pain or physical suffering inflicted by the punishment; it refers to punishment so barbaric that the recipient is treated as nonhuman. Second, the punishment cannot be inflicted arbitrarily. Third, the punishment must not be unacceptable to modern society. Finally, the punishment cannot be excessive. A punishment is excessive, or unnecessary, if another less severe punishment would be able to achieve the same punitive purpose. Applying these principles, the death penalty is a cruel and unusual punishment. It is unusually severe and degrading to human dignity, it is applied arbitrarily, it is viewed with significant doubt in contemporary society, and the less severe punishment of imprisonment would achieve the same punitive goals.

#### Concurrence (Marshall, J.)

The defendants’ crimes are heinous, but the issue is whether the death penalty is cruel and unusual punishment based on “evolving standards of decency.” Punishments once allowed may no longer be constitutional. Most states have capital punishment, but the use has been narrowed. The death penalty is likely unconscionable to most Americans. The penalty is inflicted unfairly on the bases of social class, minority membership, and gender. This country safeguards its fundamental principles of justice even in times of trouble. Doing away with the death penalty is a sign of the country’s advancement.

#### Concurrence (Stewart, J.)

Capital punishment is irreversible, contrary to the goal of rehabilitation, and denies humanity. The issue is not whether the death penalty is unconstitutional, but whether the defendants’ sentences are cruel and unusual. The sentences are cruel because they are harsher than necessary under state law and unusual because they have been arbitrarily applied to these but not other equally culpable offenders. The application of the death penalty here is unconstitutional.

#### Concurrence (Douglas, J.)

The death penalty is unusual because it is applied discriminatorily. Equal protection is a component of the ban of cruel and usual punishment. Studies have shown that the poor and minorities are more likely to be executed for crimes for which white or affluent people would be incarcerated. The Framers feared discriminatory punishment of dissidents. Judges and juries selectively impose death sentences out of bias. The Eighth Amendment demands that laws be written and applied fairly to all.

#### Concurrence (White, J.)

The death penalty is not necessarily unconstitutional, but the administration of the penalty here violates the Eighth Amendment.

#### Dissent (Rehnquist, J.)

The Court's decision exceeds the permissible bounds of judicial review and does not show proper deference to the judgment of elected legislators.

#### Dissent (Powell, J.)

For the first time, two members of the Court would hold capital punishment unconstitutional. Capital punishment is mentioned in the Constitution; the Framers cannot have intended the Eighth Amendment to bar it. The Court has never suggested the death penalty was unconstitutional. It is not clear that the public is against the death penalty, but that is an issue for the legislature. The poor and disenfranchised members of society are more likely to be put to death, but they are more likely to engage in criminal activity. That is a sad result of social inequality, but not grounds for holding the penalty unconstitutional.

#### Dissent (Burger, C.J.)

Capital punishment is not unconstitutional, and the Court does not have the legislative authority to ban it. The Framers intended to prohibit torture. No precedent of this Court has disputed the constitutionality of the penalty. The number of jurisdictions that permit the penalty, the legislatures’ judgments, and public polls suggest that death penalty is not unacceptable to the people. Capital punishment serves the legitimate state goals of incapacitation and deterrence, and it is not for the Court to demand proof. The Court leaves the question unanswered.

#### Dissent (Blackmun, J.)

As a matter of policy, the death penalty should be overturned. This must not influence the Court’s assessment of constitutionality.

**Key Terms:**

**Cruel and Unusual Punishment -** Any criminal sanction that is barbaric, torturous, inhumane, or so disproportionate to the offense committed as to shock the conscience of the community.

# Village of Arlington Heights v. Metropolitan Housing Development Corp.

#### United States Supreme Court 429 U.S. 252 (1977)

#### Rule of Law

**A state-sponsored racial classification will not be held to violate the Equal Protection Clause of the Fourteenth Amendment unless a plaintiff shows that the law is motivated by a discriminatory purpose and has a discriminatory impact.**

#### Facts

The Metropolitan Housing Development Corp. (MHDC) (plaintiff) applied for a permit from the Village of Arlington Heights (Village) (defendant) to rezone a fifteen-acre parcel of land from its zoning classification as a single-family use to a multiple-family use classification. MHDC planned to build a racially-integrated complex featuring nearly two hundred townhouse units marketed to low and moderate income tenants. The Village denied the permit request, and MHDC brought suit in federal district court alleging the denial of the permit was racially discriminatory and violated the Fourteenth Amendment and Fair Housing Act of 1968. The district court upheld the permit denial, but the court of appeals reversed. The United States Supreme Court granted certiorari.

#### Issue

Whether the Village’s denial of a zoning reclassification permit for a racially-integrated multi-family dwelling violates the Equal Protection Clause of the Fourteenth Amendment.

#### Holding and Reasoning (Powell, J.)

No. For its constitutional challenge to be upheld, MHDC must demonstrate both that the law is motivated by a discriminatory purpose and has a discriminatory impact. In determining the existence of a discriminatory purpose, several factors must be considered: (1) the historical background predating the decision; (2) the specific sequence of events leading up to the challenged classification; (3) departures by the state actor from normal procedures; (4) substantive departures, particularly if the factors usually considered important by the decisionmaker strongly point to a decision contrary to the one reached; and (5) the legislative or administrative history surrounding the adoption of the legislative classification. Nothing in the factual record indicates that the sequence of events leading up to the denial of the permit sparks suspicion. The property in question has been zoned exclusively for single-family use for decades. The vast majority of the Village is committed to single-family homes as its dominant residential land use. Additionally, the rezoning request was treated according to usual procedures, with the Village scheduling two additional hearings beyond what was common to reconsider the permit denial. Based on these facts, MHDC did not meet its required burden to show that the denial of its permit was motivated by a discriminatory purpose. The decision of the court of appeals is reversed as the permit denial is constitutional.

#### Concurrence/Dissent (Marshall, J.)

The entire case should be remanded to the court of appeals for reconsideration of the denial of the permit in light of the new standard outlined by the majority. The court of appeals is better situated to determine whether further district court proceedings are required to develop a more extensive factual record.

#### Dissent (White, J.)

Remand is necessary because the court of appeals never actually considered MHDC’s Fair Housing Act claim. Moreover, it is unnecessary for the majority to articulate such a lengthy standard for determining whether a discriminatory purpose exists. Both the district court and the court of appeals found that the permit denial furthered a legitimate state interest in preserving surrounding property values. The existence of this nondiscriminatory purpose itself justifies the permit denial. The judgment of the court of appeals should be vacated solely on the Fair Housing Act claim.

**Pulley v. Harris**

104 S.Ct. 871

Supreme Court of the United States

**R. PULLEY, Warden, Petitioner**

**v.**

**Robert Alton HARRIS.**

No. 82-1095.

Argued Nov. 7, 1983.Decided Jan. 23, 1984.

## Synopsis

State prisoner under sentence of death sought habeas corpus. The United States District Court for the Southern District of California, William B. Enright, J., denied relief. The Court of Appeals for the Ninth Circuit, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I19065193930e11d9bc61beebb95be672&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[692 F.2d 1189,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1982140581&pubNum=350&originatingDoc=I2366504d9c1e11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) reversed. On certiorari, the Supreme Court, Justice White, held that: (1) there was no basis for returning case to state court to consider statutory challenges to lack of proportionality review in California death sentence scheme; (2) Eighth Amendment does not require proportionality review by appellate court in every case in which it is requested by the defendant; and (3) California scheme for imposition of the death penalty is not rendered unconstitutional by absence of provision for proportionality review.

Reversed and remanded.

Justice Stevens filed an opinion concurring in part and concurring in the judgment.

Justice Brennan dissented and filed an opinion in which Justice Marshall joined.

# Turner v. Murray

#### United States Supreme Court 476 U.S. 28 (1986)

#### Rule of Law

**A capital defendant charged with an interracial crime is entitled to have potential jurors informed of the victim’s race and asked about racial bias during *voir dire*.**

#### Facts

Willie Turner (defendant) attempted to rob a jewelry store in Virginia. Turner demanded that the owner, W. Jack Smith, place money and jewelry into bags. Smith obeyed but triggered a silent alarm. When an officer arrived, Turner acquired the officer’s gun and shot and killed Smith. A grand jury indicted Turner on charges of capital murder. Turner proposed *voir dire* questions to the trial judge, including one question asking whether the fact that Turner was black and Smith was white affected the jury’s ability to make an impartial decision in the case. The judge rejected the question, and the jurors during *voir dire*remained unaware that Smith was white. The jury convicted Turner. In order to consider the death penalty under Virginia law, the jury was required to find that Turner was likely to commit future violent crimes or that Turner’s crime involved an outrageous depravity of mind. The jury was also required to consider any mitigating evidence offered by Turner. After the capital-sentencing hearing, during which Turner presented evidence of mental disturbance as a mitigating factor, the jury recommended the death penalty. Turner appealed the sentence, arguing that the trial judge had violated his constitutional right to a fair and impartial jury by declining to ask the proposed question during *voir dire*. The court disagreed with Turner, citing the United States Supreme Court’s decision in *Ristaino v. Ross*, 424 U.S. 589 (1976), which stated that a trial judge’s refusal to question jurors about potential racial biases was not unconstitutional unless there were special circumstances present. Turner petitioned for federal habeas corpus. The district court denied the petition, and the Court of Appeals for the Fourth Circuit affirmed.

#### Issue

Is a capital defendant charged with an interracial crime entitled to have potential jurors informed of the victim’s race and asked about racial bias during *voir dire*?

#### Holding and Reasoning (White, J.)

Yes. A capital defendant charged with an interracial crime is entitled to have potential jurors informed of the victim’s race and asked about racial bias during *voir dire*. Capital cases present special circumstances warranting questions on the issue of racial bias during *voir dire*. Under *Ristaino*, the simple fact that a defendant and a victim are of different races is not a special factor. However, capital cases present a unique situation, because the jury in such cases must make a very subjective individualized decision about whether the particular defendant deserves to be put to death. Because of this broad discretion, there is a special concern that racial prejudice may be present but go unnoticed. Therefore, a capital defendant involved in an interracial offense must have a chance to question prospective jurors about racial biases during *voir dire*. Here, a juror who had preconceptions about black individuals being violent may have unfairly factored this belief into his or her decision of whether Turner’s crime involved any aggravating factors. Such a juror may have also been less receptive to Turner’s evidence and may have preferred the death penalty due to subconscious bias. Because the *voir dire* in this case was constitutionally deficient, Turner’s death sentence should be vacated. However, Turner is not entitled to a new trial on the issue of guilt, because the special factors present in the sentencing phase were not present in the guilt phase. Accordingly, the judgment of the court of appeals is reversed, and the case is remanded.

#### Concurrence/Dissent (Brennan, J.)

A racially biased juror cannot fairly make a determination during the guilt phase of a trial or during a capital-sentencing proceeding. Therefore, both Turner’s death sentence and conviction should be reversed to guarantee Turner’s constitutional right to an impartial jury.

#### Dissent (Powell, J.)

[Information not provided in casebook excerpt.]

#### Dissent (Marshall, J.)

[Information not provided in casebook excerpt.]

**Key Terms:**

**Voir Dire** - French meaning “to speak the truth,” the process by which the judge or an attorney questions a potential juror to assess the person’s suitability for sitting on the jury. Voir dire also may be used to qualify a witness as an expert during trial, or to explore certain aspects of a witness’s testimony out of the jury’s presence.

**Right to Trial by Jury Clause** - Guarantee contained in the Sixth Amendment that any criminal defendant is entitled to have his case heard by an unbiased, local jury.

# Singer v. United States

#### United States Supreme Court 380 U.S. 24 (1965)

#### Rule of Law

**A criminal defendant does not have a constitutional right to waive the right to a jury trial in favor of a bench trial.**

#### Facts

Singer (defendant) was charged by the United States government (plaintiff) in federal district court with 30 counts of mail fraud. At the start of the scheduled jury trial, Singer offered to waive his right to a jury trial in order to save time. Rule 23(a) of the Federal Rules of Criminal Procedure (FRCP) allows a defendant to waive the right to a jury trial with the approval of the court and the consent of the government. The trial court was willing to approve the waiver, but the government refused to consent. Singer was convicted by a jury on 29 of the 30 counts. Singer appealed, challenging FRCP 23(a) on the basis that Article III, Section 2 of the United States Constitution and the Sixth Amendment guarantee not only the right to trial by jury, but also the right to waive a jury trial in favor of a judge trial. The court of appeals affirmed. The United States Supreme Court granted certiorari.

#### Issue

Does a criminal defendant have a constitutional right to waive the right to a jury trial in favor of a bench trial?

#### Holding and Reasoning (Warren, C.J.)

No. Nothing in the common law or the United States Constitution grants a defendant the absolute right to demand a bench trial when a jury trial is required by law. Prior to the drafting of the United States Constitution, English common law gave no indication that a defendant had the right to demand a judge trial. Although some American colonies permitted a defendant to waive the jury-trial right, there was no general recognition by the colonies of the right to be tried by a judge instead of a jury. Article III, Section 2 of the U.S. Constitution directs that trials of all crimes shall be by jury. The intent of the framers of the U.S. Constitution was to protect defendants from government oppression, which is perhaps why there is no mention of a right to waive the jury-trial requirement. This Court examined Article III, Section 2 and the Sixth Amendment in *Patton v. United States*, 281 U.S. 276 (1930), and determined that the defendants in federal cases could waive the jury-trial right, but only with the consent of the government and the approval of the court. The only trial right guaranteed by the Constitution is the right to a trial by an impartial jury. Requiring the consent of the government for a jury waiver is proper, because the government also has an interest in trying cases by the method that the Constitution directs is most fair. The result of a lack of consent or court approval is a trial by an impartial jury, which the Constitution guarantees. FRCP 23(a) is constitutional, because requiring a jury trial against the wishes of a defendant does not violate fair-trial or due-process rights. The government is not compelled to provide any reason for failure to consent to a jury waiver under FRCP 23(a). There may be a future case where a defendant presents a compelling reason to demand a judge trial where a jury trial is required. In this case, however, Singer failed to demand a judge trial and only requested the waiver to save time. This is not a compelling reason to require a judge trial. Accordingly, the judgment of the court of appeals is affirmed.

**Key Terms:**

**Right to a Jury Trial** - A constitutional right to a jury trial exists under the Sixth Amendment, in federal and state criminal trials where a defendant faces punishment of greater than six months’ imprisonment, and under the Seventh Amendment, in federal civil cases where a plaintiff seeks money damages.

**Sixth Amendment** - Provides criminal defendants with numerous rights such as the right to a speedy and public trial, the right to cross-examine witnesses, the right to counsel, and the right to be informed of the nature and cause of action.

# Article II, Section 2, Clause 3 of the United States Constitution - Directs that the trial of all federal crimes, except impeachment, shall be by jury.

# Regents of the University of California v. Bakke

#### United States Supreme Court 438 U.S. 265 (1978)

#### Rule of Law

**A university admissions program that relies upon race or nationality as the exclusive basis for admissions decisions violates the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964.**

#### Facts

In 1973, the Medical School of the University of California at Davis (defendant) implemented a special admissions program intended to raise enrollment levels of minority students. Bakke (plaintiff) was a white male who applied for admission in 1973 and 1974 and was rejected both years. Bakke filed suit in the state courts of California alleging that the special admission program violated the California Constitution, Title VI of the Civil Rights Act of 1964 and the Equal Protection Clause of the Fourteenth Amendment. The trial court ruled in favor of Bakke and issued an injunction prohibiting the school from basing any admissions decision on the applicant’s race. The trial court declined to order that the school accept Bakke because it concluded that Bakke had failed to prove that he would have been admitted in the absence of the restrictions of the special admissions program. Bakke appealed to the state supreme court. The supreme court affirmed the trial court’s judgment with respect to its findings of constitutional violations, but instructed the trial court to issue an order directing the school to admit Bakke. The school petitioned the United States Supreme Court for review.

