Criminal Procedure

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Chapter 1

INTRODUCTION

§ 1.01 OVERVIEW OF THE CRIMINAL JUSTICE SYSTEM

[K] Post-Conviction Remedies

[*Habeas corpus*, Page 11 – Following the second full paragraph on the page, add:]

Although a fairly strict statute of limitation generally applies to habeas claims, in limited circumstances, the period can be equitably tolled. *See* Christeson v. Roper, 135 S. Ct. 891 (2015) (holding that petitioner should have an opportunity to make a case for equitable tolling of the limitation period because his lawyers had an obvious conflict of interest in explaining why they missed the statutory deadline).

Chapter 2

THE FOURTH AMENDMENT AND THE DEPRIVATION OF LIBERTY

§ 2.02 THE SLIDING SCALE OF SUSPICION

[D] REASONABLE SUSPICION

[Page 76:]

NAVARETTE v. CALIFORNIA

UNITED STATES SUPREME COURT

134 S. Ct. 1683 (2014)

Justice THOMAS delivered the opinion of the Court.

After a 911 caller reported that a vehicle had run her off the road, a police officer located the vehicle she identified during the call and executed a traffic stop. We hold that the stop complied with the Fourth Amendment because, under the totality of the circumstances, the officer had reasonable suspicion that the driver was intoxicated.

I

On August 23, 2008, a Mendocino County 911 dispatch team for the California Highway Patrol (CHP) received a call from another CHP dispatcher in neighboring Humboldt County. The Humboldt County dispatcher relayed a tip from a 911 caller, which the Mendocino County team recorded as follows: "'Showing southbound Highway 1 at mile marker 88, Silver Ford 150 pickup. Plate of 8–David–94925. Ran the reporting party off the roadway and was last seen approximately five [minutes] ago.'" . . . The Mendocino County team then broadcast that information to CHP officers at 3:47 p.m.

A CHP officer heading northbound toward the reported vehicle responded to the broadcast. At 4:00 p.m., the officer passed the truck near mile marker 69. At about 4:05 p.m., after making a U-turn, he pulled the truck over. A second officer, who had separately responded to the broadcast, also arrived on the scene. As the two officers approached the truck, they smelled marijuana. A search of the truck bed revealed 30 pounds of marijuana. The officers arrested the driver, petitioner Lorenzo Prado Navarette, and the passenger, petitioner José Prado Navarette.

Petitioners moved to suppress the evidence, arguing that the traffic stop violated the Fourth Amendment because the officer lacked reasonable suspicion of criminal activity. Both the magistrate who presided over the suppression hearing and the Superior Court disagreed.

Petitioners pleaded guilty to transporting marijuana and were sentenced to 90 days in jail plus three years of probation.

The California Court of Appeal affirmed, concluding that the officer had reasonable suspicion to conduct an investigative stop. . . . The court reasoned that the content of the tip indicated that it came from an eyewitness victim of reckless driving, and that the officer's corroboration of the truck's description, location, and direction established that the tip was reliable enough to justify a traffic stop. . . . Finally, the court concluded that the caller reported driving that was sufficiently dangerous to merit an investigative stop without waiting for the officer to observe additional reckless driving himself. The California Supreme Court denied review. We granted certiorari, . . . and now affirm.

II

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Our decisions in *Alabama v. White*, *and Florida v. J.L.* are useful guides. . . .

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B

The initial question in this case is whether the 911 call was sufficiently reliable to credit the allegation that petitioners' truck "ran the [caller] off the roadway." Even assuming for present purposes that the 911 call was anonymous, . . . we conclude that the call bore adequate indicia of reliability for the officer to credit the caller's account. The officer was therefore justified in proceeding from the premise that the truck had, in fact, caused the caller's car to be dangerously diverted from the highway.

By reporting that she had been run off the road by a specific vehicle—a silver Ford F–150 pickup, license plate 8D94925—the caller necessarily claimed eyewitness knowledge of the alleged dangerous driving. That basis of knowledge lends significant support to the tip's reliability. . . .

There is also reason to think that the 911 caller in this case was telling the truth. Police confirmed the truck's location near mile marker 69 (roughly 19 highway miles south of the location reported in the 911 call) at 4:00 p.m. (roughly 18 minutes after the 911 call). That timeline of events suggests that the caller reported the incident soon after she was run off the road. That sort of contemporaneous report has long been treated as especially reliable. In evidence law, we generally credit the proposition that statements about an event and made soon after perceiving that event are especially trustworthy because "substantial contemporaneity of event and statement negate the likelihood of deliberate or conscious misrepresentation." Advisory Committee's Notes on Fed.

Rule Evid. 803(1). . . . There was no indication that the tip in *J. L.* (or even in *White*) was contemporaneous with the observation of criminal activity or made under the stress of excitement caused by a startling event, but those considerations weigh in favor of the caller's veracity here.

Another indicator of veracity is the caller's use of the 911 emergency system. . . . A 911 call has some features that allow for identifying and tracing callers, and thus provide some safeguards against making false reports with immunity. . . .

C

Even a reliable tip will justify an investigative stop only if it creates reasonable suspicion that "criminal activity may be afoot." *Terry*. . . .

. . .

The 911 caller in this case reported more than a minor traffic infraction and more than a conclusory allegation of drunk or reckless driving. Instead, she alleged a specific and dangerous result of the driver's conduct: running another car off the highway. That conduct bears too great a resemblance to paradigmatic manifestations of drunk driving to be dismissed as an isolated example of recklessness. Running another vehicle off the road suggests lane-positioning problems, decreased vigilance, impaired judgment, or some combination of those recognized drunk driving cues. . . . And the experience of many officers suggests that a driver who almost strikes a vehicle or another object—the exact scenario that ordinarily causes "running [another vehicle] off the roadway"—is likely intoxicated. . . . As a result, we cannot say that the officer acted unreasonably under these circumstances in stopping a driver whose alleged conduct was a significant indicator of drunk driving.

. . .

III

Like *White*, this is a "close case." . . . As in that case, the indicia of the 911 caller's reliability here are stronger than those in *J. L.,* where we held that a bare-bones tip was unreliable. . . . Although the indicia present here are different from those we found sufficient in *White,* there is more than one way to demonstrate "a particularized and objective basis for suspecting the particular person stopped of criminal activity." *Cortez*. . . . Under the totality of the circumstances, we find the indicia of reliability in this case sufficient to provide the officer with reasonable suspicion that the driver of the reported vehicle had run another vehicle off the road. That made it reasonable under the circumstances for the officer to execute a traffic stop. We accordingly affirm.

. . .

Justice SCALIA, with whom Justice GINSBURG, Justice SOTOMAYOR, and Justice KAGAN join, dissenting.

The California Court of Appeal in this case relied on jurisprudence from the California Supreme Court (adopted as well by other courts) to the effect that "an anonymous and uncorroborated tip regarding a possibly intoxicated highway driver" provides without more the reasonable suspicion necessary to justify a stop. . . .

Law enforcement agencies follow closely our judgments on matters such as this, and they will identify at once our new rule: So long as the caller identifies where the car is, anonymous claims of a single instance of possibly careless or reckless driving, called in to 911, will support a traffic stop. This is not my concept, and I am sure would not be the Framers', of a people secure from unreasonable searches and seizures. I would reverse the judgment of the Court of Appeal of California.

I

The California Highway Patrol in this case knew nothing about the tipster on whose word—and that alone—they seized Lorenzo and José Prado Navarette. They did not know her name. They did not know her phone number or address. They did not even know where she called from (she may have dialed in from a neighboring county, . . .).

The tipster said the truck had "[run her] off the roadway," . . . but the police had no reason to credit that charge and many reasons to doubt it, beginning with the peculiar fact that the accusation was anonymous. "[E]liminating accountability . . . is ordinarily the very purpose of anonymity." . . . The unnamed tipster "can lie with impunity." . . . Anonymity is especially suspicious with respect to the call that is the subject of the present case. When does a victim complain to the police about an arguably criminal act (running the victim off the road) without giving his identity, so that he can accuse and testify when the culprit is caught?