#### Issue

Does a university admissions program that relies upon race or nationality as the exclusive basis for admissions decisions violate the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964?

#### Holding and Reasoning (Powell, J.)

Yes. A university admissions program that relies upon race or nationality as the exclusive basis for admissions decisions violates the Equal Protection Clause of the Fourteenth Amendment and Title VI of the Civil Rights Act of 1964. Title VI of the Civil Rights Act prohibits any entity that receives federal funding from discriminating against any person on the grounds of race, color or nationality. The intent of Title VI is to deny federal funding to any organization that engages in unconstitutional discrimination. Discrimination that would violate the Equal Protection Clause also violates Title VI. The Medical School’s special admissions program designated 16 openings exclusively for minority applicants. The program reduced the number of openings available to white applicants from 100 to 84. Irrespective of how this restriction is labeled, it acts as a limitation based on race and nationality. Limitations based on race or nationality will be analyzed under the standard of strict scrutiny. Strict scrutiny applies even when the limitation affects a class of individuals, like white males, that is not in need of heightened protection against discriminatory laws or practices. Equal protection under the Constitution applies to everyone, regardless of membership in a class of persons historically subject to discrimination. Certain groups among the white majority have been subject to varying degrees of discrimination. To restrict the application of equal protection only to classes historically subject to discrimination would require establishing a clear minimum standard of discrimination that entitles a given class to constitutional protection. There is no reasonable basis on to which establish such a standard. There have been situations, including school desegregation and employment discrimination, in which this court has approved race-based classifications without subjecting the classifications to strict scrutiny. The distinction between those situations and the present case is that the classifications approved without strict scrutiny analysis were intended to remedy existing discriminatory practices. As the Medical School points out, we do not apply strict scrutiny to gender-based classifications, but that is because gender-based classifications are easily discernible and do not bear the abhorrent stigma associated with racial discrimination. Classifications based on race or nationality are viewed as inherently suspect, whereas gender-based classifications are not. Imposition of a suspect classification will only be upheld when the classification serves a substantial purpose and is necessary in order to achieve the stated purpose. The Medical School asserts that its special admissions program serves four substantial purposes. First, the school argues that the program serves to remedy a traditional underrepresentation of minorities in medical professions. If the school’s goal is to mandate a minimum number of minority students, the mandate is clearly unconstitutional. Conferring privilege to certain classes of individuals solely upon the basis of race or nationality amounts to discrimination per se. The Medical School’s second stated purpose is to enhance diversity on campus. The school argues that enhanced diversity also serves to enhance the free exchange of ideas and thereby implicates interests embodied in the First Amendment. This goal serves a compelling state interest. The next step in analysis of the constitutionality of the special admissions program is to determine whether the program’s race-based limitations are necessary to achieve its stated purpose. Race and nationality form only one component of diversity. Regional, cultural, and socioeconomic backgrounds also factor into diversity. Likewise, individual characteristics such as personal talents, interests and experience may enhance diversity. A program that imposes limitations exclusively on the basis of ethnicity excludes consideration of these other relevant factors and serves to actually limit diversity. Race and nationality are permissible considerations when an individual’s contribution to diversity as a whole represents only one of a number of factors that may influence the selection of a particular candidate over another, equally qualified candidate. By contrast, the Medical School’s admissions program evidences a clear intent to discriminate exclusively on the basis of ethnicity. The program expressly disqualifies a predetermined number of white applicants, irrespective of their merits, while simultaneously guaranteeing an equal number of minority applicants the opportunity to compete for admission. In this regard, the special admissions program violates the equal protection guarantees of the Fourteenth Amendment. However, as previously noted, considerations of race and nationality are permissible when they are not the only considerations for admissions determinations. As such, the order of the state court prohibiting any consideration of ethnicity is reversed. Having concluded that the special admissions program is unconstitutional, we need not address the school’s third and fourth stated purposes. The Medical School admits that it cannot prove that Bakke would have been denied admission even in the absence of the preferences established under its special admissions program. As such, the state court’s injunction ordering Bakke’s admission is affirmed.

#### Concurrence/Dissent (Brennan, J.)

Racial classifications are permissible when they serve to remedy past or ongoing racial injustices. This court has always indicated that racial classifications may be valid so long as they serve a substantial purpose. Racial classifications that confer privilege or impose disadvantages upon members of a particular race based upon the premise that one race is superior or inferior to another are inherently unconstitutional, but it has not been suggested that the Medical School’s special admissions program falls into that category. A danger exists that any race-based classification, even when implemented for the attainment of a beneficial goal, may be subverted to effect adversely discriminatory results. For that reason, any race-based classification must be subjected to strict scrutiny. Any such classification must serve an important and articulated purpose. The Medical School’s special admissions program purports to serve the important purpose of remedying past discrimination. The program would pass constitutional muster if supported by evidence of significant discrimination in the past that continues to disadvantage minority admissions today.

#### Concurrence/Dissent (Marshall, J.)

African-Americans have suffered a substantial and extraordinary history of racial discrimination. That history of discrimination continues to disadvantage African-Americans today. A program that affords preference to African-Americans, even one that absolutely excludes members of the white majority, should not be deemed violative of the Equal Protection Clause.

#### Concurrence/Dissent (Blackmun, J.)

Attainment of ultimate social equality requires that we recognize present distinctions in societal conditions among different social classifications. Elimination of those distinctions requires that we afford different treatment to different classifications.

#### Concurrence/Dissent (Stevens, J.)

In light of the various opinions set forth in this matter, it is important to remember that the question posed to the court centered on whether the Medical School’s special admissions program violated Title VI of the Civil Rights Act. The act clearly states that no person shall be excluded from participation in any program or activity that receives funding from the federal government on the basis of race, color or nationality. As such, the plain language of the act provides grounds to affirm the state court’s judgment.

**Key Terms:**

**Strict Scrutiny -** The most demanding standard of judicial review used by courts. Strict scrutiny review requires that the law or policy being challenged supports a compelling governmental interest, is narrowly tailored to achieve that interest, and is the least restrictive means available to achieve that interest.

**Civil Rights Act of 1964 -** Prohibits discrimination in public facilities, government, and employment, as well as prohibits the unequal application of voter registration requirements.

**Coker v. Georgia**

#### United States Supreme Court 433 U.S. 584 (1977)

#### Rule of Law

**Imposing the death penalty for the crime of rape violates the Eighth Amendment prohibition on cruel and unusual punishment.**

#### Facts

On September 2, 1974, Ehrlich Coker (defendant) escaped from a Georgia prison where he had been serving time for various felonies, including murder, rape, kidnapping, and aggravated assault. That night, Coker entered the home of Allen and Elnita Carver. Coker threatened both of them, tied up Mr. Carver, and took Mr. Carver’s money, keys, and a knife from the kitchen. Coker proceeded to rape Mrs. Carver and then drove her away in Mr. Carver’s car. Mr. Carver managed to free himself and alert police, who quickly detained Coker. Coker was charged with a number of offenses, including the rape of Mrs. Carver. Under Georgia law, rape was an offense punishable by death if accompanied by certain aggravating circumstances, as defined by statute. Accordingly, the jury was instructed that it could consider imposing the death penalty if it found that Coker had a prior conviction for a capital felony or if it found that the rape was committed during the commission of another capital felony. The jury found that both aggravating circumstances existed, because Coker had previously been convicted of capital felonies and because the rape occurred during the commission of an armed robbery. The jury sentenced Coker to death for the rape. The Georgia Supreme Court affirmed, and the United States Supreme Court granted certiorari.

#### Issue

May the death penalty be constitutionally imposed for the crime of rape?

#### Holding and Reasoning (White, J.)

No. The Eighth Amendment prohibits cruel and unusual punishment. A punishment is deemed excessive if (1) it does not further any goal of sentencing, or (2) it is grossly disproportionate to the crime committed. The death penalty is not “inherently barbaric” or disproportionate in all cases. It is well settled that the death sentence may be constitutionally applied, at least for the crime of murder, so long as proper procedures are followed. The issue in this case is whether a death sentence is a cruel and unusual punishment for the rape of an adult woman. Objective evidence of public sentiment toward a particular punishment provides guidance as to whether that punishment is acceptable. In the early twentieth century, 18 states and the federal government allowed death as a punishment for rape. As of the 1970s, only Georgia allowed this punishment for the rape of an adult woman. Since then, Georgia juries have imposed the death sentence for rape only one in 10 times. Trends in legislative sentiment suggest that the death penalty is an excessive punishment in rape cases. Although rape is a reprehensible act that warrants a harsh punishment, the death penalty is too irrevocable a punishment to impose on a person who has not taken another’s life. In Coker's case, the existence of aggravating circumstances does nothing to justify the imposition of the death penalty for a crime not involving the wrongful taking of a life. Coker's death sentence for the crime of rape thus violates the Eighth Amendment, because it is grossly disproportionate to the crime. The judgment of the Georgia Supreme Court is reversed, and the case is remanded.

#### Concurrence/Dissent (Powell, J.)

The plurality goes too far in holding that the death penalty is always, without exception, disproportionate to the crime of rape. State legislatures should be free to determine specific instances of aggravated rape that warrant the death penalty.

#### Dissent (Burger, C.J.)

It is not the place of the Court to supplant its judgment for that of state legislatures. The plurality bases its decision primarily on the fact that rape does not result in the death of the victim, and that therefore, it does not warrant the death penalty. However, it is not unconstitutional to impose a punishment more severe than what the victim of the crime endured. Although it is true that the Eighth Amendment bars the imposition of the death penalty for minor crimes, rape is a serious crime that is often permanently damaging to the victim, both physically and mentally. The plurality opinion shifts the Eighth Amendment inquiry to the state of the victim following the crime, rather than the “evil committed by the perpetrator.” A person who commits rape may be deserving of the death penalty.

**Key Terms:**

**Eighth Amendment** - Prohibits the imposition of excessive bail, excessive fines, or cruel and unusual punishments on criminal defendants.

**Aggravating Circumstances -** Certain facts that increase the severity of a criminal act so that it warrants a greater criminal charge or a greater punishment.

**Cruel and Unusual Punishment -** Any criminal sanction that is barbaric, torturous, inhumane, or so disproportionate to the offense committed as to shock the conscience of the community.

# Wayte v. United States

#### United States Supreme Court 470 U.S. 598 (1985)

#### Rule of Law

**A prosecution will only be dismissed as an unconstitutional selective prosecution if the defendant can show (1) a discriminatory effect and (2) a discriminatory purpose.**

#### Facts

Wayte (defendant) was a vocal war opponent who refused to register for the Selective Service System. Wayte wrote a letter to the Selective Service System and the President reporting that he would not register for the draft. Wayte was warned that he could be prosecuted, but refused to register. Wayte was indicted. Wayte then moved to dismiss on the grounds that he was selectively prosecuted for exercising his constitutional right to freedom of speech and sought discovery of government documents. The district court ordered discovery, but the government did not provide the documents. The district court dismissed the charges. The court of appeals reversed, holding that Wayte had not proven selective prosecution and that the discovery order was erroneous. The United States Supreme Court granted certiorari.

#### Issue

Must a prosecution under passive enforcement policy of prosecuting only those who are reported be dismissed as an unconstitutional selective prosecution?

#### Holding and Reasoning (Powell, J.)

No. Prosecutors with probable cause to believe a suspect committed a crime enjoy a high degree of discretion in the management of criminal prosecutions, including determining whether and what charges to bring and whether the employ a grand jury. However, that discretion is not absolute. Specifically, prosecutors may not intentionally exercise their discretion to bring charges on constitutionally impermissible grounds, like a defendant’s race or exercise of a constitutional right. Equal protection standards govern selective enforcement cases. Thus, the claimant must show that there was actual discrimination and a discriminatory purpose. The exercise of prosecutorial discretion is not easily reviewed by courts without knowledge of the merits of the prosecution’s case or the government’s law enforcement goals. Further, this type of review might cause delays and other problems in the judicial system or make prosecutors less likely to bring charges. In this case, Wayte has not made the required showing. The government prosecuted only people who were reported or reported themselves; some of those prosecuted were war protesters and others were not. Those who were reported were not prosecuted if they later registered, regardless of whether they voiced opposition. Thus, Wayte has not shown actual discrimination. Beyond that, Wayte has not proven a discriminatory purpose. At best, Wayte has shown awareness that some protesters would be prosecuted. Since Wayte did not meet his burden, his selective prosecution claim must be denied.

#### Dissent (Marshall, J.)

The Court addresses the question of whether Wayte was selectively prosecuted, but this question is not at issue. The issue is whether Wayte was entitled to the discovery ordered by the district court. The district court concluded that Wayte had made out a claim for selective prosecution and had a right to discovery. Wayte needed only to demonstrate that the district court did not err or abuse its discretion in ordering discovery. Wayte has made that showing, and the selective prosecution claim cannot be dismissed.

**Key Terms:**

**Equal Protection -** A constitutional right guaranteeing that one class of people will enjoy the same protection of the laws as another.

**Due Process -** A constitutional guarantee that a law shall not be unreasonable, arbitrary, or capricious and that individuals will be given notice of legal proceedings conducted fairly with an opportunity for an individual to be heard before the government may impose sanctions on one’s life, liberty, or property.

**Swayne v. Alabama**

85 S.Ct. 824

Supreme Court of the United States

**Robert SWAIN, Petitioner,**

**v.**

**STATE OF ALABAMA.**

No. 64.

Argued Dec. 8, 1964.Decided March 8, 1965.

## Synopsis

Defendant was convicted, in the Circuit Court, Talladega County, for rape, and he appealed. The [Alabama Supreme Court, 275 Ala. 508, 156 So.2d 368,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1963131488&pubNum=735&originatingDoc=I0a41058b9bf011d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed, and certiorari was granted. The Supreme Court, Mr. Justice White, held that since defense counsel also participate in peremptory challenge process mere showing that Negroes have not served during specified period of time does not, absent sufficient showing of prosecutors' participation, give rise to inference of systematic discrimination on part of State by exercise of peremptory challenges.

Affirmed.

Mr. Justice Goldberg, the Chief Justice, and Mr. Justice Douglas dissented.

# \*\*GRAHAM v. FLORIDA\*\*

#### United States Supreme Court 560 U.S. 48 (2010)

#### Rule of Law

**Imposing a sentence of life in prison without parole upon a juvenile who did not commit homicide violates the Eighth Amendment’s prohibition against cruel and unusual punishment.**

#### Facts

At the age of sixteen, Terrance Graham (defendant) pleaded guilty to attempted robbery and was sentenced to three years’ probation with the first year to be served in the county jail. Six months after being released, Graham and two other individuals, Bailey and Lawrence, committed a home-invasion robbery and held two men at gunpoint while ransacking the home looking for cash. During a second robbery attempt, Bailey was shot. After driving Bailey to a hospital and leaving him there, Graham and Lawrence were flagged down by a police officer but refused to stop. Shortly thereafter, Graham crashed the vehicle into a telephone pole and attempted to flee on foot, but he was apprehended. These events occurred thirty-four days short of his eighteenth birthday. Thus, Graham was still considered a juvenile. The trial court found that Graham had violated his probation by committing the home-invasion robbery, possessing a firearm, and associating with persons engaged in criminal activity. Because the Florida Legislature had abolished the parole system, the trial court sentenced Graham to the maximum sentence–life in prison without the possibility of parole for the home-invasion, plus fifteen years in prison for the attempted armed robbery. Graham appealed. The Florida Court of Appeal affirmed the sentence, and the state’s supreme court denied review. The United States Supreme Court granted certiorari.

#### Issue

Does imposing a sentence of life in prison without the possibility of parole upon a minor who did not commit homicide violate the Eighth Amendment’s prohibition against cruel and unusual punishment?

#### Holding and Reasoning (Kennedy, J.)

Yes. Graham argues that a life-without-parole sentence is disproportionate to the crime committed. In general, the Court’s cases addressing the proportionality of sentences fall within two general classifications. The first involves challenges to the length of term-of-years sentences, given all the circumstances in a particular case. The second classification involves cases in which the Court implements the proportionality standard by certain categorical restrictions and rules to define Eighth Amendment standards involving the death penalty. The second classification can further be broken down into two subsets: one considering the nature of the offense and another considering the characteristics of the offender. In those cases, the Court will consider “objective indicia of society’s standards, as expressed in legislative enactments and state practice” to determine whether there is a national consensus against the sentence in question. Additionally, the Court relies on precedent and its own independent judgment to determine whether a particular sentence violates the Constitution. However, here is a case that has not been previously considered: a categorical challenge to a term-of-years sentence. The case implicates a particular type of sentence as it applies to an entire class of offenders who have committed a range of crimes. Thus, the appropriate analysis to be employed involves the categorical approach. In *Roper v. Simmons*, 543 U.S. 551 (2005), the Court held that juveniles who do not kill, intend to kill, or foresee that life will be taken may not be sentenced to life without possibility of parole. Such a sentence deprives the offender of the most basic liberties without giving hope of restoration. Further, juveniles often lack sufficient psychological maturity to merit a life-without-parole sentence. A categorical rule allows all juvenile non-homicide offenders a chance to demonstrate maturity and reform. Conversely, a life-without-parole sentence gives no chance for fulfillment outside of the prison’s walls. The judgment of the Florida District Court of Appeal is reversed, and the matter is remanded for further proceedings.

#### Concurrence (Roberts, C.J.)

Although the majority reaches the correct conclusion, there is no need to invent a new constitutional rule. Rather, by relying on precedent and the decision reached in *Roper*, the Court can reach the same conclusion. Further, there should not be a categorical ban against life-without-parole sentences in all juvenile non-homicide cases. There have been many examples of horrific crimes perpetrated by juveniles that may warrant imposition of such a sentence.

#### Concurrence (Stevens, J.)

Society continually evolves, and so does our view of punishment. What was once a constitutional sentence can become cruel and unusual over time. For this reason, proportionality review under the Eight Amendment remains essential.

#### Dissent (Thomas, J.)

Imposing a life sentence without parole on a juvenile is justified because such punishments deter and also incapacitate–ensuring that such offenders will not threaten their communities. Here, the question is not whether the punishment of life-without-parole fits the crime, but to whom the Constitution assigns that decision. The Florida Legislature rightly chose to make such a sentence available in certain cases, and the Court should not contradict that decision.

**Key Terms:**

**Parole** - The release of a prisoner from jail for the remainder of his sentence if certain conditions are met (e.g., regular meetings with a parole officer).

**Estelle v. Gamble**

97 S.Ct. 285

Supreme Court of the United States

**W. J. ESTELLE, Jr., Director, Texas Department of Corrections, et al., Petitioners,**

**v.**

[**J. W. GAMBLE.**](https://1.next.westlaw.com/Search/Results.html?query=advanced%3a+OAID(5022810453)&saveJuris=False&contentType=BUSINESS-INVESTIGATOR&startIndex=1&contextData=(sc.Default)&categoryPageUrl=Home%2fCompanyInvestigator&originationContext=document&transitionType=DocumentItem)

No. 75-929.

Argued Oct. 5, 1976.Decided Nov. 30, 1976.Rehearing Denied Jan. 17, 1977. See [429 U.S. 1066, 97 S.Ct. 798](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&pubNum=708&cite=97SCT798&originatingDoc=Ibdef4d469c2511d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

## Synopsis

State prisoner filed a pro se complaint against various prison officials under civil rights statute for failure to provide adequate medical care. The United States District Court for the Southern District of Texas, at Houston, dismissed the cause and the prisoner appealed. The United States Court of Appeals for the Fifth Circuit, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ibec95fb5909711d98e8fb00d6c6a02dd&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[516 F.2d 937,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1975111024&pubNum=350&originatingDoc=Ibdef4d469c2511d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))reversed and remanded, and denied rehearing en banc, [521 F.2d 815.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1975200047&pubNum=350&originatingDoc=Ibdef4d469c2511d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) Certiorari was granted. The Supreme Court, Mr. Justice Marshall, J., held, inter alia, that while deliberate indifference to prisoner's serious illness or injury constitutes cruel and unusual punishment in violation of Eighth Amendment, prisoner's pro se complaint showing that he had been seen and treated by medical personnel on 17 occasions within three-month period was insufficient to state a cause of action against physician both in his capacity as treating physician and as medical director of the corrections department, but case would be remanded to consider whether a cause of action was stated against other prison officials.

Reversed and remanded.

Mr. Justice Blackmun concurred in the judgment.

Mr. Justice Stevens filed a dissenting opinion.

**Trop v. Dulles**

78 S.Ct. 590

Supreme Court of the United States

**Albert L. TROP, Petitioner,**

**v.**

**John Foster DULLES, as Secretary of State of the United States and United States Department of State.**

No. 70.

Reargued Oct. 28, 29, 1957.Decided March 31, 1958.

**Synopsis**

Action for judgment declaring that plaintiff had not lost his nationality because of his conviction by military court martial of desertion from the United States Army during wartime and his dishonorable discharge therefrom. The United States District Court for the Eastern District of New York, entered judgment summarily dismissing complaint and plaintiff appealed. The United States Court of Appeals for the Second Circuit, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I309eebdb8eb011d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[239 F.2d 527,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1957104164&pubNum=350&originatingDoc=Id4c587819c1d11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed and the Supreme Court granted certiorari. The Supreme Court held that statute authorizing expatriation of person who is convicted by military court martial of desertion from United States Army in wartime and is given a dishonorable discharge, even though no attempt is made to give allegiance to a foreign power, is beyond the war powers of Congress.

Reversed and remanded.

Mr. Justice Frankfurter, Jr., Mr. Justice Burton, Jr., Mr. Justice Clark, and Mr. Justice Harlan, dissented.

# Kennedy v. Louisiana

#### United States Supreme Court 554 U.S. 407 (2008)

#### Rule of Law

**The Eighth Amendment prohibits imposition of the death penalty in a criminal case that does not result in the death of a victim.**

#### Facts

Patrick Kennedy (defendant) was charged with, and convicted of, aggravated rape of his eight-year-old stepdaughter. The jury imposed the death penalty on Kennedy under a Louisiana statute authorizing capital punishment for the rape of a child under the age of 12 years. Kennedy appealed, arguing that the death sentence violated the Eighth Amendment barring cruel and unusual punishment. The Louisiana Supreme Court affirmed the conviction and sentence. The U.S. Supreme Court granted certiorari to review.

#### Issue

Does the Eighth Amendment prohibit imposition of the death penalty in a criminal case that does not result in the death of a victim?

#### Holding and Reasoning (Kennedy, J.)

Yes. The Court has previously held 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 v. Simmons*, 543 U.S. 551, 568 (2005). In reaching its decision in *Roper*, the Court was guided by society’s standards as evidenced through legislative enactment and state practice with respect to executions. For example, six states including Louisiana allow imposition of the death penalty for rape of a child. Conversely, 44 states and the federal government have not made the crime a capital offense. Whether the death penalty is disproportionate to the crime committed depends also upon the standards elaborated by controlling precedents and by the Court’s own understanding and interpretation of the Eighth Amendment’s text, history, meaning, and purpose. Currently, there is a national consensus against imposing capital punishment for the crime of child rape. In cases involving criminal actions being taken against individuals, the death penalty should not be expanded to instances where the victim’s life was not taken. That is often contrary to defendants who commit acts of terrorism, espionage, or similar crimes against the state and nation. Although rape is a horrible and devastating event for a child, in terms of moral depravity and of the injury to the person and to the public, it cannot be compared to murder in severity. Moreover, the idea that an offender is to be repaid for the hurt he caused does not necessarily mean he should receive the death penalty when no death resulted to a victim. It is not at all evident that the child rape victim’s hurt is lessened when the law permits the death of the perpetrator. Finally, punishment by death may not have a big impact on deterrence, especially when the abuser is a family member and there is already a fear of disclosing the abuse that is occurring. The judgment of the Louisiana Supreme Court is reversed.

#### Dissent (Alito, J.)

The Court's decision means that capital punishment is never appropriate in child-rape cases, no matter how heinous the crime and surrounding circumstances may be. This conclusion is not supported by either a national consensus or by an evolving-standards-of-decency analysis. The fact that only six states permit capital punishment in child-rape cases is not a reliable indication of how state lawmakers and their constituents actually feel about the issue. This Court previously held that capital punishment was prohibited in cases involving the rape of an adult woman, in *Coker v. Georgia*, 433 U.S. 584 (1977). Dicta in *Coker* suggested that capital punishment would be inappropriate in all rape cases, no matter the age of the victim, and this has likely influenced state legislatures and courts away from allowing the death penalty to be imposed in child-rape cases. Additionally, the policy arguments relied upon by the Court in its decision are either unsupported or irrelevant to the question of whether the death penalty is cruel and unusual punishment. The decision of the Louisiana Supreme Court should be affirmed.

**Key Terms:**

**Eighth Amendment** - Prohibits the imposition of excessive bail, excessive fines, or cruel and unusual punishments on criminal defendants.

# Furman v. Georgia

#### United States Supreme Court 408 U.S. 238 (1972)

#### Rule of Law

**The sentencing and execution of the death penalty in the petitioners' cases violate the Eighth Amendment prohibition of cruel and unusual punishment.**

**Wilkerson v. Utah**

99 U.S. 130

Supreme Court of the United States

**WILKERSON**

**v.**

**UTAH.**

October Term, 1878

**\*\*1** ERROR to the Supreme Court of the Territory of Utah.

The facts are stated in the opinion of the court.

**Attorneys and Law Firms**

**\*130** Submitted by *Mr. E. D. Hoge* and *Mr. P. L. Williams* for the plaintiff in error, and by *The Solicitor-General* for the defendant in error.

**Opinion**

**\*\*2** The legislative act of Utah, passed March 6, 1852, provides that a person convicted of a capital offence ‘shall suffer death by being shot, hanged, or beheaded,’ as the court may direct, or ‘he shall have his option as to the manner of his execution.’ Its Penal Code of 1876, by which all acts and parts of acts inconsistent therewith are repealed, provides that any person convicted of murder in the first degree ‘shall suffer death,’ and that ‘the several sections of this code, which declare certain crimes to be punishable as therein mentioned, devolve a duty upon the court authorized to pass sentence, to determine and impose the punishment prescribed.’ A., convicted of having, June 11, 1877, committed murder in the first degree in that Territory, was, by the proper court thereof, sentenced to be publicly shot. *Held*, that the sentence was not erroneous.

MR. JUSTICE CLIFFORD delivered the opinion of the court.

Duly organized Territories are invested with legislative power, which extends to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. Rev. Stats., sect. 1851.

Congress organized the Territory of Utah on the 9th of September, 1850, and provided that the legislative power and authority of the Territory shall be vested in the governor and legislative assembly. 9 Stat. 454.

Sufficient appears to show that the prisoner named in the record was legally charged with the wilful, malicious, and premeditated murder of William Baxter, with malice aforethought, by indictment of the grand jury in due form of law, as fully set forth in the transcript; and that he, upon his arraignment, pleaded that he was not guilty of the alleged offence. Pursuant to the order of the court, a jury for the trial of the prisoner was duly impanelled and sworn; and it appears that the jury, after a full and fair trial, found, by their verdict, that the prisoner was guilty of murder in the first degree.

Regular proceedings followed, and the record also shows that  **\*131** the presiding justice in open court sentenced the prisoner as follows: That ‘you be taken from hence to some place in this Territory, where you shall be safely kept until Friday, the fourteenth day of December next; that between the hours of ten o'clock in the forenoon and three o'clock in the afternoon of the last-named day you be taken from your place of confinement to some place within this district, and that you there be publicly shot until you are dead.’

Proceedings in the court of original jurisdiction being ended, the prisoner sued out a writ of error and removed the cause into the Supreme Court of the Territory, where the judgment of the subordinate court was affirmed. Final judgment having been rendered in the Supreme Court of the Territory, the prisoner sued out the present writ of error, the act of Congress providing that such a writ from this court to the Supreme Court of the Territory will lie in criminal cases where the accused is sentenced to capital punishment or is convicted of bigamy or polygamy. 18 Stat. 254.

**\*\*3** Appended to the proceedings is the assignment of error imputed to the court below, which is repeated in the same words in the brief of his counsel filed since the case was removed into this court. No exception was taken to the proceedings in either court prior to the sentence, the assignment of error being that the court below erred in affirming the judgment of the court of original jurisdiction and in adjudging and sentencing the prisoner to be shot to death.

Murder, as defined by the Compiled Laws of the Territory, is the unlawful killing of a human being with malice aforethought, and the provision is that such malice may be express or implied. Comp. Laws Utah, 1876, 585. Express malice is when there is manifested a deliberate intention unlawfully to take away the life of a fellow-creature, and it may be implied when there is no considerable provocation, or when the circumstances attending the killing show an abandoned or malignant heart.

Criminal homicide, when perpetrated by a person lying in wait, or by any other kind of wilful, deliberate, malicious, and premediated killing, or which is committed in the perpetration or attempt to perpetrate any one of the offences therein enumerated,  **\*132** and evidencing a depraved mind, regardless of human life, is murder in the first degree. Id. 586.

Provision is also made that every person guilty of murder in the first degree shall suffer death, or, upon the recommendation of the jury, may be imprisoned at hard labor in the penitentiary for life, at the discretion of the court; and that every person guilty of murder in the second degree shall be imprisoned at hard labor in the penitentiary for not less than five nor more than fifteen years. Comp. Laws Utah, 1876, 586.

Duly convicted of murder in the first degree as the prisoner was by the verdict of the jury, it is conceded that the existing law of the Territory provides that he ‘shall suffer death;’ nor is it denied that the antecedent law of the Territory which was in force from March 6, 1852, to March 4, 1876, provided that ‘when any person shall be convicted of any crime the punishment of which is death, . . . he shall suffer death by being shot, hung, or beheaded, as the court may direct,’ or as the convicted person may choose. Sess. Laws Utah, 1852, p. 61; Comp. Laws Utah, 1876, 564.

When the Revised Penal Code went into operation, it is doubtless true that it repealed that provision, as sect. 400 provides that ‘all acts and parts of acts' heretofore passed ‘inconsistent with the provisions of this act be and the same are hereby repealed.’ Comp. Laws Utah, 651.

Assume that sect. 124 of the prior law is repealed by the Revised Penal Code, and it follows that the existing law of the Territory provides that every person guilty of murder in the first degree shall suffer death, without any other statutory regulation as to the mode of executing the sentence than what is found in the following enactment of the Revised Penal Code. Sect. 10 provides that ‘the several sections of this code, which declare certain crimes to be punishable as therein mentioned, devolve a duty upon the court authorized to pass sentence to determine and impose the punishment prescribed.’ Comp. Laws Utah, 1876, 567.

**\*\*4** Construed as that provision must be in connection with the enactment that every person guilty of murder in the first degree shall suffer death, and in view of the fact that the laws of the Territory contain no other specifie regulation as to the  **\*133** mode of executing such a sentence, the court here is of the opinion that the assignment of error shows no legal ground for reversing the judgment of the court below. Authority to pass such a sentence is certainly not possessed by the circuit courts of the United States, as the act of Congress provides that the manner of inflicting the punishment of death shall be by hanging. Rev. Stat., sect. 5325.