The question before us, the Court agrees, is whether the "content of information possessed by police and its degree of reliability," gave the officers reasonable suspicion that the driver of the truck (Lorenzo) was committing an ongoing crime. When the only source of the government's information is an informant's tip, we ask whether the tip bears sufficient "'indicia of reliability,'" . . . to establish "a particularized and objective basis for suspecting the particular person stopped of criminal activity." . . .

The most extreme case, before this one, in which an anonymous tip was found to meet this standard was *White,* . . . . There the reliability of the tip was established by the fact that it predicted the target's behavior in the finest detail—a detail that could be known only by someone familiar with the target's business: She would, the tipster said, leave a particular apartment building, get into a brown Plymouth station wagon with a broken right tail light, and drive immediately to a particular motel. . . . Very few persons would have such intimate knowledge, and hence knowledge of the unobservable fact that the woman was carrying unlawful drugs was plausible. . . . Here the Court makes a big deal of the fact that the tipster was dead right about the fact that a silver Ford F–150 truck (license plate 8D94925) was traveling south on Highway 1 somewhere near mile marker 88. But everyone in the world who saw the car would have that knowledge, and anyone who wanted the car stopped would have to provide that information. Unlike the situation in White,

that generally available knowledge in no way makes it plausible that the tipster saw the car run someone off the road.

The Court says, . . . that "[b]y reporting that she had been run off the road by a specific vehicle . . . the caller necessarily claimed eyewitness knowledge." So what? The issue is not how she claimed to know, but whether what she claimed to know was true. The claim to "eyewitness knowledge" of being run off the road supports *not at all* its veracity; nor does the amazing, mystifying prediction (so far short of what existed in *White*) that the petitioners' truck *would be heading south on Highway 1*.

. . .

Finally, and least tenably, the Court says that another "indicator of veracity" is the anonymous tipster's mere "use of the 911 emergency system.". . . Because, you see, recent "technological and regulatory developments" suggest that the identities of unnamed 911 callers are increasingly less likely to remain unknown. . . . Indeed, the systems are able to identify "the caller's geographic location with increasing specificity." . . . *Amici* disagree with this, . . . and the present case surely suggests that *amici* are right—since we know neither the identity of the tipster nor even the county from which the call was made. But assuming the Court is right about the ease of identifying 911 callers, it proves absolutely nothing in the present case unless the anonymous caller was *aware* of that fact. "It is the tipster's *belief* in anonymity, not its *reality,* that will control his behavior." . . . There is no reason to believe that your average anonymous 911 tipster is aware that 911 callers are readily identifiable.

II

All that has been said up to now assumes that the anonymous caller made, at least in effect, an accusation of drunken driving. But in fact she did not. She said that the petitioners' truck "'[r]an [me] off the roadway.'" . . . That neither asserts that the driver was drunk nor even raises the *likelihood* that the driver was drunk. The most it conveys is that the truck did some apparently nontypical thing that forced the tipster off the roadway, whether partly or fully, temporarily or permanently. Who really knows what (if anything) happened? The truck might have swerved to avoid an animal, a pothole, or a jaywalking pedestrian.

But let us assume the worst of the many possibilities: that it was a careless, reckless, or even intentional maneuver that forced the tipster off the road. Lorenzo might have been distracted by his use of a hands-free cell phone. . . . Or, indeed, he might have intentionally forced the tipster off the road because of some personal animus, or hostility to her "Make Love, Not War" bumper sticker. I fail to see how reasonable suspicion of a *discrete instance* of irregular or hazardous driving generates a reasonable suspicion of *ongoing intoxicated driving*. What proportion of the hundreds of thousands—perhaps millions—of careless, reckless, or intentional traffic violations committed each day is attributable to drunken drivers? I say 0.1 percent. I have no basis for that except my own guesswork. But unless the Court has some basis in reality to believe that the proportion is many orders of magnitude above that—say 1 in 10 or at least 1 in 20—it has no grounds for its unsupported assertion that the tipster's report in this case gave rise to a *reasonable suspicion* of drunken driving.

Bear in mind that that is the only basis for the stop that has been asserted in this litigation. The stop required suspicion of an ongoing crime, not merely suspicion of having run someone off the road earlier. And driving while being a careless or reckless person, unlike driving while being a drunk person, is not an ongoing crime. In other words, in order to stop the petitioners the officers here not only had to assume without basis the accuracy of the anonymous accusation but also had to posit an unlikely reason (drunkenness) for the accused behavior.

In sum, at the moment the police spotted the truck, it was more than merely "*possib[le]* " that the petitioners were not committing an ongoing traffic crime. . . . It was overwhelmingly likely that they were not.

III

It gets worse. Not only, it turns out, did the police have no good reason *at first* to believe that Lorenzo was driving drunk, they had very good reason *at last* to know that he was not. The Court concludes that the tip, plus confirmation of the truck's location, produced reasonable suspicion that the truck not only had been *but still was* barreling dangerously and drunkenly down Highway 1. . . . In fact, alas, it was not, and the officers knew it. They followed the truck for five minutes, presumably to see if it was being operated recklessly. And *that* was good police work. While the anonymous tip was not enough to support a stop for drunken driving under *Terry v. Ohio*, . . . it was surely enough to counsel observation of the truck to see if it was driven by a drunken driver. But the pesky little detail left out of the Court's reasonable-suspicion equation is that, for the five minutes that the truck was being followed (five minutes is a *long* time), Lorenzo's driving was irreproachable. Had the officers witnessed the petitioners violate a single traffic law, they would have had cause to stop the truck, *Whren v. United States,* . . . and this case would not be before us. And not only was the driving *irreproachable,* but the State offers no evidence to suggest that the petitioners even did anything *suspicious,* such as suddenly slowing down, pulling off to the side of the road, or turning somewhere to see whether they were being followed. . . . Consequently, the tip's suggestion of ongoing drunken driving (if it could be deemed to suggest that) not only went uncorroborated; it was affirmatively undermined.

. . .

The Court's opinion serves up a freedom-destroying cocktail consisting of two parts patent falsity: (1) that anonymous 911 reports of traffic violations are reliable so long as they correctly identify a car and its location, and (2) that a single instance of careless or reckless driving necessarily supports a reasonable suspicion of drunkenness. All the malevolent 911 caller need do is assert a traffic violation, and the targeted car will be stopped, forcibly if necessary, by the police. If the driver turns out not to be drunk (which will almost always be the case), the caller need fear no consequences, even if 911 knows his identity. After all, he never alleged drunkenness, but merely called in a traffic violation—and on that point his word is as good as his victim's.

Drunken driving is a serious matter, but so is the loss of our freedom to come and go as we please without police interference. To prevent and detect murder we do not allow searches without probable cause or targeted *Terry* stops without reasonable suspicion. We should not do so for drunken driving either. After today's opinion all of us on the road, and not just drug dealers, are at risk of having our freedom of movement curtailed on suspicion of drunkenness,

based upon a phone tip, true or false, of a single instance of careless driving. I respectfully dissent.

. . .

§ 2.03 ARREST

[A] THE PRESENCE OF PROBABLE CAUSE

[Page 108 – After Notes and Questions]

DISTRICT OF COLUMBIA v. WESBY

UNITED STATES SUPREME COURT

138 S. CT. 577 (2018)

Justice THOMAS delivered the opinion of the Court.