Punishments of the kind are always directed by the circuit courts to be inflicted in that manner, but organized Territories are invested with legislative power which extends to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States. By virtue of that power the legislative branch of the Territory may define offences and prescribe the punishment of the offenders, subject to the prohibition of the Constitution that cruel and unusual punishments shall not be inflicted. Story, Const. (3d ed.), sect. 1903.

Good reasons exist for supposing that Congress never intended that the provision referred to, that the punishment of death shall be by hanging, should supersede the power of the Territories to legislate upon the subject, as the congressional provision is a part of the first crimes act ever passed by the national legislature. 1 Stat. 114. Different statutory regulations existed in the Territory for nearly a quarter of a century, and the usages of the army to the present day are that sentences of the kind may in certain cases be executed by shooting, and in others by hanging.

Offences of various kinds are defined in the rules and articles of war where the offender, if duly convicted, may be sentenced to the death penalty. In some of those cases the provision is that the accused, if convicted, shall suffer death, and in others the punishment to be awarded depends upon the finding of the court-martial; but in none of those cases is the mode of putting to death prescribed in the articles of war or the military regulations. Art. 96 provides that no person shall be sentenced to suffer death except by the concurrence of two-thirds of the members of a general court-martial, and in the cases specified in the rules and articles enacted by Congress. Rev. Stat., p. 238.

Repeated instances occur where the death penalty is prescribed  **\*134** in those articles; but the invariable enactment is that the person guilty of the offence shall suffer death, without any specification as to the mode in which the sentence shall be executed, and the regulations of the army are as silent in that respect as the rules and articles of war. Congress having made no regulations in that regard, the custom of war, says a learned writer upon the subject, has, in the absence of statutory law, determined that capital punishment be inflicted by shooting or hanging; and the same author adds to the effect that mutiny, meaning mutiny not resulting in loss of life, desertion, or other military crime, if a capital offence, is commonly punished by shooting; that a spy is always hanged, and that mutiny, if accompanied by loss of life, is punished in the same manner,-that is, by hanging. Benet, Courts-Martial (5th ed.), 163.

**\*\*5** Military laws, says another learned author, do not say how a criminal offending against such laws shall be put to death, but leave it entirely to the custom of war; and his statement is that shooting or hanging is the method determined by such custom. DeHart, Courts-Martial, 196. Like the preceding author, he also proceeds to state that a spy is generally hanged, and that mutiny unaccompanied with loss of life is punished by the same means; and he also concurs with Benet, that desertion, disobedience of orders, or other capital crimes are usually punished by shooting, adding, that the mode in all cases, that is, either shooting or hanging, may be declared in the sentence.

Corresponding rules prevail in other countries, of which the following authorities will afford sufficient proof: Simmons, Courts-Martial (5th ed.), sect. 645; Griffith, Military Law, 86.

Capital punishment, says the author first named, may be either by shooting or hanging. For mutiny, desertion, or other military crime it is commonly by shooting; for murder not combined with mutiny, for treason, and piracy accompanied with wounding or attempt to murder, by hanging, as the sentence in England must accord with the law of the country in regard to the punishment of offenders. Exactly the same views are expressed by the other writer, which need not be reproduced.

Cruel and unusual punishments are forbidden by the Constitution, but the authorities referred to are quite sufficient to  **\*135** show that the punishment of shooting as a mode of executing the death penalty for the crime of murder in the first degree is not included in that category, within the meaning of the eighth amendment. Soldiers convicted of desertion or other capital military offences are in the great majority of cases sentenced to be shot, and the ceremony for such occasions is given in great fulness by the writers upon the subject of courts-martial. Simmons, sects. 759, 760; DeHart, pp. 247. 248.

Where the conviction is in the civil tribunals, the rule of the common law was that the sentence or judgment must be pronounced or rendered by the court in which the prisoner was tried or finally condemned, and the rule was universal that it must be such as is annexed to the crime by law. Of these, says Blackstone, some are capital, which extend to the life of the offender, and consist generally in being hanged by the neck till dead. 4 Bl. Com. 377.

Such is the general statement of that commentator, but he admits that in very atrocious crimes other circumstances of terror, pain, or disgrace were sometimes superadded. Cases mentioned by the author are, where the prisoner was drawn or dragged to the place of execution, in treason; or where he was embowelled alive, beheaded, and quartered, in high treason. Mention is also made of public dissection in murder, and burning alive in treason committed by a female. History confirms the truth of these atrocities, but the commentator states that the humanity of the nation by tacit consent allowed the mitigation of such parts of those judgments as savored of torture or cruelty, and he states that they were seldom strictly carried into effect. Examples of such legislation in the early history of the parent country are given by the annotator of the last edition of Archbold's Treatise. Arch. Crim. Pr. and Pl. (8th ed.) 584.

**\*\*6** Many instances, says Chitty, have arisen in which the ignominious or more painful parts of the punishment of high treason have been remitted, until the result appears to be that the king, though he cannot vary the sentence so as to aggravate the punishment, may mitigate or remit a part of its severity. 1 Chitt. Cr. L. 787; 1 Hale, P. C. 370.

Difficulty would attend the effort to define with exactness  **\*136** the extent of the constitutional provision which provides that cruel and unusual punishments shall not be inflicted; but it is safe to affirm that punishments of torture, such as those mentioned by the commentator referred to, and all others in the same line of unnecessary cruelty, are forbidden by that emendment to the Constitution. Cooley, Const. Lim. (4th ed.) 408; Wharton, Cr. L. (7th ed.), sect. 3405.

Concede all that, and still it by no means follows that the sentence of the court in this case falls within that category, or that the Supreme Court of the Territory erred in affirming the judgment of the court of original jurisdiction. Antecedent to the enactment of the code which went into operation March 4, 1876, the statute of the Territory passed March 6, 1852, provided that when any person was convicted of any capital offence he shall suffer death by being shot, hanged, or beheaded, as the court may direct, subject to the qualification therein expressed, to the effect that the person condemned might have his option as to the manner of his execution, the meaning of which qualification, as construed, was that the option was limited to the modes prescribed in the statute, and that if it was not exercised, the direction must be given by the court passing the sentence.

Nothing of the kind is contained in the existing code, and the legislature in dropping the provision as to the option failed to enact any specific regulation as to the mode of executing the death penalty. Instead of that, the explicit enactment is that every person guilty of murder in the first degree shall suffer death, or, upon the recommendation of the jury, may be imprisoned at hard labor in the penitentiary for life, at the discretion of the court.

Beyond all question, the first clause of the provision is applicable in this case, as the jury gave no such recommendation as that recited in the second clause, the record showing that their verdict was unconditional and absolute, from which it follows that the sentence that the prisoner shall suffer death is legally correct. Comp. Laws Utah, 1876, p. 586.

Had the statute prescribed the mode of executing the sentence, it would have been the duty of the court to follow it, unless the punishment to be inflicted was cruel and unusual,  **\*137** within the meaning of the eighth amendment to the Constitution, which is not pretended by the counsel of the prisoner. Statutory directions being given that the prisoner when duly convicted shall suffer death, without any statutory regulation specifically pointing out the mode of executing the command of the law, it must be that the duty is devolved upon the court authorized to pass the sentence to determine the mode of execution and to impose the sentence prescribed. Id., p. 567.

**\*\*7** Persons guilty of murder in the first degree ‘shall suffer death,’ are the words of the territorial statute; and when that provision is construed in connection with sect. 10 of the code previously referred to, it is clear that it is made obligatory upon the court to prescribe the mode of executing the sentence of death which the code imposes where the conviction is for murder in the first degree, subject, of course, to the ocnstitutional prohibition, that cruel and unusual punishment shall not be inflicted.

Other modes besides hanging were sometimes resorted to at common law, nor did the common law in terms require the court in passing the sentence either to prescribe the mode of execution or to fix the time or place for carrying it into effect, as is frequently if not always done in the Federal circuit courts. At common law, neither the mode of executing the prisoner nor the time or place of execution was necessarily embodied in the sentence. Directions in regard to the former were usually given by the judge in the calendar of capital cases prepared by the clerk at the close of the term; as, for example, in the case of murder, the direction was ‘let him be hanged by the neck,’ which calendar was signed by the judge and clerk, and constituted in many cases the only authority of the officer as to the mode of execution. 4 Bl. Com. 404; Bishop, (Cr. Proc. (2d ed.), sects. 1146-1148; Bishop, Cr. L. (6th ed.), sect. 935.

Reference is made to the cases of [*Hartung* v. *The People* (22 N. Y. 95),](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1860012742&pubNum=596&originatingDoc=Ie97f0985b5c211d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) *The*[](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ie18f889528c911dcaba8d9d29eb57eff&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[*People* v. *Hartung* (23 How. Pr. (N. Y.) 314),](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1862009778&pubNum=426&originatingDoc=Ie97f0985b5c211d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) *Same* v. *Same* (26 id. 154), and *Same*v. *Same* (28 id. 400), as supporting the theory of the prisoner that the court possessed no authority to prescribe the mode of execution; but the court here is entirely of a different opinion, for the reasons already given.

*Judgment affirmed*.

**Weems v. United States**

30 S.Ct. 544

Supreme Court of the **United** **States**

**PAUL A. WEEMS, Plff. in Err.,**

**v.**

**UNITED STATES.**

No. 20.

Argued November 30 and December 1, 1909.Decided May 2, **1910**.

## Synopsis

IN ERROR to the Supreme Court of the Philippine Island to review a judgment which affirmed a conviction in the Court of First Instance for the City of Manila of the falsification by a public official of a public and official document. Reversed, and remanded with directions to dismiss the proceeding.

See same case below, 7 Philippine, 241.

The facts are stated in the opinion.

# Solem v. Helm

#### United States Supreme Court 463 U.S. 277 (1983)

#### Rule of Law

**A life sentence without the possibility of parole for a seventh nonviolent felony violates the Eighth Amendment prohibition of cruel and unusual punishment**.

#### Facts

Jerry Helm (defendant) had six prior nonviolent felony convictions when he was convicted for passing a “no account” check in the amount of $100. The crime normally carries a sentence of up to five years in prison and a $5,000 fine. Under South Dakota’s recidivist statute, an offender with at least three felony convictions can be sentenced to life imprisonment and a $25,000 fine. Helm pled guilty, and the South Dakota Circuit Court sentenced Helm to life imprisonment without the possibility of parole. The court of appeals reversed on the grounds that the sentence was “grossly disproportionate” to the crime. The United States Supreme Court granted certiorari to consider whether the sentence violated the Eighth Amendment.

#### Issue

Does a life sentence without the possibility of parole for a seventh nonviolent felony violate the Eighth Amendment prohibition of cruel and unusual punishment?

#### Holding and Reasoning (Powell, J.)

Yes. The Eighth Amendment prohibits cruel and unusual punishment. Sentences that are inhumane or disproportionate to the offense are unconstitutional. The requirement of proportionality is a common law principle incorporated into our Constitution. In *Weems v. United States*, 217 U.S. 349 (1910), the Court invalidated a sentence of 15 years hard labor for falsifying documents because the sentence was disproportionate. In *Enmund v. Florida*, 458 U.S. 782 (1982), the Court deemed a death sentence excessive in a case where the defendant did not intend to kill anyone. Reviewing courts should consider three objective factors in assessing proportionality under the Eighth Amendment: (1) the seriousness of the crime and the punishment, (2) other sentences issued within the jurisdiction, and (3) sentences issued for the offense outside the jurisdiction. In this case, Helm’s crime and previous offenses were all minor and nonviolent. Yet Helm’s sentence was the most severe available under South Dakota law at the time. Helm’s sentence was more serious than the life sentence validated in *Rummel v. Estelle*, 445 U.S. 263 (1980), because parole was possible after 12 years. South Dakota authorizes the life sentences for murder, treason, first-degree manslaughter or arson, and kidnapping. Only Nevada law would permit a life sentence for Helm’s offense, and there is no evidence of such a sentence being imposed. Under these criteria, Helm’s sentence was disproportionate to the offense. Ad hoc executive clemency is not analogous to parole with established procedures. Helm’s sentence violated the Eighth Amendment and must be overturned.

#### Dissent (Burger, C.J.)

The Court’s ruling ignores precedent, encroaches on states’ rights, and misrepresents the proportionality principle. This Court approved of a life sentence in *Rummel* for an offender with fewer and less serious convictions than Helm, but the majority does not overrule that decision. The Eighth Amendment prohibition of cruel and unusual punishment was aimed at preventing torture and focused solely on the method of punishment. The proportionality rule has generally been reserved for serious, capital cases. The Court’s application of the rule in this case is a way to substitute its judgment for that of the legislature. The Court creates a slippery slope that will likely cause a great deal of highly subjective litigation in lower courts.

**Key Terms:**

**Cruel and Unusual Punishment -** Any criminal sanction that is barbaric, torturous, inhumane, or so disproportionate to the offense committed as to shock the conscience of the community.

***Solem* Proportionality Test -** Test for assessing whether a sentence is disproportionate to the crime and therefore violates the Eighth Amendment prohibition of cruel and unusual punishment based on three objective factors: (1) the seriousness of the crime and the punishment, (2) other sentences issued within the jurisdiction, and (3) sentences issued for the offense outside the jurisdiction.

**Harmelin v. Michigan**

111 S.Ct. 2680

Supreme Court of the United States

**Ronald Allen HARMELIN, Petitioner**

**v.**

**MICHIGAN.**

No. 89–7272.

Argued Nov. 5, 1990.Decided June 27, 1991.

## Synopsis

Petitioner was convicted in Oakland Circuit Court, Gene Schnelz, J., of possessing more than 650 grams of cocaine and was sentenced to mandatory term of life in prison without possibility of parole. [The Michigan Court of Appeals, 176 Mich.App. 524, 440 N.W.2d 75](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989062820&pubNum=0000595&originatingDoc=I72ea61da9c9a11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), affirmed and certiorari was granted. The Supreme Court, Justice [Scalia](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254763301&originatingDoc=I72ea61da9c9a11d991d0cc6b54f12d4d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I72ea61da9c9a11d991d0cc6b54f12d4d) held that imposition of mandatory sentence of life in prison without possibility of parole, without any consideration of mitigating factors, such as fact that petitioner had no prior felony convictions, did not constitute cruel and unusual punishment; severe, mandatory penalties may be cruel, but they are not unusual in the constitutional sense.

Affirmed.

[Scalia](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254763301&originatingDoc=I72ea61da9c9a11d991d0cc6b54f12d4d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I72ea61da9c9a11d991d0cc6b54f12d4d), J., announced judgment of Court and delivered opinion of court with respect to Part IV, in which Chief Justice [Rehnquist](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0238463201&originatingDoc=I72ea61da9c9a11d991d0cc6b54f12d4d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I72ea61da9c9a11d991d0cc6b54f12d4d) and [O'Connor](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0209675601&originatingDoc=I72ea61da9c9a11d991d0cc6b54f12d4d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I72ea61da9c9a11d991d0cc6b54f12d4d), [Kennedy](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0243105201&originatingDoc=I72ea61da9c9a11d991d0cc6b54f12d4d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I72ea61da9c9a11d991d0cc6b54f12d4d) and [Souter](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0263202201&originatingDoc=I72ea61da9c9a11d991d0cc6b54f12d4d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I72ea61da9c9a11d991d0cc6b54f12d4d), Justices, joined, and an opinion with respect to Parts I, II, and III, in which the Chief Justice joined.

Justice [Kennedy](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0243105201&originatingDoc=I72ea61da9c9a11d991d0cc6b54f12d4d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I72ea61da9c9a11d991d0cc6b54f12d4d) filed an opinion concurring in part and concurring in the judgment, in which [O'Connor](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0209675601&originatingDoc=I72ea61da9c9a11d991d0cc6b54f12d4d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I72ea61da9c9a11d991d0cc6b54f12d4d) and [Souter](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0263202201&originatingDoc=I72ea61da9c9a11d991d0cc6b54f12d4d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I72ea61da9c9a11d991d0cc6b54f12d4d), Justices, joined.

Justice [White](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0257944001&originatingDoc=I72ea61da9c9a11d991d0cc6b54f12d4d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I72ea61da9c9a11d991d0cc6b54f12d4d) filed a dissenting opinion in which [Blackmun](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0264439801&originatingDoc=I72ea61da9c9a11d991d0cc6b54f12d4d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I72ea61da9c9a11d991d0cc6b54f12d4d) and [Stevens](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0156277701&originatingDoc=I72ea61da9c9a11d991d0cc6b54f12d4d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I72ea61da9c9a11d991d0cc6b54f12d4d), Justices, joined.

Justice [Marshall](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0336250901&originatingDoc=I72ea61da9c9a11d991d0cc6b54f12d4d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I72ea61da9c9a11d991d0cc6b54f12d4d) filed dissenting opinion.

Justice [Stevens](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0156277701&originatingDoc=I72ea61da9c9a11d991d0cc6b54f12d4d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I72ea61da9c9a11d991d0cc6b54f12d4d) filed dissenting opinion in which [Blackmun](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0264439801&originatingDoc=I72ea61da9c9a11d991d0cc6b54f12d4d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I72ea61da9c9a11d991d0cc6b54f12d4d), Justice, joined.

# Ewing v. California

#### United States Supreme Court 538 U.S. 11 (2003)

#### Rule of Law

**Sentencing a repeat felon to 25 years imprisonment under a state’s three strikes law does not violate the Eighth Amendment prohibition of cruel and unusual punishment.**

#### Facts

Gary Ewing (defendant) was arrested for stealing golf clubs worth $1,200. Ewing had prior convictions, including three burglaries and a robbery. Under California’s “Three Strikes and You’re Out Law,” defendants with more than two violent or serious felonies are sentenced to “an indeterminate term of life imprisonment.” Some crimes may be deemed felonies or misdemeanors at the discretion of the prosecutor and the court. Courts may also avoid the three strikes rule by vacating allegations of earlier serious or violent felonies. Ewing was charged with felony grand theft, and the prosecutor invoked the three strikes law. The trial court did not exercise its discretion to reduce the charge or vacate earlier allegations. Ewing was convicted and sentenced to 25 years to life imprisonment. The United States Supreme Court granted certiorari to consider whether the sentence violated the Eighth Amendment.

#### Issue

Does sentencing a repeat felon to 25 years imprisonment under a state’s three strikes law violate the Eighth Amendment prohibition of cruel and unusual punishment?

#### Holding and Reasoning (O’Connor, J.)

No. The Constitution does not prohibit a 25-year sentence for serious, habitual offenders. The principle of proportionality that forms part of the Eighth Amendment prohibition of cruel and unusual punishment was limited by *Harmelin v. Michigan*, 501 U.S. 957 (1991), for cases not involving the death penalty. The state interest in protecting public safety from habitual offenders spawned three strikes laws across the country. California’s law reflects the policy choice of the legislature to remove repeat violent or serious offenders from society. About 67 percent of offenders released from prison will commit another serious crime within three years. Recidivism laws further the goals of incapacitation and deterrence. California saw a 25 percent drop in the recidivism rate following the passage of the law. California’s legislature bears the responsibility for assessing the law’s prudence, and this Court is satisfied that the state had a reasonable basis for believing the law promotes its goals. In this case, there is no great disproportion between the seriousness of the offense and the sentence. Ewing was convicted of stealing items worth $1,200 after four serious or violent felonies. The sentence is warranted by California’s interest in protecting the public from repeat offenders like Ewing through incapacitation and deterrence. Thus, Ewing’s sentence is affirmed.

#### Concurrence (Scalia, J.)

The purpose of the Eighth Amendment prohibition of cruel and unusual punishment was to bar particular methods of criminal punishment, not disproportionate sanctions. The proportionality principle only makes sense if the goal of punishment is retribution. If the goals include incapacitation, deterrence, and rehabilitation, the principle cannot be logically applied. Proportionality alone does not justify Ewing’s sentence of 25 years to life for shoplifting golf clubs. The truth underlying the majority’s opinion is the notion that criminal sanctions should be reasonably related the state’s penological goals, but this requires an admission that the Court is not simply applying the law but making policy judgments.

#### Concurrence (Thomas, J.)

The *Solem v. Helm*, 463 U.S. 277 (1983), proportionality test cannot be rationally applied, and the Eighth Amendment prohibition of cruel and unusual punishment does not require proportionality.

#### Dissent (Stevens, J.)

The Eighth Amendment bars excessive punishment, and judges have the authority to determine what punishment is permissible under the amendment. Historically, judges have been given broad discretion in sentencing, and those judges assessed the proportionality of a sentence in light of all of the goals of criminal punishment. Thus, the principle of proportionality underlying the Eighth Amendment considers each of the penological goals of punishment.

#### Dissent (Breyer, J.)

The issue is whether Ewing’s sentence was proportionate to his crime. Ewing will spend 25 years in prison for stealing golf clubs worth $1,197 due to his prior convictions. *Solem* controls, and Ewing’s sentence should be found unconstitutional. Shoplifting is a serious problem, but the harshness of the sentence is not proportionate to the crime. When the injury to the victim and community, the seriousness of the crime, and Ewing’s blameworthiness are considered, stealing the clubs is a relatively minor crime.

**Key Terms:**

**Cruel and Unusual Punishment -** Any criminal sanction that is barbaric, torturous, inhumane, or so disproportionate to the offense committed as to shock the conscience of the community.

**Recidivism -** The propensity to repeat criminal behavior.

**Incapacitation -** Disabling or disqualifying an individual.

**Lockyer v. Andrade**

123 S.Ct. 1166

Supreme Court of the United States

**Bill LOCKYER, Attorney General of California, Petitioner,**

**v.**

**Leandro ANDRADE.**

No. 01-1127.

Argued Nov. 5, 2002.Decided March 5, 2003.

## Synopsis

State prisoner who was convicted on two counts of petty theft and sentenced to life in prison under California's Career Criminal Punishment Act, also known as the Three Strikes law, petitioned for writ of habeas corpus. The United States District Court for the Central District of California, [Christina A. Snyder](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0188505401&originatingDoc=I1d16f9a59c9711d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I1d16f9a59c9711d993e6d35cc61aab4a), J., denied petition, and prisoner appealed. The United States Court of Appeals for the Ninth Circuit, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I44dba0b179c611d9ac1ffa9f33b6c3b0&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[270 F.3d. 743,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2001931207&pubNum=506&originatingDoc=I1d16f9a59c9711d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) Paez, Circuit Judge, reversed and remanded. Certiorari was granted. The Supreme Court, Justice [O'Connor](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0209675601&originatingDoc=I1d16f9a59c9711d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I1d16f9a59c9711d993e6d35cc61aab4a), held that California Court of Appeal's decision affirming petitioner's two consecutive terms of 25 years to life in prison for “third strike” conviction was not “contrary to” or an “unreasonable application” of “clearly established” gross disproportionality principle set forth by [Rummel](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980105865&originatingDoc=I1d16f9a59c9711d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)), [Solem](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1983130328&originatingDoc=I1d16f9a59c9711d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) and [Harmelin](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1991116023&originatingDoc=I1d16f9a59c9711d993e6d35cc61aab4a&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) decisions of United States Supreme Court and thus did not warrant federal habeas relief.

Reversed.

Justice [Souter](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0263202201&originatingDoc=I1d16f9a59c9711d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I1d16f9a59c9711d993e6d35cc61aab4a) dissented and filed opinion in which Justices [Stevens](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0156277701&originatingDoc=I1d16f9a59c9711d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I1d16f9a59c9711d993e6d35cc61aab4a), [Ginsburg](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0224420501&originatingDoc=I1d16f9a59c9711d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I1d16f9a59c9711d993e6d35cc61aab4a) and [Breyer](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I1d16f9a59c9711d993e6d35cc61aab4a&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I1d16f9a59c9711d993e6d35cc61aab4a) joined.

# Rummel v. Estelle, Corrections Director

#### United States Supreme Court 445 U.S. 263 (1980)

#### Rule of Law

**A state has broad discretion to define and punish criminal recidivism.**

#### Facts

Between 1964 and 1973, William James Rummel (defendant) was convicted three times for nonviolent property felonies, the total value of which was about $230. Pursuant to the Texas recidivism statute, which was harsher than almost any other state's, Rummel's third felony conviction subjected him to life imprisonment as a recidivist. Rummel brought a habeas corpus action against Estelle, the Texas director of corrections. Rummel did not question the state's right to treat his crimes as felonies, but he contended that his life sentence was so disproportionate to the nonviolent crimes he committed that it violated the Eighth Amendment. The district court denied relief. Rummel appealed and a circuit court panel reversed. The full circuit court reheard the case en banc and reinstated the district court's judgment. The full court placed particular importance on Rummel's eligibility for parole after 12 years. Rummel appealed to the United States Supreme Court.

#### Issue

Does a state have broad discretion to define and punish criminal recidivism?

#### Holding and Reasoning (Rehnquist, J.)

Yes. A state has broad discretion to define and punish criminal recidivism. The state has a right to determine the point at which an offender's repeated felonies warrant separating him from society for an unusually long period of time. This segregation and its duration are based not merely on the nature of the offender's felonies, but on the state's need to deter the felonious propensities the offender has demonstrated over time. Short of imposing the death penalty, which because of its severity and finality is qualitatively different from imprisonment, a state may impose whatever sentence it considers necessary to deter recidivism. Here, there is no clear and objective test that the Court can apply to say that Rummel's life sentence is so disproportionate, and so much harsher than another state would impose, that it constitutes cruel and unusual punishment under the Eighth Amendment. Moreover, the harshness of Rummel's sentence is considerably mitigated by his eligibility for parole after 12 years. Rummel's sentence is affirmed.

#### Dissent (Powell, J.)

First, Rummel's eligibility for parole should play no role in the Eighth Amendment analysis of his case. Second, a life sentence for repeated parking meter violations might deter parking violations, but that would be so disproportional to the offense as to violate both common sense and the Eighth Amendment. Contrary to the majority's assertion, it is possible to measure the proportionality of a noncapital sentence for recidivism against a clear and objective standard. The Court should consider the nature of the offense, the recidivism sentence for similar offenses in other states, and the sentence imposed on other offenders in the same state. Judged by that test, Rummel's life sentence is disproportionately harsh and should be overturned.

**Key Terms:**

**Writ of Habeas Corpus** - Enables a detainee or prisoner to challenge the legality of his detention by the government.

**Eighth Amendment** - Prohibits the imposition of excessive bail, excessive fines, or cruel and unusual punishments on criminal defendants.

**Recidivism -** The propensity to repeat criminal behavior.

**Hutto v. Davis**

102 S.Ct. 703

Supreme Court of the United States

**Terrell Don HUTTO, Director, Virginia State Department of Corrections, et al.**

**v.**

**Roger Trenton DAVIS.**

No. 81-23.

Jan. 11, 1982.Rehearing Denied March 22, 1982.See [455 U.S. 1038, 102 S.Ct. 1742](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1982212531&pubNum=708&originatingDoc=Ie2c427f59bf111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

**Synopsis**

Virginia prisoner, sentenced to 40 years' imprisonment and assessed $20,000 fine upon conviction of possession of marijuana with intent to distribute and distribution of that marijuana, filed petition for writ of habeas corpus. The United States District Court for the Western District of Virginia, James C. Turk, Chief Judge, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I3dd0c6eb551f11d9a99c85a9e6023ffa&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[432 F.Supp. 444,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1977125259&pubNum=345&originatingDoc=Ie2c427f59bf111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))granted relief. A panel of the United States Court of Appeals for the Fourth Circuit, [585 F.2d 1226,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1978120771&pubNum=350&originatingDoc=Ie2c427f59bf111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) reversed. On rehearing en banc, the Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I951e6b0691bf11d9bc61beebb95be672&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[601 F.2d 153,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1979113582&pubNum=350&originatingDoc=Ie2c427f59bf111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed district court judgment. That judgment was vacated by the Supreme Court, [445 U.S. 947, 100 S.Ct. 1593,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980234896&pubNum=708&originatingDoc=Ie2c427f59bf111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) 63 L.Ed.2d 732. On remand, the Court of Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ia16ff4a5927811d9bdd1cfdd544ca3a4&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[646 F.2d 123,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981116356&pubNum=350&originatingDoc=Ie2c427f59bf111d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed district court by equally divided vote, and certiorari was granted. The Supreme Court held that by affirming district court, Court of Appeals sanctioned an intrusion into basic line-drawing process that is properly within process of legislatures, not courts.

Reversed and remanded with instructions.

Justice Powell concurred in the judgment and filed opinion.

Justice Brennan dissented and filed opinion in which Justice Marshall and Justice Stevens joined.

**Enmund v. Florida**

102 S.Ct. 3368

Supreme Court of the United States

**Earl ENMUND, Petitioner**

**v.**

**FLORIDA.**

No. 81-5321.

Argued March 23, 1982.Decided July 2, 1982.

**Synopsis**

Defendant was convicted in the Circuit Court, Hardee County, William A. Norris, Jr., J., of murder in the first degree and robbery, and was sentenced to death. He appealed. The Supreme Court of [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I4a6286410c7811d9bc18e8274af85244&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[Florida, 399 So.2d 1362,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981118490&pubNum=735&originatingDoc=I6b4669c59c2511d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed. Certiorari was granted and, in an opinion by Justice White, the Supreme Court held that: (1) the Eighth Amendment does not permit imposition of death penalty on defendant who aids and abets felony in course of which murder is committed by others but who does not himself kill, attempt to kill, or intend that killing take place or that lethal force will be employed, and (2) identical treatment of robbers and their accomplice, and attribution to accomplice of culpability of those who killed victims, was impermissible under Eighth Amendment.

Reversed and remanded.

Justice Brennan filed concurring opinion.

Justice O'Connor filed dissenting opinion in which Chief Justice Burger, Justice Powell and Justice Rehnquist joined.

Opinion on remand, [439 So.2d 1383](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1983148879&pubNum=735&originatingDoc=I6b4669c59c2511d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

**Coker v. Georgia**

#### United States Supreme Court 433 U.S. 584 (1977)

#### Rule of Law

**Imposing the death penalty for the crime of rape violates the Eighth Amendment prohibition on cruel and unusual punishment.**

# Roper v. Simmons

#### United States Supreme Court 543 U.S. 551 (2005)

#### Rule of Law

**(1) An individual who has committed capital murder between the ages of fifteen and eighteen cannot be sentenced to death.  
(2) International law and foreign practice, particularly when near-universal in support of a common doctrine or policy, may be considered in interpretations of the Eighth Amendment to the United States Constitution by American courts.**

#### Facts

Christopher Simmons (defendant) was sentenced to death following his conviction for a murder occurring when he was seventeen years old. Simmons challenged his conviction on the ground that the application of the death penalty to a minor is unconstitutional and is not supported by international law. The United States Supreme Court previously considered constitutional challenges to the juvenile death penalty in Thompson v. Oklahoma, 487 U.S. 815 (1988), where a plurality held that the Eighth and Fourteenth Amendments to the United States Constitution, as well as trends in international law, prohibited application of the death penalty to persons under age sixteen at the time of commission of the crime. The dissent strongly opposed the consideration of international practice on any matters relating to interpreting the United States Constitution. However, in Stanford v. Kentucky, 492 U.S. 361 (1989), on the issue of the constitutionality of the death penalty applied to persons aged sixteen and seventeen, the application of the death penalty was upheld. Simmons argued in Missouri state court that after the Stanford decision, a new national consensus developed opposing application of the death penalty to juveniles which was supported by international law and foreign practice. The Missouri Supreme Court agreed, and Roper (plaintiff) appealed to the United States Supreme Court.