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

I

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

After the officers knocked on the front door, they saw a man look out the window and then run upstairs. One of the partygoers opened the door, and the officers entered. They immediately observed that the inside of the house " 'was in disarray' " and looked like " 'a vacant property.' " 841 F.Supp.2d 20, 31 (D.D.C.2012) (quoting Defs. Exh. A). The officers smelled marijuana and saw beer bottles and cups of liquor on the floor. In fact, the floor was so dirty that one of the partygoers refused to sit on it while being questioned. Although the house had working electricity and plumbing, it had no furniture downstairs other than a few padded metal chairs. The only other signs of habitation were blinds on the windows, food in the refrigerator, and toiletries in the bathroom.

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

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

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

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

. . . The officers then contacted the owner. He told them that he had been trying to negotiate a lease with Peaches, but they had not reached an agreement. He confirmed that he had not given Peaches (or anyone else) permission to be in the house—let alone permission to use it for a bachelor party. At that point, the officers arrested the 21 partygoers for unlawful entry. . . .

. . .

. . . To determine whether an officer had probable cause for an arrest, "we examine the events leading up to the arrest, and then decide 'whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to' probable cause." . . .

Considering the totality of the circumstances, the officers made an "entirely reasonable inference" that the partygoers were knowingly taking advantage of a vacant house as a venue for their late-night party. . . .

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

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

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

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

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

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

. . .

[B] THE SIGNIFICANCE OF A GOOD FAITH ERROR

[Page 115 – After Note (4):]

(5) While *DeFillippo* involved reliance on a law later found to be unconstitutional, unanswered was the legitimacy of an officer's reliance on a legal assumption that was incorrect at the time the officer made it. Such was the issue before the Court in *Heien v. North Carolina*, 135 S. Ct. 530 (2014). In that case, an officer stopped a vehicle because one of its two brake lights was out. For a violation of the law, however, both brake lights would have to have been inoperative. In the course of the stop, a quantity of cocaine was seized. The Court sustained the detention, holding that, just as the presence of probable cause could survive a reasonable mistake as to facts, "reasonable men make mistakes of law, too, and such mistakes are no less compatible with the concept of reasonable suspicion." The Court noted that to hold otherwise would be difficult to reconcile with the holding in *DeFillippo*.

[D] THE METHOD OF ACCOMPLISHING THE ARREST

[Page 127 – Add to Note (1):]

Lower courts frequently struggle with the determination of when *Welsh* is applicable, both in regard to the circumstances which might justify a residential entry, and as to the nature of the offense under investigation. For example, in *Commonwealth v. Jewett*, 31 N.E.3d 1079 (Mass. 2015), the court observed that in *Welsh* the Supreme Court had noted that "there was no immediate or continuous pursuit" of the suspected party, implying that this factor would make cases distinguishable. Additionally, the Massachusetts court said that "*Welsh* did not conclude that all misdemeanors are minor offenses, but rather only that nonjailable offenses are considered such."

[Page 132 – Add to Notes:]

(5) The holding in *Garner* was reaffirmed in *Plumhoff v. Rickard*, 134 S. Ct. 2012 (2014), in which officers had fired fifteen shots into an automobile involved in a high-speed chase. The Court accepted the conclusion of the lower court that the accused's conduct threatened the lives of innocent bystanders. The Court did not consider the number of shots fired to be excessive, because "if police officers are justified in firing at a suspect in order to end a severe threat to the public safety, the officers need not stop shooting until the threat has ended."

[P. 147 – Add after notes:]

§ 3.01 THE CONSTITUTIONAL CHOICE: TRESPASS V. PRIVACY

CARPENTER V. UNITED STATES
United States Supreme Court (2018)

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

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

I
A

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

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

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

B

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

Based on that information, the prosecutors applied for court orders under the Stored Communications Act to obtain cell phone records for petitioner Timothy Carpenter and several other suspects. That statute, as amended in 1994, permits the Government to compel the disclosure of certain telecommunications records when it "offers specific and articulable facts showing that there are reasonable grounds to believe" that the records sought "are relevant and material to an ongoing criminal investigation." 18 U. S. C. §2703(d). Federal Magistrate Judges issued two orders directing Carpenter's wireless carriers—MetroPCS and Sprint—to disclose "cell/site sector [information] for [Carpenter's] telephone[ ] at call origination and at call termination for incoming and outgoing calls" during the four-month period when the string of robberies occurred. . . . The first order sought 152days of cell-site records from MetroPCS, which produced records spanning 127 days. The second order requested seven days of CSLI from Sprint, which produced two days of records covering the period when Carpenter's phone was "roaming" in northeastern Ohio. Altogether the Government obtained 12,898 location points cataloging Carpenter's movements—an average of 101 data points per day.

Carpenter was charged with six counts of robbery and an additional six counts of carrying a firearm during a federal crime of violence. See 18 U. S. C. §§924(c), 1951(a).Prior to trial, Carpenter moved to suppress the cell-site data provided by the wireless carriers. He argued that the Government's seizure of the records violated the Fourth Amendment because they had been obtained without a warrant supported by probable cause. The District Court denied the motion. . . .

At trial, seven of Carpenter's confederates pegged him as the leader of the operation. In addition, FBI agent Christopher Hess offered expert testimony about the cell-site data. Hess explained that each time a cell phone taps into the wireless network, the carrier logs a time-stamped record of the cell site and particular sector that were used. With this information, Hess produced maps that placed Carpenter's phone near four of the charged robberies. In the Government's view, the location records clinched the case: They confirmed that Carpenter was "right where the . . . robbery was at the exact time of the robbery." App. 131 (closing argument). Carpenter was convicted on all but one of the firearm counts and sentenced to more than 100 years in prison.

The Court of Appeals for the Sixth Circuit affirmed. 819 F. 3d 880 (2016). The court held that Carpenter lacked a reasonable expectation of privacy in the location information collected by the FBI because he had shared that information with his wireless carriers. Given that cell phone users voluntarily convey cell-site data to their carriers as "a means of establishing communication," the court concluded that the resulting business records are not entitled to Fourth Amendment protection. *Id.,* at 888 (quoting *Smith* v. *Maryland*, 442 U. S. 735, 741 (1979)).

. . .

II

A

. . .

As technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes, this Court has sought to "assure[ ] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted." . . . For that reason, we rejected in *Kyllo* a "mechanical interpretation" of the Fourth Amendment and held that use of a thermal imager to detect heat radiating from the side of the defendant's home was a search. . . . Because any other conclusion would leave homeowners "at the mercy of advancing technology," we determined that the Government—absent a warrant—could not capitalize on such new sense-enhancing technology to explore what was happening within the home. . . .

Likewise in *Riley*, the Court recognized the "immense storage capacity" of modern cell phones in holding that police officers must generally obtain a warrant before searching the contents of a phone. . . . We explained that while the general rule allowing warrantless searches incident to arrest "strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to" the vast store of sensitive information on a cell phone. . . .

B

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

The first set of cases addresses a person's expectation of privacy in his physical location and movements. In *United States* v. *Knotts*, 460 U. S. 276 (1983), we considered the Government's use of a "beeper" to aid in tracking a vehicle through traffic. . . . The Court concluded that the "augment[ed]" visual surveillance did not constitute a search because "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." . . . Since the movements of the vehicle and its final destination had been "voluntarily conveyed to anyone who wanted to look," Knotts could not assert a privacy interest in the information obtained. . . .

This Court in *Knotts*, however, was careful to distinguish between the rudimentary tracking facilitated by the beeper and more sweeping modes of surveillance. The Court emphasized the "limited use which the government made of the signals from this particular beeper" during a discrete "automotive journey." . . . Significantly, the Court reserved the question whether "different constitutional principles may be applicable" if "twenty-four hour surveillance of any citizen of this country [were] possible." . . .

Three decades later, the Court considered more sophisticated surveillance of the sort envisioned

in *Knotts* and found that different principles did indeed apply. In *United States* v. *Jones*, FBI agents installed a GPS tracking device on Jones's vehicle and remotely monitored the vehicle's movements for 28 days. The Court decided the case based on the Government's physical trespass of the vehicle. . . . At the same time, five Justices agreed that related privacy concerns would be raised by, for example, "surreptitiously activating a stolen vehicle detection system" in Jones's car to track Jones himself, or conducting GPS tracking of his cell phone. . . .

In a second set of decisions, the Court has drawn a line between what a person keeps to himself and what he shares with others. We have previously held that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." . . .

This third-party doctrine largely traces its roots to *Miller*. While investigating Miller for tax evasion, the Government subpoenaed his banks, seeking several months of canceled checks, deposit slips, and monthly statements. The Court rejected a Fourth Amendment challenge to the records collection. For one, Miller could "assert neither ownership nor possession" of the documents; they were "business records of the banks." . . . For another, the nature of those records confirmed Miller's limited expectation of privacy, because the checks were "not confidential communications but negotiable instruments to be used in commercial transactions," and the bank statements contained information "exposed to [bank] employees in the ordinary course of business." . . . The Court thus concluded that Miller had "take[n] the risk, in revealing his affairs to another, that the information [would] be conveyed by that person to the Government." . . .

Three years later, *Smith* applied the same principles in the context of information conveyed to a telephone company. The Court ruled that the Government's use of a pen register—a device that recorded the outgoing phone numbers dialed on a landline telephone—was not a search. Noting the pen register's "limited capabilities," the Court "doubt[ed] that people in general entertain any actual expectation of privacy in the numbers they dial." . . .

III

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

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

We decline to extend *Smith* and *Miller* to cover these novel circumstances. Given the unique nature of cellphone location records, the fact that the information is held by a third party does not

by itself overcome the user's claim to Fourth Amendment protection. Whether the Government employs its own surveillance technology as in *Jones* or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI. The location information obtained from Carpenter's wireless carriers was the product of a search.[1]

A

A person does not surrender all Fourth Amendment protection by venturing into the public sphere. To the contrary, "what [one] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." *Katz*, ... A majority of this Court has already recognized that individuals have a reasonable expectation of privacy in the whole of their physical movements. *Jones*, 565 U. S., at 430 (ALITO, J., concurring in judgment); *id.,* at 415 (SOTOMAYOR, J., concurring). Prior to the digital age, law enforcement might have pursued a suspect for a brief stretch, but doing so "for any extended period of time was difficult and costly and therefore rarely undertaken." *Id.,* at 429 (opinion of ALITO, J.). For that reason, "society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period." . . .

Allowing government access to cell-site records contravenes that expectation. Although such records are generated for commercial purposes, that distinction does not negate Carpenter's anticipation of privacy in his physical location. Mapping a cell phone's location over the course of 127 days provides an all-encompassing record of the holder's whereabouts. As with GPS information, the timestamped data provides an intimate window into a person's life, revealing not only his particular movements, but through them his "familial, political, professional, religious, and sexual associations." *Id.,* at 415 (opinion of SOTOMAYOR, J.). These location records "hold for many Americans the 'privacies of life.'" *Riley*, . . . And like GPS monitoring, cell phone tracking is remarkably easy, cheap, and efficient compared to traditional investigative tools. With just the click of a button, the Government can access each carrier's deep repository of historical location information at practically no expense.

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

[3]The parties suggest as an alternative to their primary submissions that the acquisition of CSLI becomes a search only if it extends beyond a limited period. . . . As part of its argument, the Government treats the seven days of CSLI requested from Sprint as the pertinent period, even though Sprint produced only two days of records. . . . Contrary to JUSTICE KENNEDY's assertion, . . . we need not decide whether there is a limited period for which the Government may obtain an individual's historical CSLI free from Fourth Amendment scrutiny, and if so, how long that period might be. It is sufficient for our purposes today to hold that accessing seven days of CSLI constitutes a Fourth Amendment search.

. . .

B

The Government's primary contention to the contrary is that the third-party doctrine governs this case. In its view, cell-site records are fair game because they are "business records" created and maintained by the wireless carriers. . . .

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

. . .

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

* * *

Our decision today is a narrow one. We do not express a view on matters not before us: real-time CSLI or "tower dumps" (a download of information on all the devices that connected to a particular cell site during a particular interval). We do not disturb the application of *Smith* and *Miller* or call into question conventional surveillance techniques and tools, such as security cameras. Nor do we address other business records that might incidentally reveal location information. Further, our opinion does not consider other collection techniques involving foreign affairs or national security. As Justice Frankfurter noted when considering new innovations in airplanes and radios, the Court must tread carefully in such cases, to ensure that we do not "embarrass the future." *Northwest Airlines, Inc.* v. *Minnesota*, 322 U. S. 292, 300 (1944).

IV

Having found that the acquisition of Carpenter's CSLI was a search, we also conclude that the Government must generally obtain a warrant supported by probable cause before acquiring such records. . . .

The Government acquired the cell-site records pursuant to a court order issued under the Stored Communications Act, which required the Government to show "reasonable grounds" for believing that the records were "relevant and material to an ongoing investigation." . . . That showing falls

well short of the probable cause required for a warrant. The Court usually requires "some quantum of individualized suspicion" before a search or seizure may take place. . . . Under the standard in the Stored Communications Act, however, law enforcement need only show that the cell-site evidence might be pertinent to an ongoing investigation—a "gigantic" departure from the probable cause rule. . . .

. . .

* * *

As Justice Brandeis explained in his famous dissent, the Court is obligated—as "[s]ubtler and more far-reaching means of invading privacy have become available to the Government"—to ensure that the "progress of science" does not erode Fourth Amendment protections. *Olmstead* v. *United States* . . . . Here the progress of science has afforded law enforcement a powerful new tool to carry out its important responsibilities. At the same time, this tool risks Government encroachment of the sort the Framers, "after consulting the lessons of history," drafted the Fourth Amendment to prevent. . . .

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

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

. . .

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

. . .

Here the only question necessary to decide is whether the Government searched anything of Carpenter's when it used compulsory process to obtain cell-site records from Carpenter's cell phone service providers. This Court's decisions in *Miller* and *Smith* dictate that the answer is no, as every Court of Appeals to have considered the question has recognized. . . .

. . .

Miller and *Smith* set forth an important and necessary limitation on the *Katz* framework. They rest upon the commonsense principle that the absence of property law analogues can be dispositive of privacy expectations. The defendants in those cases could expect that the third-party businesses could use the records the companies collected, stored, and classified as their own for any number of business and commercial purposes. The businesses were not bailees or custodians of the

records, with a duty to hold the records for the defendants' use. The defendants could make no argument that the records were their own papers or effects. . . .
. . .

In fact, Carpenter's Fourth Amendment objection is even weaker than those of the defendants in *Miller* and *Smith*. Here the Government did not use a mere subpoena to obtain the cell-site records. It acquired the records only after it proved to a Magistrate Judge reasonable grounds to believe that the records were relevant and material to an ongoing criminal investigation. . . . So even if §222 gave Carpenter some attenuated interest in the records, the Government's conduct here would be reasonable under the standards governing subpoenas. . . .

Under *Miller* and *Smith*, then, a search of the sort that requires a warrant simply did not occur when the Government used court-approved compulsory process, based on a finding of reasonable necessity, to compel a cell phone service provider, as owner, to disclose cell-site records.

. . .

In my respectful view the majority opinion misreads this Court's precedents, old and recent, and transforms *Miller* and *Smith* into an unprincipled and unworkable doctrine. The Court's newly conceived constitutional standard will cause confusion; will undermine traditional and important law enforcement practices; and will allow the cell phone to become a protected medium that dangerous persons will use to commit serious crimes.

. . .

. . . A person's movements are not particularly private. As the Court recognized in *Knotts*, when the defendant there "traveled over the public streets he voluntarily conveyed to anyone who wanted to look the fact that he was traveling over particular roads in a particular direction, the fact of whatever stops he made, and the fact of his final destination." . . . Today expectations of privacy in one's location are, if anything, even less reasonable than when the Court decided *Knotts* over 30 years ago. Millions of Americans choose to share their location on a daily basis, whether by using a variety of location-based services on their phones, or by sharing their location with friends and the public at large via social media.