#### Issue

(1) Can an individual who committed capital murder at seventeen years of age be sentenced to death?(2) May international law and foreign practice ever be considered in resolving questions about the interpretation of the United States Constitution in American courts?

#### Holding and Reasoning (Kennedy, J.)

(1) No. The Eighth and Fourteenth Amendments of the United States Constitution prohibit cruel and unusual punishment, and the execution of an individual who committed capital murder before he reached eighteen years of age classifies as cruel and unusual punishment. Under Stanford v. Kentucky, 492 U.S. 361 (1989), the law allowed for such an execution. However, since that decision was handed down, the United States has become the only country in the world that allows for the execution of juvenile offenders. The United Nations in that time period has also ratified a convention document prohibiting the imposition of capital punishment upon individuals under the age of eighteen. The rest of the world has decided that capital punishment for juvenile offenders is cruel and unusual, and the United States should be no different. Therefore, the rule of law from Stanford no longer controls, and Simmons’s sentence to life imprisonment without parole is affirmed.(2) Yes. The application of the death penalty to persons under eighteen, including Simmons, violates both international law and the United States Constitution. International law and foreign practice, particularly when near-universal in support of a common doctrine or policy, may be considered in interpretations of the Eighth Amendment to the United States Constitution by American courts. While the ultimate duty of interpreting the United States Constitution lies with the United States Supreme Court, the Court has repeatedly referred since its 1958 decision in Trop v. Dulles, 356 U.S 86 (1958) 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.” A major international provision addressing the issue of the application of the death penalty to juveniles is Article 37 of the United Nations (UN) Convention on the Rights of the Child, which expressly prohibits capital punishment for crimes committed by juveniles under the age of eighteen. Every country in the world has ratified this Convention, with the exception of the United States and Somalia. No ratifying country has entered a reservation to the provision prohibiting the execution of juvenile offenders. Additionally, only seven countries other than the United States have executed juveniles in the past two decades, and each country subsequently either abolished or made a public disavowal of the practice. Thus, based on this fact and the nearly-universal ratification of the UN Convention on the Rights of the Child, the United States has emerged as the lone proponent of the continuing execution of juveniles among an international community that is largely opposed to the practice. Additionally, based on its history, the United States is most analogous to the United Kingdom as far as its process for developing its laws. The United Kingdom abolished juvenile execution within its borders long before the UN, and the United States’ own Eighth Amendment is modeled after the English Declaration of Rights of 1689. Since the early 1900s, the United Kingdom interpreted this provision as prohibiting the execution of persons under age eighteen. Since it was first prohibited in the United Kingdom, the weight of authority against the practice has only grown in that country and the international community. While international authority is not controlling on United States courts, when international opinion on a subject is near-universal, it is useful to consider in supporting the conclusions of the United States Supreme Court. The United States Constitution embodies certain guarantees for individual freedom and human dignity. It does not lessen the weight of the Constitution to acknowledge the express affirmation of these rights by other countries. The embodiment of these rights in the Eighth and Fourteenth Amendments to the United States Constitution prohibits the application of the death penalty to persons under eighteen. The Missouri Supreme Court’s decision to set aside Simmons’ death sentence is affirmed.

#### Concurrence (Stevens, J.)

The Eighth Amendment, if its interpretation had remained stagnant from its inception, would have allowed for the execution of anyone regardless of age. However, the law is an evolving entity, and the court should be applauded for its decision to overturn recent precedent in this decision. The execution of juvenile offenders is cruel and unusual punishment in every other country in the world, and the United States should no longer be the exception.

#### Dissent (O’Connor, J.)

In general, it is true that individuals under the age of eighteen are less mature and thus less knowledgeable of the true consequences of their actions. To categorically prohibit capital punishment from applying to all individuals under the age of eighteen however is a bit extreme. Certain individuals under eighteen years of age are completely aware of the consequences of their actions and should be subject to the same punishments as their adult counterparts. Someone does not magically become more culpable for his actions merely because he has reached a particular age. The individual eighteen years of age can be sentenced to death, but his counterpart who is seventeen years, 364 days cannot. That is an unacceptable standard under the law when both individuals had the same intent and committed the same crime. Therefore, there should be a fact-based inquiry at the sentencing phase to determine whether a juvenile offender should be sentenced to death rather than a blanket prohibition.

#### Dissent (Scalia, J.)

The United States should be making its own laws and interpretations of those laws rather than looking to other countries and what they decide to do. The United States does not benchmark its judicial interpretations against other countries in other matters, especially regarding the separation of church and state. The United States is also one of only six countries to allow for legal abortions. Should that law be changed as well because most other countries do not believe in it? The Supreme Court should be making its decisions based on its own beliefs, not the beliefs of others.

**Key Terms:**

**Eighth Amendment** - Prohibits the imposition of excessive bail, excessive fines, or cruel and unusual punishments on criminal defendants.

**Juvenile Offender -** An individual who was under the age of eighteen when he committed a crime.

# Atkins v. Virginia

#### United States Supreme Court 536 U.S. 304 (2002)

#### Rule of Law

**Capital punishment of an intellectually disabled individual constitutes cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution.**

#### Facts

Daryl Renard Atkins (defendant) and William Jones, who was armed with a semiautomatic handgun, abducted Eric Nesbitt, robbed him of his money and then drove him to an automated teller machine where the pair forced Nesbitt to withdraw additional cash. Thereafter, Atkins and Jones shot Nesbitt eight times, killing him. Atkins and Jones were charged with abduction, armed robbery, and capital murder. In the penalty phase, Dr. Evan Nelson, a forensic psychologist and witness for the defense, testified that Atkins was mildly intellectually disabled. Nelson’s conclusion was based on interviews conducted with people who knew Atkins, a review of his school and court records, and an IQ test administered to Atkins with a score of 59. A person with an IQ of 100 is considered to have an average level of cognitive functioning. Atkins was convicted of abduction, armed robbery, and capital murder and sentenced to death. Atkins appealed and the United States Supreme Court granted certiorari to review.

#### Issue

Does capital punishment of an intellectually disabled individual constitute cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution?

#### Holding and Reasoning (Stevens, J.)

Yes. The Eighth Amendment to the federal constitution expressly states, “[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishment inflicted.” Since the Court’s decision in *Penry v. Lynaugh*, 492 U.S. 302 (1989), the nation has debated whether the death penalty should apply to individuals with intellectual disabilities. Chief Justice Warren said in *Trop v. Dulles*, 356 U.S. 86 (1958), that the Eighth Amendment “must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.” Review under those evolving standards should be influenced by objective factors, including legislation enacted by the states. Relying on such legislative evidence, the Court has held that death is impermissible for those convicted of rape or in those cases where no life was taken. Further, public outcry against the execution of an intellectually disabled murderer in Georgia in 1986 led to the nation’s first statute prohibiting such executions. In 1988, Congress reinstated the death penalty, but expressly said that it did not apply to intellectually disabled individuals. Since that time, numerous states have enacted similar statutes to that of Georgia. There are two rationales why the intellectually disabled should be excluded from execution. First, there is a serious question regarding whether the general justifications for imposition of the death penalty, retribution and deterrence, should apply to intellectually disabled offenders. Retribution implies that the offender get his “just deserts,” but the severity of the punishment depends on the culpability of the offender. *See Gregg v. Georgia*, 428 U.S. 153 (1976). If the actions of the average murderer do not warrant imposition of the death penalty, surely the lesser culpability of the intellectually disabled offender does not merit that form of punishment. Further, the same impairments that make intellectually disabled defendants less morally culpable equally make them less able to understand and control their impulses. Consequently, deterrence does not affect them in the same manner as a defendant with normal cognitive functioning. The reduced capacity of intellectually disabled offenders provides a second justification. Intellectually disabled defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses. Their demeanor may create an unwarranted impression of lack of remorse for their crimes. The Court’s independent evaluation of the case at bar reveals that death is not a suitable punishment for an intellectually disabled individual.

#### Dissent (Rehnquist, C.J.)

In reaching its decision, the Court improperly relied on foreign law, the views of professional and religious organizations, and data from potentially unscientific and unreliable opinion polls in purporting to evaluate evolving standards of decency. The only sources on which the Court should have relied to objectively evaluate whether a punishment is cruel and unusual under evolving standards of decency are legislation and determinations by sentencing juries.

#### Dissent (Scalia, J.)

The Court’s decision takes its death-is-different jurisprudence to the extreme and finds no support in the Eighth Amendment nor in current social attitudes. In fact, the majority opinion rests almost entirely on the views of the Court’s members. Fewer than half of the 38 states that currently permit capital punishment have legislation barring execution of the intellectually disabled. How is that, as the majority suggests, a consensus that death is not applicable to the intellectually disabled? Previous cases before the Court have often required much more before finding a punishment cruel and unusual on “evolving standards” grounds. The majority’s retribution argument fails to note that culpability of a defendant depends on the gravity of the crime and, along with mental capacity, should be weighed in the penalty phase. Similarly, the purpose of deterrence is served if many of those targeted by the death penalty do not commit abhorrent crimes. The Court should not seek to use the Eighth Amendment to modify the death penalty one piece at a time. The issue should be left to the various legislative bodies.

**Key Terms:**

**Murder -** The unlawful killing of a human being with malice aforethought.

**Thompson v. Oklahoma**

108 S.Ct. 2687

Supreme Court of the United States

**William Wayne THOMPSON, Petitioner**

**v.**

**OKLAHOMA.**

No. 86-6169.

Argued Nov. 9, 1987.Decided June 29, 1988.

## Synopsis

Defendant was convicted of first-degree murder and sentenced to death, by jury verdict, in the District Court of Grady County, James R. Winchester, J. Defendant appealed. The Oklahoma Court of Criminal Appeals, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ie046e1bcf52f11d9b386b232635db992&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[724 P.2d 780,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986144896&pubNum=661&originatingDoc=I6b45a6739c2511d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) Brett, J., affirmed. On writ of certiorari, the Supreme Court, Justice Stevens, held that Eighth and Fourteenth Amendments prohibited execution of defendant convicted of first-degree murder for offense committed when defendant was 15 years old.

Judgment vacated; case remanded.

Justice O'Connor filed opinion concurring in judgment.

Justice Scalia filed dissenting opinion in which Rehnquist, Chief Justice, and White, Justice, joined.

Justice Kennedy did not participate.

# Gregg v. Georgia

#### United States Supreme Court 428 U.S. 153 (1976)

#### Rule of Law

**The death penalty is not a per se violation of the Eighth and Fourteenth Amendments to the federal constitution but should be imposed under sentencing procedures to avoid capricious or indiscriminate use.**

**Naovarath v. Nevada**

105 Nev. 525

Supreme Court of Nevada.

**Khamsone Kham NAOVARATH, Appellant,**

**v.**

**The STATE of Nevada, Respondent.**

No. 18872.

Sept. 7, 1989.

**Synopsis**

Defendant was convicted in the District Court, Clark County, Miriam Shearing, J., of first-degree murder. Defendant appealed. The Supreme Court, Springer, J., held that sentence of life imprisonment without possibility of parole imposed upon 13–year-old defendant was cruel and unusual under Federal and State Constitutions.

Appeal granted.

Mowbray, J., filed a concurring opinion.

Young, C.J., filed a dissenting opinion in which Steffen, J., joined.

# Tison v. Arizona

#### United States Supreme Court 481 U.S. 137 (1987)

#### Rule of Law

**It is constitutionally permissible to sentence a defendant convicted of felony-murder to death even if the defendant neither intended to kill the victim nor actually inflicted the fatal injury if the defendant was a major participant in the felony and possessed a reckless indifference to human life.**

#### Facts

Gary Tison was an inmate serving a sentence of life imprisonment for killing a guard during an attempted escape. On July 30, 1978, several years into his sentence, his brother and two sons, Ricky and Raymond Tison (defendants), attempted to free Gary from prison. They brought an ice chest full of weapons to the prison and armed both Gary and his cellmate, Randy Greenawalt. They locked the prison guards and other visitors in a closet and proceeded to escape in a Ford automobile. They then abandoned the Ford and decided to steal another car to continue their escape. Raymond flagged down a car occupied by a man and three of his family members. To Ricky and Raymond’s surprise, Gary and Randy shot and killed all four occupants of the car while Ricky and Raymond were at a distance getting water. Both Ricky and Raymond were convicted of felony-murder and sentenced to death.

#### Issue

Is it constitutionally permissible to sentence a defendant convicted of felony-murder to death where the defendant neither intended to kill the victim nor actually inflicted the fatal injury?

#### Holding and Reasoning (O’Connor, J.)

Yes. In *Enmund v. Florida*, 458 U.S. 782(1982), this Court held that if a defendant possesses an intent to kill, he possesses a mental state sufficient to justify the death penalty, even where the defendant does not actually inflict the fatal injury. In that case, Enmund was waiting in the getaway car while his accomplice murdered a couple during an armed robbery. He was convicted of felony-murder and sentenced to death. This Court overturned the death sentence, however, stating that the death penalty was a disproportional penalty due to the particular circumstances surrounding the murder. Enmund was not present during the killings and played a very minor role in the felony. Furthermore, there was no proof that Enmund had any culpable mental state. *Enmund* only ruled that an intent to kill is sufficient to justify the death penalty. It did not consider whether other degrees of participation or other mental states would also justify the death penalty. This court finds that defendants who are major participants in a felony and who act with a reckless indifference to human life may be subject to the death penalty. One who acts as a major participant in a felony should be held more responsible for any ensuing deaths. Also, murders that are committed without an intent to kill, but with complete indifference to whether someone is killed, are just as deserving of the death penalty as murders committed with an intent to kill. Here, Ricky and Raymond Tison lacked the intent to kill. However, they played a major role in carrying out Gary Tison’s escape and acted with a reckless indifference to human life. Both freed two convicted murderers and armed them with weapons. Raymond flagged down the victims’ car and admitted that he was willing to kill in order to complete the escape. Their major participation in the felony and their culpable mental states suggest that the death penalty is not an excessive punishment under the Eighth Amendment.

#### Dissent (Brennan, J.)

A reckless indifference to human life should not be sufficient to justify the death penalty because, in this case, Ricky and Raymond Tison did not actually kill. In situations where the defendant has not actually killed, it is all the more necessary to find that the defendant had an intent to kill. The law should not punish a person who has not chosen to kill to the same extent as a person who has.

**Key Terms:**

**Eighth Amendment** - Prohibits the imposition of excessive bail, excessive fines, or cruel and unusual punishments on criminal defendants.

**Johnson v. Texas**

113 S.Ct. 2658

Supreme Court of the United States

**Dorsie Lee JOHNSON, Jr., Petitioner,**

**v.**

**TEXAS.**

No. 92–5653.

Argued April 26, 1993.Decided June 24, 1993.*Rehearing Denied Aug. 9, 1993.See*[*509 U.S. 941, 114 S.Ct. 15.*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&pubNum=708&cite=114SCT15&originatingDoc=I822d75dc9c7e11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))

**Synopsis**

Defendant was convicted in the 132nd Judicial District Court, Scurry County, [Gene L. Dulaney](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0246664401&originatingDoc=I822d75dc9c7e11d9bdd1cfdd544ca3a4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I822d75dc9c7e11d9bdd1cfdd544ca3a4), J., of capital murder, and he appealed. The Texas Court of Criminal Appeals, [773 S.W.2d 322,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989093388&pubNum=713&originatingDoc=I822d75dc9c7e11d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed. Certiorari was granted. The Supreme Court, Justice [Kennedy](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0243105201&originatingDoc=I822d75dc9c7e11d9bdd1cfdd544ca3a4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I822d75dc9c7e11d9bdd1cfdd544ca3a4), J., held that instruction on future dangerousness based on probability of violence constituting continuing threat to society allowed adequate consideration of defendant's youth.