. . .

The Court says its decision is a "narrow one." . . . But its reinterpretation of *Miller* and *Smith* will have dramatic consequences for law enforcement, courts, and society as a whole.

Most immediately, the Court's holding that the Government must get a warrant to obtain more than six days of cell-site records limits the effectiveness of an important investigative tool for solving serious crimes. As this case demonstrates, cell-site records are uniquely suited to help the Government develop probable cause to apprehend some of the Nation's most dangerous criminals: serial killers, rapists, arsonists, robbers, and so forth. . . . These records often are indispensable at the initial stages of investigations when the Government lacks the evidence necessary to obtain a warrant. . . . And the long-term nature of many serious crimes, including serial crimes and

terrorism offenses, can necessitate the use of significantly more than six days of cell-site records. The Court's arbitrary 6-day cutoff has the perverse effect of nullifying Congress' reasonable framework for obtaining cell-site records in some of the most serious criminal investigations.

. . .

This case should be resolved by interpreting accepted property principles as the baseline for reasonable expectations of privacy. Here the Government did not search anything over which Carpenter could assert ownership or control. Instead, it issued a court-authorized subpoena to a third party to disclose information it alone owned and controlled. That should suffice to resolve this case.

Having concluded, however, that the Government searched Carpenter when it obtained cell-site records from his cell phone service providers, the proper resolution of this case should have been to remand for the Court of Appeals to determine in the first instance whether the search was reasonable. Most courts of appeals, believing themselves bound by *Miller* and *Smith*, have not grappled with this question. And the Court's reflexive imposition of the warrant requirement obscures important and difficult issues, such as the scope of Congress' power to authorize the Government to collect new forms of information using processes that deviate from traditional warrant procedures, and how the Fourth Amendment's reasonableness requirement should apply when the Government uses compulsory process instead of engaging in an actual, physical search.

These reasons all lead to this respectful dissent.

JUSTICE THOMAS, dissenting.

This case should not turn on "whether" a search occurred. . . . It should turn, instead, on *whose* property was searched. . . . By obtaining the cell-site records of MetroPCS and Sprint, the Government did not search Carpenter's property. He did not create the records, he does not maintain them, he cannot control them, and he cannot destroy them. Neither the terms of his contracts nor any provision of law makes the records his. The records belong to MetroPCS and Sprint.

The Court concludes that, although the records are not Carpenter's, the Government must get a warrant because Carpenter had a reasonable "expectation of privacy" in the location information that they reveal. *Ante,* at 11. I agree with JUSTICE KENNEDY, JUSTICE ALITO, JUSTICE GORSUCH, and every Court of Appeals to consider the question that this is not the best reading of our precedents.

The more fundamental problem with the Court's opinion, however, is its use of the "reasonable expectation of privacy" test, which was first articulated by Justice Harlan in *Katz* v. *United States*, 389 U. S. 347, 360–361 (1967) (concurring opinion). The *Katz* test has no basis in the text or history of the Fourth Amendment. And, it invites courts to make judgments about policy, not law. Until we confront the problems with this test, *Katz* will continue to distort Fourth Amendment jurisprudence. I respectfully dissent.

[Justice Thomas's dissent is a detailed attack on the Katz decision.]

. . .

In several recent decisions, this Court has declined to apply the *Katz* test because it threatened to narrow the original scope of the Fourth Amendment. . . . But as today's decision demonstrates, *Katz* can also be invoked to expand the Fourth Amendment beyond its original scope. This Court should not tolerate errors in either direction. "The People, through ratification, have already weighed the policy tradeoffs that constitutional rights entail." . . . Whether the rights they ratified are too broad or too narrow by modern lights, this Court has no authority to unilaterally alter the document they approved.

Because the *Katz* test is a failed experiment, this Court is duty bound to reconsider it. Until it does, I agree with my dissenting colleagues' reading of our precedents. Accordingly, I respectfully dissent.

JUSTICE ALITO, with whom JUSTICE THOMAS joins, dissenting.

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

First, the Court ignores the basic distinction between an actual search (dispatching law enforcement officers to enter private premises and root through private papers and effects) and an order merely requiring a party to look through its own records and produce specified documents. The former, which intrudes on personal privacy far more deeply, requires probable cause; the latter does not. Treating an order to produce like an actual search, as today's decision does, is revolutionary. It violates both the original understanding of the Fourth Amendment and more than a century of Supreme Court precedent. Unless it is somehow restricted to the particular situation in the present case, the Court's move will cause upheaval. Must every grand jury subpoena *duces tecum* be supported by probable cause? If so, investigations of terrorism, political corruption, white-collar crime, and many other offenses will be stymied. And what about subpoenas and other document-production orders issued by administrative agencies? See, *e.g.*, 15 U. S. C. §57b–1(c) (Federal Trade Commission); §§77s(c), 78u(a)–(b) (Securities and Exchange Commission); 29 U. S. C. §657(b) (Occupational Safety and Health Administration); 29 CFR §1601.16(a)(2) (2017) (Equal Employment Opportunity Commission).

Second, the Court allows a defendant to object to the search of a third party's property. This also is revolutionary. The Fourth Amendment protects "[t]he right of the people to be secure in *their* persons, houses, papers, and effects" (emphasis added), not the persons, houses, papers, and effects of others. Until today, we have been careful to heed this fundamental feature of the Amendment's text. This was true when the Fourth Amendment was tied to property law, and it remained true after *Katz* v. *United States*, 389 U. S. 347 (1967), broadened the Amendment's reach.

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

. . .

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

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

The other possibility is that this Court will face the embarrassment of explaining in case after case that the principles on which today's decision rests are subject to all sorts of qualifications and limitations that have not yet been discovered. If we take this latter course, we will inevitably end up "mak[ing] a crazy quilt of the Fourth Amendment." *Smith, supra*, at 745.

All of this is unnecessary. In the Stored Communications Act, Congress addressed the specific problem at issue in this case. The Act restricts the misuse of cell-site records by cell service providers, something that the Fourth Amendment cannot do. The Act also goes beyond current Fourth Amendment case law in restricting access by law enforcement. It permits law enforcement officers to acquire cell-site records only if they meet a heightened standard and obtain a court order. If the American people now think that the Act is inadequate or needs updating, they can turn to their elected representatives to adopt more protective provisions. Because the collection and storage of cell-site records affects nearly every American, it is unlikely that the question whether the current law requires strengthening will escape Congress's notice.

Legislation is much preferable to the development of an entirely new body of Fourth Amendment case law for many reasons, including the enormous complexity of the subject, the need to respond to rapidly changing technology, and the Fourth Amendment's limited scope. The Fourth Amendment restricts the conduct of the Federal Government and the States; it does not apply to private actors. But today, some of the greatest threats to individual privacy may come from powerful private companies that collect and sometimes misuse vast quantities of data about the lives of ordinary Americans. If today's decision encourages the public to think that this Court can protect them from this looming threat to their privacy, the decision will mislead as well as disrupt. And if holding a provision of the Stored Communications Act to be unconstitutional dissuades Congress from further legislation in this field, the goal of protecting privacy will be greatly disserved.

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

JUSTICE GORSUCH, dissenting.

. . .

What to do? It seems to me we could respond in at least three ways. The first is to ignore the problem, maintain *Smith* and *Miller*, and live with the consequences. If the confluence of these decisions and modern technology means our Fourth Amendment rights are reduced to nearly nothing, so be it. The second choice is to set *Smith* and *Miller* aside and try again using the *Katz* "reasonable expectation of privacy" jurisprudence that produced them. The third is to look for answers elsewhere.

. . .

Justice Gorsuch found its first two alternatives unacceptable.

. . .