Affirmed.

Justice [Scalia](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254763301&originatingDoc=I822d75dc9c7e11d9bdd1cfdd544ca3a4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I822d75dc9c7e11d9bdd1cfdd544ca3a4) concurred and filed opinion.

Justice [Thomas](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I822d75dc9c7e11d9bdd1cfdd544ca3a4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I822d75dc9c7e11d9bdd1cfdd544ca3a4) concurred and filed opinion.

Justice [O'Connor](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0209675601&originatingDoc=I822d75dc9c7e11d9bdd1cfdd544ca3a4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I822d75dc9c7e11d9bdd1cfdd544ca3a4) dissented and filed opinion joined by Justices [Blackmun](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0264439801&originatingDoc=I822d75dc9c7e11d9bdd1cfdd544ca3a4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I822d75dc9c7e11d9bdd1cfdd544ca3a4), [Stevens](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0156277701&originatingDoc=I822d75dc9c7e11d9bdd1cfdd544ca3a4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I822d75dc9c7e11d9bdd1cfdd544ca3a4), and [Souter](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0263202201&originatingDoc=I822d75dc9c7e11d9bdd1cfdd544ca3a4&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I822d75dc9c7e11d9bdd1cfdd544ca3a4).

**Workman v. Commonwealth**

429 S.W.2d 374

Court of Appeals of Kentucky.

**Richard WORKMAN and Isaac Pipes, Appellants,**

**v.**

**COMMONWEALTH of Kentucky, Appellee.**

June 14, 1968.

**Synopsis**

The Jefferson County Circuit Court, Criminal Branch, Second Division, Miles Pound, J., found defendants guilty of having committed forcible rape, and from a denial of motion to vacate the judgment, defendants appealed. The Court of Appeals, Osborne, J., held that although penalty of life imprisonment without parole may be imposed on adult offender convicted of rape, life imprisonment without benefit of parole is cruel and unusual punishment when applied to juvenile offenders.

Affirmed in part, reversed in part.

Montgomery, J., dissented.

**Sullivan v. Florida**

129 S.Ct. 2157

Supreme Court of the United States

**Joe Harris SULLIVAN, petitioner,**

**v.**

**FLORIDA.**

No. **08**–**7621**.

May 4, 2009.

**Synopsis**

Case below, [987 So.2d 83](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&pubNum=0000735&cite=987SO2D83&originatingDoc=I0c117b53c83f11ddbc7bf97f340af743&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Search)).

**Opinion**

Motion of petitioner for leave to proceed *in forma pauperis* granted.

 Petition for writ of certiorari to the District Court of Appeal of **Florida**, First District, granted.

**Eddings v. Oklahoma**

102 S.Ct. 869

Supreme Court of the United States

**Monty Lee EDDINGS, Petitioner,**

**v.**

**OKLAHOMA.**

No. 80–5727.

Argued Nov. 2, 1981.Decided Jan. 19, 1982.

**Synopsis**

Defendant, who was 16 years old at time of murder, entered plea of nolo contendere to murder charge and was sentenced to death by the District Court, Creek County, Charles S. Woodson, J. The Oklahoma Court of Criminal Appeals affirmed, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I024aca01f3bb11d99439b076ef9ec4de&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[616 P.2d 1159.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1980111987&pubNum=661&originatingDoc=Ic1d390889c1e11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) Certiorari was granted. The Supreme Court, Justice Powell, held death sentence was to be vacated and cause remanded for further proceedings where, as a matter of law, state courts refused to consider as a mitigating circumstance the petitioner's unhappy upbringing and emotional disturbance, including evidence of turbulent family history and beatings by a harsh father.

Reversed in part and remanded for further proceedings.

Justice Brennan and Justice O'Connor filed concurring opinions.

Chief Justice Burger dissented and filed opinion in which Justice White, Justice Blackmun and Justice Rehnquist joined.

# \*\*GLOSSIP v. GROSS\*\*

#### United States Supreme Court \_\_\_ U.S. \_\_\_, 135 S. Ct. 2726 (2015)

#### Rule of Law

**A defendant must establish that a method of execution has a substantial risk of harm as compared to a known and available alternative method of execution in order to prove cruel and unusual punishment under the Eighth Amendment.**

#### Facts

Richard Glossip and several other death-row inmates in Oklahoma (plaintiffs) filed a petition in federal district court against Kevin Gross and other state officials (defendants) to enjoin executions in the state. The inmates alleged that one of the drugs used in the state’s three-drug lethal injection constituted cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution because the drug might not prevent extreme pain. The district court rejected the claim, and the court of appeals affirmed. The United States Supreme Court granted review.

#### Issue

Must a defendant establish that a method of execution has a substantial risk of harm as compared to a known and available alternative method of execution in order to prove cruel and unusual punishment under the Eighth Amendment?

#### Holding and Reasoning (Alito, J.)

Yes. In order to prove a method of execution amounts to cruel and unusual punishment, a defendant must show that a method of execution has a substantial risk of harm compared to alternative methods. Here, Glossip has failed to prove that the state’s three-drug lethal injection is inadequate and causes extreme pain. Thus, the lethal injection does not have a substantial risk of harm as compared to other methods of execution and does not constitute cruel and unusual punishment. Accordingly, the judgment of the court of appeals is affirmed.

#### Concurrence (Scalia, J.)

This concurrence responds to the dissent of Justice Breyer and his call to abolish the death penalty. This Court cannot possibly hold unconstitutional that which the United States Constitution explicitly contemplates. The Fifth Amendment provides that no person shall be deprived of life without due process. The Eighth Amendment bars punishments that add “terror, pain, or disgrace” to a legal capital sentence. *Baze v. Rees*, 553 U.S. 35 (2008) (Thomas, J., concurring in the judgment). Justice Breyer’s attempt to substitute concepts of unreliable, arbitrary, or delayed imposition of sentences for actual cruel punishment is without legal merit. The convictions themselves are unreliable, not the punishment. The allegation of arbitrary or inconsistent use of the death penalty through comparison to the egregiousness of the crime is subjective and unpersuasive. Variations in sentences are inevitable in our jury-trial system. The argument that the death penalty is cruel due to lengthy stays on death row under poor conditions is nonsense. If the conditions are bad, the remedy is to cure those conditions, not to abolish the punishment. The delays are a product of this Court’s own making, having adopted numerous protections for capital defendants. The constitutionality of the death penalty is for the states to decide, not this Court.

#### Dissent (Breyer, J.)

Justice Sotomayor is correct. Additionally, the death penalty itself likely constitutes cruel and unusual punishment under the Eighth Amendment. The death penalty is unconstitutional for three reasons: (1) serious unreliability, (2) arbitrary application, and (3) unconscionably long delays that undermine the death penalty’s penal purpose. (1) The death penalty is cruel because it is unreliable. Research shows that innocent people have been executed within the last three decades. The death penalty has been wrongfully imposed numerous times upon defendants who have later been completely exonerated. Wrongful convictions occur at a higher rate in capital cases than for ordinary crimes due to the intense community pressure to secure a conviction for the most serious crimes. The death penalty is also unreliable due to the death qualification of jurors, which disqualifies jurors who are opposed to the death penalty. (2) The death penalty is cruel, because its administration is arbitrary. This Court held in 1976 that the death penalty would be unconstitutional if shown to be inflicted in an arbitrary manner. *See Gregg v. Georgia*, 428 U.S. 153 (1976). Studies indicate that over the last 40 years, the death penalty has been imposed without reasonable consistency. Although the death penalty purportedly has been reserved for the most atrocious crimes, there is no meaningful basis for differentiating the few cases where the death penalty is used from the multitude of more heinous cases where the death penalty is not used. To the contrary, factors that should not influence use of the death penalty, such as race, gender, or geography, often have greater influence than the comparative egregiousness of the crime. (3) The death penalty is cruel due to excessive delays in its use. In 2014, the 35 defendants who were executed in the United States spent an average of 18 years on death row. The delay subjects inmates to years of dehumanizing solitary confinement with uncertainty as to when, if ever, execution will occur. The delay also lessens the intended effects of deterrence and retribution. These concerns have rendered the death penalty a truly unusual punishment; the death penalty is rarely used by many states.

#### Dissent (Sotomayor, J.)

The inmates should be given a stay of execution while seeking to prove the challenged drug’s inadequacy.

**Key Terms:**

**Cruel and Unusual Punishment -** Any criminal sanction that is barbaric, torturous, inhumane, or so disproportionate to the offense committed as to shock the conscience of the community.

# Baze v. Rees

#### United States Supreme Court 553 U.S. 35 (2008)

#### Rule of Law

**A method of execution must create an intolerable risk of harm to be deemed cruel and unusual.**

#### Facts

The petitioners in this case were convicted of double homicide and sentenced to death in Kentucky. Kentucky administers the death penalty by lethal injection. Lethal injection protocols in Kentucky require the use of three drugs. The first drug renders the prisoner unconscious. The second drug is administered to prevent involuntary muscle movement and to eventually stop respiration. A third drug then induces cardiac arrest. In the lower court, the petitioners claimed that the lethal injection protocol used in Kentucky constitutes cruel and unusual punishment in violation of the Eighth Amendment, because there is a risk that the protocols could be followed incorrectly and thereby result in significant pain for the prisoner. The petitioners presented an alternative method of lethal injection through the use of a one-drug protocol. This method has not been used or adopted by any other state. The court below determined that Kentucky’s protocols for lethal injections do not violate the Eighth Amendment.

#### Issue

Does a method of execution need to create an intolerable risk of harm in order to be deemed cruel and unusual?

#### Holding and Reasoning (Roberts, C.J.)

Yes. The Eighth Amendment of the Constitution prohibits the infliction of cruel and unusual punishment. It has been established that capital punishment does not violate the Eighth Amendment, and that the Eighth Amendment does not require that all risk of pain be eliminated. Executions violate the Eighth Amendment when they involve a method of execution in which there is an objectively intolerable risk of harm that is cruel and unusual. Any suggested alternative procedures must be feasible, readily implemented, and must significantly reduce a substantial risk of pain. A state that unjustifiably ignores an adequate alternative procedure can be found to inflict cruel and unusual punishment by continuing to use established procedures. Here, the petitioners have failed to show that there is a substantial risk that the first drug will be administered improperly. Consequently, the petitioners have failed to show that Kentucky’s established protocols violate the Eighth Amendment. The judgment of the court below is affirmed.

#### Concurrence (Alito, J.)

This case involves the issue of the constitutionality of a method of execution, which should not be conflated with the issue of the death penalty itself.

#### Concurrence (Stevens, J.)

The use of the second drug in Kentucky’s protocol is disturbing because there is no real need to prevent involuntary muscle movement. By preventing involuntary muscle movement, Kentucky runs the risk that the prisoner is experiencing excruciating pain that cannot be detected due to the paralysis induced by the second drug. States therefore ought to consider eliminating the use of the second drug. This Court and legislatures should also consider whether the principal rationales for the death penalty, namely deterrence and retribution, justify the great costs imposed by death penalty litigation. The death penalty offers few benefits. Arguably, the unnecessary execution of prisoners that produces only marginal benefits constitutes cruel and unusual punishment in violation of the Eighth Amendment.

#### Concurrence (Scalia, J.)

Even if the death penalty does not deter crimes, it is still constitutional because it serves the purpose of retribution.

#### Concurrence (Thomas, J.)

There is no support for the substantial risk standard or unnecessary risk standard in the Eighth Amendment. A method of execution only violates the Eighth Amendment if it poses a significant and unnecessary risk of inflicting severe pain.

#### Concurrence (Breyer, J.)

In reviewing a method of execution, the relevant question is whether the method creates an untoward, readily avoidable risk of inflicting severe and unnecessary suffering. However, the petitioners have failed to show that Kentucky’s protocols create such a risk.

#### Dissent (Ginsburg, J.)

Kentucky’s protocol lacks sufficient safeguards to ensure the first drug is administered properly. Therefore, the case should be vacated and remanded in order to consider whether the lack of safeguards poses an untoward, readily avoidable risk of inflicting severe and unnecessary pain.

**Key Terms:**

**Eighth Amendment** - Prohibits the imposition of excessive bail, excessive fines, or cruel and unusual punishments on criminal defendants.

# Graham v. Florida

#### United States Supreme Court 560 U.S. 48 (2010)

#### Rule of Law

**Imposing a sentence of life in prison without parole upon a juvenile who did not commit homicide violates the Eighth Amendment’s prohibition against cruel and unusual punishment.**

# Roper v. Simmons

#### United States Supreme Court 543 U.S. 551 (2005)

#### Rule of Law

**(1) An individual who has committed capital murder between the ages of fifteen and eighteen cannot be sentenced to death.  
(2) International law and foreign practice, particularly when near-universal in support of a common doctrine or policy, may be considered in interpretations of the Eighth Amendment to the United States Constitution by American courts.**

# Miller v. Alabama

#### United States Supreme Court 567 U.S. 460 (2012)

#### Rule of Law

**A mandatory punishment of life without parole for those under the age of 18 at the time the crime is committed violates the Eighth Amendment’s prohibition on cruel and unusual punishment.**

#### Facts

This case involves two criminal defendants. In November 1999, 14-year-old Kuntrell Jackson (defendant) and two other boys robbed a video store. During the robbery, one of the other boys shot the store clerk. Jackson was tried as an adult, as permitted under Arkansas law. A jury convicted Jackson of capital felony murder and aggravated robbery. Because the verdict only allowed for life without possibility of parole, the judge sentenced Jackson accordingly. The judge did not consider that Jackson did not shoot the clerk or that he had family members who had previously shot others. Evan Miller (defendant) was also 14 years old when he killed his neighbor while high after he beat the neighbor in the neighbor’s trailer and set fire to it. Miller was tried as an adult for murder in the course of arson. The mandatory minimum for that crime is life without parole under Alabama law. The sentencer did not consider that Miller had previously been abused by his stepfather and neglected by his mother, or that he had attempted suicide four times.

#### Issue

Does a mandatory punishment of life without parole for those under the age of 18 at the time the crime is committed violate the Eighth Amendment’s prohibition on cruel and unusual punishment?

#### Holding and Reasoning (Kagan, J.)

Yes. This Court’s previous cases have established that juveniles have diminished culpability and are more susceptible to reformation. They should therefore be treated differently from adults when given severe penalties. Here, the mandatory minimums imposed by Alabama law prevents courts from considering a juvenile’s diminished culpability and potential for reformation. In Jackson’s case, he did not personally shoot the store clerk. He also had family members who had previously shot others. The judge should have been able to consider these facts before imposing such a harsh penalty on Jackson. In Miller’s case, Miller was high when he committed his crime and had a pathological background. These facts should have been considered by the sentencer. Consequently, the mandatory minimum of life without parole violates the Eighth Amendment prohibition on cruel and unusual punishment.

#### Dissent (Roberts, C.J.)

The Eighth Amendment bans cruel and unusual punishments. The punishment here cannot be characterized as unusual, as thousands of juveniles convicted of deliberate murder are sentenced to life without parole.

#### Dissent (Thomas, J.)

The cruel and unusual punishment prohibition was originally intended to prohibit torturous punishments, particularly those identified as such when the Bill of Rights was adopted. There is nothing in the Constitution that supports a finding that imposing a sentence of life in prison without parole on juveniles is cruel and unusual.

#### Dissent (Alito, J.)

The Court has improperly overridden the legislative judgment of 28 states and the federal government by precluding mandatory sentences of life without parole.