There is another way. From the founding until the 1960s, the right to assert a Fourth Amendment claim didn't depend on your ability to appeal to a judge's personal sensibilities about the "reasonableness" of your expectations or privacy. It was tied to the law. . . . The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures." True to those words and their original understanding, the traditional approach asked if a house, paper or effect was *yours* under law. No more was needed to trigger the Fourth Amendment. Though now often lost in *Katz*'s shadow, this traditional understanding persists. *Katz* only "supplements, rather than displaces the traditional property-based understanding of the Fourth Amendment." . . .

Beyond its provenance in the text and original understanding of the Amendment, this traditional approach comes with other advantages. Judges are supposed to decide cases based on "democratically legitimate sources of law"—like positive law or analogies to items protected by the enacted Constitution—rather than "their own biases or personal policy preferences." Pettys, Judicial Discretion in Constitutional Cases, 26 J. L. & Pol. 123, 127 (2011). A Fourth Amendment model based on positive legal rights "carves out significant room for legislative participation in the Fourth Amendment context," too, by asking judges to consult what the people's representatives have to say about their rights. . . . Nor is this approach hobbled by *Smith* and *Miller*, for those cases are just *limitations* on *Katz*, addressing only the question whether individuals have a reasonable expectation of privacy in materials they share with third parties. Under this more traditional approach, Fourth Amendment protections for your papers and effects do not automatically disappear just because you share them with third parties.

Given the prominence *Katz* has claimed in our doctrine, American courts are pretty rusty at applying the traditional approach to the Fourth Amendment. We know that if a house, paper, or effect is yours, you have a Fourth Amendment interest in its protection. But what kind of legal interest is sufficient to make something *yours*? And what source of law determines that? Current positive law? The common law at 1791, extended by analogy to modern times? Both? . . . . Much work is needed to revitalize this area and answer these questions. I do not begin to claim all the answers today, but (unlike with *Katz*) at least I have a pretty good idea what the questions are. . . .

. . .

What does all this mean for the case before us? To start, I cannot fault the Sixth Circuit for holding that *Smith* and *Miller* extinguish any *Katz*-based Fourth Amendment interest in third party cell-site data. That is the plain effect of their categorical holdings. Nor can I fault the Court today for its implicit but unmistakable conclusion that the rationale of *Smith* and *Miller* is wrong; indeed, I agree with that. The Sixth Circuit was powerless to say so, but this Court can and should. At the same time, I do not agree with the Court's decision today to keep *Smith* and *Miller* on life support and supplement them with a new and multilayered inquiry that seems to be only *Katz*-squared. Returning there, I worry, promises more trouble than help. Instead, I would look to a more traditional Fourth Amendment approach. Even if *Katz* may still supply one way to prove a Fourth Amendment interest, it has never been the only way. Neglecting more traditional approaches may mean failing to vindicate the full protections of the Fourth Amendment.

. . .

Chapter 3

THE FOURTH AMENDMENT AND THE SEIZURE OF EVIDENCE

[Page 252 – Add after *United States v. Jones*:]

§ 3.03 SPECIAL CONSIDERATIONS

[A] PHYSICAL INTEGRITY

[2] TAKING BODILY FLUIDS

[Page 224:]

BIRCHFIELD v. NORTH DAKOTA

UNITED STATES SUPREME COURT

(2016)

Justice ALITO delivered the opinion of the Court.

Drunk drivers take a grisly toll on the Nation's roads, claiming thousands of lives, injuring many more victims, and inflicting billions of dollars in property damage every year. To fight this problem, all States have laws that prohibit motorists from driving with a blood alcohol concentration (BAC) that exceeds a specified level. But determining whether a driver's BAC is over the legal limit requires a test, and many drivers stopped on suspicion of drunk driving would not submit to testing if given the option. So every State also has long had what are termed "implied consent laws." These laws impose penalties on motorists who refuse to undergo testing when there is sufficient reason to believe they are violating the State's drunk-driving laws.

In the past, the typical penalty for noncompliance was suspension or revocation of the motorist's license. The cases now before us involve laws that go beyond that and make it a crime for a motorist to refuse to be tested after being lawfully arrested for driving while impaired. The question presented is whether such laws violate the Fourth Amendment's prohibition against unreasonable searches.

I

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Enforcement of laws of this type obviously requires the measurement of BAC. One way of doing this is to analyze a sample of a driver's blood directly. A technician with medical training uses a syringe to draw a blood sample from the veins of the subject, who must remain still during the procedure, and then the sample is shipped to a separate laboratory for measurement of its alcohol concentration. . . .

The most common and economical method of calculating BAC is by means of a machine that measures the amount of alcohol in a person's breath. . . .

Over time, improved breath test machines were developed. Today, such devices can detect the presence of alcohol more quickly and accurately than before, typically using infrared technology rather than a chemical reaction. . . . And in practice all breath testing machines used for evidentiary purposes must be approved by the National Highway Traffic Safety Administration. . . .

Measurement of BAC based on a breath test requires the cooperation of the person being tested. The subject must take a deep breath and exhale through a mouthpiece that connects to the machine. . . . Typically the test subject must blow air into the device " 'for a period of several seconds' " to produce an adequate breath sample, and the process is sometimes repeated so that analysts can compare multiple samples to ensure the device's accuracy. . . .

When a standard infrared device is used, the whole process takes only a few minutes from start to finish. . . . Most evidentiary breath tests do not occur next to the vehicle, at the side of the road, but in a police station, where the controlled environment is especially conducive to reliable testing, or in some cases in the officer's patrol vehicle or in special mobile testing facilities. . . .

Because the cooperation of the test subject is necessary when a breath test is administered and highly preferable when a blood sample is taken, the enactment of laws defining intoxication based on BAC made it necessary for States to find a way of securing such cooperation. So-called "implied consent" laws were enacted to achieve this result. They provided that cooperation with BAC testing was a condition of the privilege of driving on state roads and that the privilege would be rescinded if a suspected drunk driver refused to honor that condition. . . . Today, "all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing if they are arrested or otherwise detained on suspicion of a drunk-driving offense." . . .

In recent decades, the States and the Federal Government have toughened drunk-driving laws, and those efforts have corresponded to a dramatic decrease in alcohol-related fatalities. As of the early 1980's, the number of annual fatalities averaged 25,000; by 2014, the most recent year for which statistics are available, the number had fallen to below 10,000. . . .

If the penalty for driving with a greatly elevated BAC or for repeat violations exceeds the penalty for refusing to submit to testing, motorists who fear conviction for the more severely punished offenses have an incentive to reject testing. . . .

To combat the problem of test refusal, some States have begun to enact laws making it a crime to refuse to undergo testing. . . .

II

A

Petitioner Danny Birchfield accidentally drove his car off a North Dakota highway on October 10, 2013. A state trooper arrived and watched as Birchfield unsuccessfully tried to drive back out

of the ditch in which his car was stuck. The trooper approached, caught a strong whiff of alcohol, and saw that Birchfield's eyes were bloodshot and watery. Birchfield spoke in slurred speech and struggled to stay steady on his feet. At the trooper's request, Birchfield agreed to take several field sobriety tests and performed poorly on each. He had trouble reciting sections of the alphabet and counting backwards in compliance with the trooper's directions.

Believing that Birchfield was intoxicated, the trooper informed him of his obligation under state law to agree to a BAC test. Birchfield consented to a roadside breath test. The device used for this sort of test often differs from the machines used for breath tests administered in a police station and is intended to provide a preliminary assessment of the driver's BAC. . . . Because the reliability of these preliminary or screening breath tests varies, many jurisdictions do not permit their numerical results to be admitted in a drunk-driving trial as evidence of a driver's BAC. . . . In North Dakota, results from this type of test are "used only for determining whether or not a further test shall be given." . . . In Birchfield's case, the screening test estimated that his BAC was 0.254%, more than three times the legal limit of 0.08%. . . .

The state trooper arrested Birchfield for driving while impaired, gave the usual *Miranda* warnings, again advised him of his obligation under North Dakota law to undergo BAC testing, and informed him, as state law requires, . . . that refusing to take the test would expose him to criminal penalties. In addition to mandatory addiction treatment, sentences range from a mandatory fine of $500 (for first-time offenders) to fines of at least $2,000 and imprisonment of at least one year and one day (for serial offenders). . . .

Although faced with the prospect of prosecution under this law, Birchfield refused to let his blood be drawn. Just three months before, Birchfield had received a citation for driving under the influence, and he ultimately pleaded guilty to that offense. . . . This time he also pleaded guilty—to a misdemeanor violation of the refusal statute—but his plea was a conditional one: while Birchfield admitted refusing the blood test, he argued that the Fourth Amendment prohibited criminalizing his refusal to submit to the test. The State District Court rejected this argument and imposed a sentence that accounted for his prior conviction. . . . The sentence included 30 days in jail (20 of which were suspended and 10 of which had already been served), 1 year of unsupervised probation, $1,750 in fine and fees, and mandatory participation in a sobriety program and in a substance abuse evaluation. . . .

On appeal, the North Dakota Supreme Court affirmed. . . . The court found support for the test refusal statute in this Court's *McNeely* plurality opinion, which had spoken favorably about "acceptable 'legal tools' with 'significant consequences' for refusing to submit to testing." . . .

B

On August 5, 2012, Minnesota police received a report of a problem at a South St. Paul boat launch. Three apparently intoxicated men had gotten their truck stuck in the river while attempting to pull their boat out of the water. When police arrived, witnesses informed them that a man in underwear had been driving the truck. That man proved to be William Robert Bernard, Jr., petitioner in the second of these cases. Bernard admitted that he had been drinking but denied driving the truck (though he was holding its keys) and refused to perform any field sobriety tests.

After noting that Bernard's breath smelled of alcohol and that his eyes were bloodshot and watery, officers arrested Bernard for driving while impaired.

Back at the police station, officers read Bernard Minnesota's implied consent advisory, which like North Dakota's informs motorists that it is a crime under state law to refuse to submit to a legally required BAC test. . . . Aside from noncriminal penalties like license revocation, . . . refusal in Minnesota can result in criminal penalties ranging from no more than 90 days' imprisonment and up to a $1,000 fine for a misdemeanor violation to seven years' imprisonment and a $14,000 fine for repeat offenders. . . .

The officers asked Bernard to take a breath test. After he refused, prosecutors charged him with test refusal in the first degree because he had four prior impaired-driving convictions. . . . First-degree refusal carries the highest maximum penalties and a mandatory minimum 3-year prison sentence. . . .

The Minnesota District Court dismissed the charges on the ground that the warrantless breath test demanded of Bernard was not permitted under the Fourth Amendment. . . . The Minnesota Court of Appeals reversed, . . . and the State Supreme Court affirmed that judgment. Based on the longstanding doctrine that authorizes warrantless searches incident to a lawful arrest, the high court concluded that police did not need a warrant to insist on a test of Bernard's breath. . . .

C

A police officer spotted our third petitioner, Steve Michael Beylund, driving the streets of Bowman, North Dakota, on the night of August 10, 2013. The officer saw Beylund try unsuccessfully to turn into a driveway. In the process, Beylund's car nearly hit a stop sign before coming to a stop still partly on the public road. The officer walked up to the car and saw that Beylund had an empty wine glass in the center console next to him. Noticing that Beylund also smelled of alcohol, the officer asked him to step out of the car. As Beylund did so, he struggled to keep his balance.

The officer arrested Beylund for driving while impaired and took him to a nearby hospital. There he read Beylund North Dakota's implied consent advisory, informing him that test refusal in these circumstances is itself a crime. . . . Unlike the other two petitioners in these cases, Beylund agreed to have his blood drawn and analyzed. A nurse took a blood sample, which revealed a blood alcohol concentration of 0.250%, more than three times the legal limit.

Given the test results, Beylund's driver's license was suspended for two years after an administrative hearing. Beylund appealed the hearing officer's decision to a North Dakota District Court, principally arguing that his consent to the blood test was coerced by the officer's warning that refusing to consent would itself be a crime. The District Court rejected this argument, and Beylund again appealed.

The North Dakota Supreme Court affirmed. In response to Beylund's argument that his consent was insufficiently voluntary because of the announced criminal penalties for refusal, the court

relied on the fact that its then-recent *Birchfield* decision had upheld the constitutionality of those penalties. . . .

III

As our summary of the facts and proceedings in these three cases reveals, the cases differ in some respects. Petitioners Birchfield and Beylund were told that they were obligated to submit to a blood test, whereas petitioner Bernard was informed that a breath test was required. Birchfield and Bernard each refused to undergo a test and was convicted of a crime for his refusal. Beylund complied with the demand for a blood sample, and his license was then suspended in an administrative proceeding based on test results that revealed a very high blood alcohol level.

Despite these differences, success for all three petitioners depends on the proposition that the criminal law ordinarily may not compel a motorist to submit to the taking of a blood sample or to a breath test unless a warrant authorizing such testing is issued by a magistrate. If, on the other hand, such warrantless searches comport with the Fourth Amendment, it follows that a State may criminalize the refusal to comply with a demand to submit to the required testing, just as a State may make it a crime for a person to obstruct the execution of a valid search warrant. . . .

And by the same token, if such warrantless searches are constitutional, there is no obstacle under federal law to the admission of the results that they yield in either a criminal prosecution or a civil or administrative proceeding. We therefore begin by considering whether the searches demanded in these cases were consistent with the Fourth Amendment.

. . .

V

A

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Blood and breath tests to measure blood alcohol concentration are not as new as searches of cell phones, but here, as in *Riley*, the founding era does not provide any definitive guidance as to whether they should be allowed incident to arrest.[2]

Lacking such guidance, we engage in the same mode of analysis as in *Riley*: we examine "the degree to which [they] intrud[e] upon an individual's privacy and . . . the degree to which [they are] needed for the promotion of legitimate governmental interests.'" . . .

B

[2] At most, there may be evidence that an arrestee's mouth could be searched in appropriate circumstances at the time of the founding. See W. Cuddihy, Fourth Amendment: Origins and Original Meaning: 602-1791, p. 420 (2009). Still, searching a mouth for weapons or contraband is not the same as requiring an arrestee to give up breath or blood.

We begin by considering the impact of breath and blood tests on individual privacy interests, and we will discuss each type of test in turn.

1

Years ago we said that breath tests do not "implicat[e] significant privacy concerns." . . . That remains so today.

First, the physical intrusion is almost negligible. Breath tests "do not require piercing the skin" and entail "a minimum of inconvenience." . . .

Petitioner Bernard argues, however, that the process is nevertheless a significant intrusion because the arrestee must insert the mouthpiece of the machine into his or her mouth. . . . But there is nothing painful or strange about this requirement. The use of a straw to drink beverages is a common practice and one to which few object.

Nor, contrary to Bernard, is the test a significant intrusion because it "does not capture an ordinary exhalation of the kind that routinely is exposed to the public" but instead " 'requires a sample of "alveolar" (deep lung) air.' " . . . Humans have never been known to assert a possessory interest in or any emotional attachment to *any* of the air in their lungs. The air that humans exhale is not part of their bodies. Exhalation is a natural process−indeed, one that is necessary for life. Humans cannot hold their breath for more than a few minutes, and all the air that is breathed into a breath analyzing machine, including deep lung air, sooner or later would be exhaled even without the test. . . .

Second, breath tests are capable of revealing only one bit of information, the amount of alcohol in the subject's breath. In this respect, they contrast sharply with the sample of cells collected by the swab in *Maryland* v. *King.* Although the DNA obtained under the law at issue in that case could lawfully be used only for identification purposes, . . . the process put into the possession of law enforcement authorities a sample from which a wealth of additional, highly personal information could potentially be obtained. A breath test, by contrast, results in a BAC reading on a machine, nothing more. No sample of anything is left in the possession of the police.