**Key Terms:**

**Eighth Amendment** - Prohibits the imposition of excessive bail, excessive fines, or cruel and unusual punishments on criminal defendants.

**Cruel and Unusual Punishment -** Any criminal sanction that is barbaric, torturous, inhumane, or so disproportionate to the offense committed as to shock the conscience of the community.

# Atkins v. Virginia

#### United States Supreme Court 536 U.S. 304 (2002)

#### Rule of Law

**Capital punishment of an intellectually disabled individual constitutes cruel and unusual punishment in violation of the Eighth Amendment to the U.S. Constitution.**

**Hall v. Florida**

134 S.Ct. 1986

Supreme Court of the United States

**Freddie Lee HALL, Petitioner**

**v.**

**FLORIDA.**

No. 12–10882.

Argued March 3, 2014.Decided May 27, 2014.

**Synopsis**

**Background:** Petitioner was convicted in the Circuit Court, Putnam County, [John W. Booth](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0333510601&originatingDoc=I79ae857ce58811e3a795ac035416da91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I79ae857ce58811e3a795ac035416da91), J., of first-degree murder, and sentenced to death. He appealed. The Florida Supreme Court, [403 So.2d 1321,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981133786&pubNum=735&originatingDoc=I79ae857ce58811e3a795ac035416da91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed. Petitioner moved to vacate death sentence. The Circuit Court, Sumter County, [John W. Booth](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0333510601&originatingDoc=I79ae857ce58811e3a795ac035416da91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I79ae857ce58811e3a795ac035416da91), J., denied motion. Petitioner appealed. The Supreme Court, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ice0687890c7d11d98220e6fa99ecd085&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[541 So.2d 1125,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1989039161&pubNum=735&originatingDoc=I79ae857ce58811e3a795ac035416da91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) reversed and remanded for resentencing. The Circuit Court, [Richard Tombrink, Jr.](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0331055001&originatingDoc=I79ae857ce58811e3a795ac035416da91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I79ae857ce58811e3a795ac035416da91), J., imposed death sentence. Petitioner appealed. The Florida Supreme Court, [614 So.2d 473,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1993026559&pubNum=735&originatingDoc=I79ae857ce58811e3a795ac035416da91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))affirmed. Petitioner sought postconviction relief. The Circuit Court, Tombrink, J., denied relief, and the Florida Supreme Court, [742 So.2d 225,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1999160229&pubNum=735&originatingDoc=I79ae857ce58811e3a795ac035416da91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed. Petitioner filed motion to vacate sentence. The Circuit Court, Tombrink, J., denied motion. Petitioner appealed. The Florida Supreme Court, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I4e78a4f64a9811e2a531ef6793d44951&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[109 So.3d 704,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2029478936&pubNum=3926&originatingDoc=I79ae857ce58811e3a795ac035416da91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed. Certiorari was granted.

[**Holding:**](https://1.next.westlaw.com/Document/I79ae857ce58811e3a795ac035416da91/View/FullText.html?originationContext=typeAhead&transitionType=Default&contextData=(sc.Default)#co_anchor_F72033456174) The United States Supreme Court, Justice [Kennedy](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0243105201&originatingDoc=I79ae857ce58811e3a795ac035416da91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I79ae857ce58811e3a795ac035416da91), held that Florida's rule, as interpreted by that State's Supreme Court, foreclosing further exploration of a capital defendant's intellectual disability if his IQ score was more than 70, created unacceptable risk that persons with intellectual disability would be executed, in violation of Eighth Amendment, abrogating, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=Ie4b67fd1e90711dbaba7d9d29eb57eff&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[*Cherry v. State*, 959 So. 2d 702](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2011925658&pubNum=0000735&originatingDoc=I79ae857ce58811e3a795ac035416da91&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).

Reversed and remanded.

Justice [Alito](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I79ae857ce58811e3a795ac035416da91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I79ae857ce58811e3a795ac035416da91), dissented and filed opinion, in which Chief Justice [Roberts](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0258116001&originatingDoc=I79ae857ce58811e3a795ac035416da91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I79ae857ce58811e3a795ac035416da91), and Justices [Scalia](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254763301&originatingDoc=I79ae857ce58811e3a795ac035416da91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I79ae857ce58811e3a795ac035416da91) and [Thomas](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I79ae857ce58811e3a795ac035416da91&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=I79ae857ce58811e3a795ac035416da91) joined.

**Trop v. Dulles**

78 S.Ct. 590

Supreme Court of the United States

**Albert L. TROP, Petitioner,**

**v.**

**John Foster DULLES, as Secretary of State of the United States and United States Department of State.**

No. 70.

Reargued Oct. 28, 29, 1957.Decided March 31, 1958.

**Synopsis**

Action for judgment declaring that plaintiff had not lost his nationality because of his conviction by military court martial of desertion from the United States Army during wartime and his dishonorable discharge therefrom. The United States District Court for the Eastern District of New York, entered judgment summarily dismissing complaint and plaintiff appealed. The United States Court of Appeals for the Second Circuit, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I309eebdb8eb011d993e6d35cc61aab4a&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[239 F.2d 527,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1957104164&pubNum=350&originatingDoc=Id4c587819c1d11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed and the Supreme Court granted certiorari. The Supreme Court held that statute authorizing expatriation of person who is convicted by military court martial of desertion from United States Army in wartime and is given a dishonorable discharge, even though no attempt is made to give allegiance to a foreign power, is beyond the war powers of Congress.

Reversed and remanded.

Mr. Justice Frankfurter, Jr., Mr. Justice Burton, Jr., Mr. Justice Clark, and Mr. Justice Harlan, dissented.

# Furman v. Georgia

#### United States Supreme Court 408 U.S. 238 (1972)

#### Rule of Law

**The sentencing and execution of the death penalty in the petitioners' cases violate the Eighth Amendment prohibition of cruel and unusual punishment.**

# Gregg v. Georgia

#### United States Supreme Court 428 U.S. 153 (1976)

#### Rule of Law

**The death penalty is not a per se violation of the Eighth and Fourteenth Amendments to the federal constitution but should be imposed under sentencing procedures to avoid capricious or indiscriminate use.**

# Kansas v. Marsh

#### United States Supreme Court 548 U.S. 163 (2006)

#### Rule of Law

**A state law that provides for the imposition of the death penalty if a unanimous jury finds that aggravating circumstances are not outweighed by mitigating circumstances does not violate the Eighth Amendment to the U.S. Constitution.**

#### Facts

Michael Lee Marsh II (defendant) broke into the home of Marry Ane Pusch and waited for her to return. When Pusch returned home with her 19-month-old daughter Marsh repeatedly shot Marry Ane, stabbed her, and slashed her throat. Marsh then set the house on fire with the toddler inside, killing her. The jury convicted Marsh of capital murder of the toddler and first-degree premeditated murder or Marry Ane, aggravated arson, and aggravated burglary. The jury found, beyond a reasonable doubt, the existence of three aggravating circumstances, but those circumstances were not outweighed by any mitigating circumstances. Marsh was sentenced to death for the murder of the toddler, sentenced to life imprisonment for the murder of Marry Ane and additional imprisonment for the arson and burglary offenses. Marsh appealed and the Kansas Supreme Court reversed only the capital murder and aggravated arson convictions. The U.S. Supreme Court then granted certiorari to review.

#### Issue

Does a state law that provides for the imposition of the death penalty if a unanimous jury finds that aggravating circumstances are not outweighed by mitigating circumstances does not violate the Eighth Amendment to the U.S. Constitution.

#### Holding and Reasoning (Thomas, J.)

No. Marsh explicitly challenges Kansas law § 21-4624(e) which provides that if a unanimous jury finds that aggravating circumstances are not outweighed by mitigating circumstances, the death penalty shall be imposed. Marsh argued to the Kansas Supreme Court 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 the statute unconstitutional, noting that the weighing equation violated the Eighth and Fourteenth Amendments. In *Walton v. Arizona*, 497 U.S. 639 (1990) (overruled on other grounds, *Ring v. Arizona*, 536 U.S. 584 (2002)), a jury had convicted Walton of a capital offense. At sentencing the trial judge found two aggravating circumstances and that the mitigating circumstances did not call for leniency. Walton was sentenced to death. Walton argued that Arizona’s death penalty statute, similar to the one in Kansas, was unconstitutional and “tells an Arizona sentencing judge who finds even a single aggravating factor, that death must be imposed,” unless there are outweighing mitigating factors. The Court rejected Walton’s argument and stated that so long as a state’s burden to prove the existence of aggravating circumstances is not lessened, a defendant’s constitutional rights are not violated by placing on him the burden of proving mitigating circumstances. The Arizona statute and the Kansas law operate in substantially the same manner and are sufficiently alike. The Court has never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required. Therefore, consistent with the *Walton* decision, the Kansas death penalty statute is constitutional. The judgment of the Kansas Supreme Court is reversed.

#### Concurrence (Scalia, J.)

Almost two-thirds of all death sentences are overturned because of due process appeals related to the rights of defendants sentenced to death. Virtually none of the reversals are attributable to a defendant’s actual innocence. Most are based on legal errors. Certainly courts and juries are not perfect. But the American system of criminal justice and imposition of death penalty sentences have been so closely scrutinized that mistakes have been reduced to an insignificant minimum. It is not proper for the Court or its Justices to second-guess state legislatures who have decided to impose a death penalty statutory scheme for the worst criminals by creating obstacles.

#### Dissent (Souter, J.)

In *Furman v. Georgia*, 408 U.S. 238 (1972), the Court held that the Eighth Amendment barred imposition of the death penalty under statutory schemes so inarticulate that sentencing discretion resulted in freakish results. Today, states have great leeway in crafting a death penalty structure. However, the end scheme must meet the test of constitutional reliability in producing a reasoned moral response to the defendant’s background, character, and crime. A law like the one in Kansas which requires execution when the case for aggravation has failed to convince the sentencing jury is absurd. The Kansas law is unconstitutional.

**Key Terms:**

**Cruel and Unusual Punishment -** Any criminal sanction that is barbaric, torturous, inhumane, or so disproportionate to the offense committed as to shock the conscience of the community.

**Woodward v. Alabama**

**Harris v. Alabama**

115 S.Ct. 1031

Supreme Court of the United States

[**Louise HARRIS**](https://1.next.westlaw.com/Search/Results.html?query=advanced%3a+OAID(5025054899)&saveJuris=False&contentType=BUSINESS-INVESTIGATOR&startIndex=1&contextData=(sc.Default)&categoryPageUrl=Home%2fCompanyInvestigator&originationContext=document&transitionType=DocumentItem)**, Petitioner,**

**v.**

**ALABAMA.**

No. 93–7659.

Argued Dec. 5, 1994.Decided Feb. 22, 1995.Rehearing Denied April 17, 1995.See [514 U.S. 1078, 115 S.Ct. 1725.](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&pubNum=708&cite=115SCT1725&originatingDoc=Ia48dce1b9c4a11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))

**Synopsis**

Defendant was convicted in the Circuit Court, Montgomery County, No. CC–88–1237, [H. Randall Thomas](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0264274201&originatingDoc=Ia48dce1b9c4a11d991d0cc6b54f12d4d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ia48dce1b9c4a11d991d0cc6b54f12d4d), J., of capital murder, and was sentenced to death. The Court of Criminal Appeals, [632 So.2d 503,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1992112375&pubNum=735&originatingDoc=Ia48dce1b9c4a11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default))affirmed, and the Alabama Supreme Court, [632 So.2d 543, Houston,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1993130518&pubNum=735&originatingDoc=Ia48dce1b9c4a11d991d0cc6b54f12d4d&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) J., also affirmed. On certiorari review, the Supreme Court, Justice [O'Connor](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0209675601&originatingDoc=Ia48dce1b9c4a11d991d0cc6b54f12d4d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ia48dce1b9c4a11d991d0cc6b54f12d4d), held that Alabama law, which vested sentencing authority in trial judge but required judge to consider advisory jury verdict, did not violate Eighth Amendment by failing to specify weight judge must give to jury's recommendation.

Affirmed.

Justice [Stevens](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0156277701&originatingDoc=Ia48dce1b9c4a11d991d0cc6b54f12d4d&refType=RQ&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)&analyticGuid=Ia48dce1b9c4a11d991d0cc6b54f12d4d) dissented and filed opinion.

**Woodson v. North Carolina**

96 S.Ct. 2978

Supreme Court of the United States

**James Tyrone WOODSON and Luby Waxton, Petitioners,**

**v.**

**State of NORTH CAROLINA.**

No. 75-5491.

Argued March 31, 1976.Decided July 2, 1976.

**Synopsis**

Defendants were convicted in North Carolina trial court of first-degree murder and sentenced to death and they appealed. The North Carolina Supreme Court, [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I95b03c3904a911da8ac8f235252e36df&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[287 N.C. 578, 215 S.E.2d 607,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1975131115&pubNum=711&originatingDoc=I31993ef69c2511d9bdd1cfdd544ca3a4&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed and certiorari was granted. The United States Supreme Court, Mr. Justice Stewart, Mr. Justice Powell and Mr. Justice Stevens, announcing the judgment of the court and filing an opinion delivered by Mr. Justice Stewart, held that North Carolina's mandatory death sentence for first-degree murder violated the Eighth and Fourteenth Amendments; that imposition of mandatory death sentence failed to curb arbitrary and wanton jury discretion with objective standards to guide, regularize and make rationally reviewable the process for imposing a sentence of death; and that imposition of mandatory death sentence without consideration of the character and record of the individual offender or the circumstances of the particular offense was inconsistent with the fundamental respect for humanity which underlies the Eighth Amendment.

Reversed.

Mr. Justice Brennan filed a statement concurring in the judgment.

Mr. Justice Marshall filed a statement concurring in the judgment.

Mr. Justice White filed a dissenting opinion in which Mr. Chief Justice Burger and Mr. Justice Rehnquist joined.

Mr. Justice Blackmun filed a dissenting statement.

Mr. Justice Rehnquist filed a dissenting opinion.

**Enmund v. Florida**

102 S.Ct. 3368

Supreme Court of the United States

**Earl ENMUND, Petitioner**

**v.**

**FLORIDA.**

No. 81-5321.

Argued March 23, 1982.Decided July 2, 1982.

**Synopsis**

Defendant was convicted in the Circuit Court, Hardee County, William A. Norris, Jr., J., of murder in the first degree and robbery, and was sentenced to death. He appealed. The Supreme Court of [](https://1.next.westlaw.com/Link/RelatedInformation/Flag?documentGuid=I4a6286410c7811d9bc18e8274af85244&transitionType=InlineKeyCiteFlags&originationContext=docHeaderFlag&Rank=0&RuleBookModeDisplay=False&contextData=(sc.Default))[Florida, 399 So.2d 1362,](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1981118490&pubNum=735&originatingDoc=I6b4669c59c2511d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)) affirmed. Certiorari was granted and, in an opinion by Justice White, the Supreme Court held that: (1) the Eighth Amendment does not permit imposition of death penalty on defendant who aids and abets felony in course of which murder is committed by others but who does not himself kill, attempt to kill, or intend that killing take place or that lethal force will be employed, and (2) identical treatment of robbers and their accomplice, and attribution to accomplice of culpability of those who killed victims, was impermissible under Eighth Amendment.

Reversed and remanded.

Justice Brennan filed concurring opinion.

Justice O'Connor filed dissenting opinion in which Chief Justice Burger, Justice Powell and Justice Rehnquist joined.

Opinion on remand, [439 So.2d 1383](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1983148879&pubNum=735&originatingDoc=I6b4669c59c2511d9bc61beebb95be672&refType=RP&originationContext=document&transitionType=DocumentItem&contextData=(sc.Default)).