Finally, participation in a breath test is not an experience that is likely to cause any great enhancement in the embarrassment that is inherent in any arrest. . . .

2

Blood tests are a different matter. They "require piercing the skin" and extract a part of the subject's body. . . . And while humans exhale air from their lungs many times per minute, humans do not continually shed blood. It is true, of course, that people voluntarily submit to the taking of blood samples as part of a physical examination, and the process involves little pain or risk. . . . Nevertheless, for many, the process is not one they relish. It is significantly more intrusive than blowing into a tube. . . .

In addition, a blood test, unlike a breath test, places in the hands of law enforcement authorities a sample that can be preserved and from which it is possible to extract information beyond a simple BAC reading. Even if the law enforcement agency is precluded from testing the blood for any purpose other than to measure BAC, the potential remains and may result in anxiety for the person tested.

C

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Having assessed the effect of BAC tests on privacy interests and the need for such tests, we conclude that the Fourth Amendment permits warrantless breath tests incident to arrests for drunk driving. The impact of breath tests on privacy is slight, and the need for BAC testing is great.

We reach a different conclusion with respect to blood tests. Blood tests are significantly more intrusive, and their reasonableness must be judged in light of the availability of the less invasive alternative of a breath test. Respondents have offered no satisfactory justification for demanding the more intrusive alternative without a warrant.

Neither respondents nor their *amici* dispute the effectiveness of breath tests in measuring BAC. Breath tests have been in common use for many years. Their results are admissible in court and are widely credited by juries, and respondents do not dispute their accuracy or utility. What, then, is the justification for warrantless blood tests?

One advantage of blood tests is their ability to detect not just alcohol but also other substances that can impair a driver's ability to operate a car safely. . . . A breath test cannot do this, but police have other measures at their disposal when they have reason to believe that a motorist may be under the influence of some other substance (for example, if a breath test indicates that a clearly impaired motorist has little if any alcohol in his blood). Nothing prevents the police from seeking a warrant for a blood test when there is sufficient time to do so in the particular circumstances or from relying on the exigent circumstances exception to the warrant requirement when there is not. . . .

VI

Having concluded that the search incident to arrest doctrine does not justify the warrantless taking of a blood sample, we must address respondents' alternative argument that such tests are justified based on the driver's legally implied consent to submit to them. . . . Our prior opinions have referred approvingly to the general concept of implied-consent laws that impose civil penalties and evidentiary consequences on motorists who refuse to comply. . . . Petitioners do not question the constitutionality of those laws, and nothing we say here should be read to cast doubt on them.

It is another matter, however, for a State not only to insist upon an intrusive blood test, but also to impose criminal penalties on the refusal to submit to such a test. There must be a limit to the

consequences to which motorists may be deemed to have consented by virtue of a decision to drive on public roads.

Respondents and their *amici* all but concede this point. North Dakota emphasizes that its law makes refusal a misdemeanor and suggests that laws punishing refusal more severely would present a different issue. . . . Borrowing from our Fifth Amendment jurisprudence, the United States suggests that motorists could be deemed to have consented to only those conditions that are "reasonable" in that they have a "nexus" to the privilege of driving and entail penalties that are proportional to severity of the violation. . . . But in the Fourth Amendment setting, this standard does not differ in substance from the one that we apply, since reasonableness is always the touchstone of Fourth Amendment analysis. . . . And applying this standard, we conclude that motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense.

VII

Our remaining task is to apply our legal conclusions to the three cases before us.

Petitioner Birchfield was criminally prosecuted for refusing a warrantless blood draw, and therefore the search he refused cannot be justified as a search incident to his arrest or on the basis of implied consent. There is no indication in the record or briefing that a breath test would have failed to satisfy the State's interests in acquiring evidence to enforce its drunk-driving laws against Birchfield. And North Dakota has not presented any case-specific information to suggest that the exigent circumstances exception would have justified a warrantless search. . . . Unable to see any other basis on which to justify a warrantless test of Birchfield's blood, we conclude that Birchfield was threatened with an unlawful search and that the judgment affirming his conviction must be reversed.

Bernard, on the other hand, was criminally prosecuted for refusing a warrantless breath test. That test *was* a permissible search incident to Bernard's arrest for drunk driving, an arrest whose legality Bernard has not contested. Accordingly, the Fourth Amendment did not require officers to obtain a warrant prior to demanding the test, and Bernard had no right to refuse it.

Unlike the other petitioners, Beylund was not prosecuted for refusing a test. He submitted to a blood test after police told him that the law required his submission, and his license was then suspended and he was fined in an administrative proceeding. The North Dakota Supreme Court held that Beylund's consent was voluntary on the erroneous assumption that the State could permissibly compel both blood and breath tests. Because voluntariness of consent to a search must be "determined from the totality of all the circumstances" . . . we leave it to the state court on remand to reevaluate Beylund's consent given the partial inaccuracy of the officer's advisory.

We accordingly reverse the judgment of the North Dakota Supreme Court in No. 14-1468 and remand the case for further proceedings not inconsistent with this opinion. We affirm the judgment of the Minnesota Supreme Court in No. 14-1470. And we vacate the judgment of the North Dakota Supreme Court in No. 14-1507 and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice SOTOMAYOR, with whom Justice GINSBURG joins, concurring in part and dissenting in part.

The Court today considers three consolidated cases. I join the majority's disposition of *Birchfield* v. *North Dakota,* No. 14-1468, and *Beylund* v. *Levi,* No. 14-1507, in which the Court holds that the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement does not permit warrantless blood tests. But I dissent from the Court's disposition of *Bernard v. Minnesota*, No. 14-1470, in which the Court holds that the same exception permits warrantless breath tests. Because no governmental interest categorically makes it impractical for an officer to obtain a warrant before measuring a driver's alcohol level, the Fourth Amendment prohibits such searches without a warrant, unless exigent circumstances exist in a particular case.[3]

. . .

II

The States do not challenge *McNeely's* holding that a categorical exigency exception is not necessary to accommodate the governmental interests associated with the dissipation of blood alcohol after drunk-driving arrests. They instead seek to exempt breath tests from the warrant requirement categorically under the search-incident-to-arrest doctrine. The majority agrees. Both are wrong.

As discussed above, regardless of the exception a State requests, the Court's traditional framework asks whether, in light of the privacy interest at stake, a legitimate governmental interest ever requires conducting breath searches without a warrant—and, if so, whether that governmental interest is adequately addressed by a case-by-case exception or requires a categorical exception to the warrant requirement. That framework directs the conclusion that a categorical search-incident-to-arrest rule for breath tests is unnecessary to address the State's governmental interests in combating drunk driving.

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B

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The search-incident-to-arrest exception is particularly ill suited to breath tests. To the extent the Court discusses any fit between breath tests and the rationales underlying the search-incident-to-arrest exception, it says that evidence preservation is one of the core values served by the exception and worries that "evidence may be lost" if breath tests are not conducted. *Ante,* at 31. But, of course, the search-incident-to-arrest exception is concerned with evidence destruction only insofar as that destruction would occur before a warrant could be sought. And breath tests are not, except

[3] Because I see no justification for warrantless blood or warrantless breath tests, I also dissent from the parts of the majority opinion that justify its conclusions with respect to blood tests on the availability of warrantless breath tests. See *ante*, at 33-34.

in rare circumstances, conducted at the time of arrest, before a warrant can be obtained, but at a separate location 40 to 120 minutes after an arrest is effectuated. That alone should be reason to reject an exception forged to address the immediate needs of arrests.

The exception's categorical reach makes it even less suitable here. The search-incident-to-arrest exception is applied categorically precisely because the needs it addresses could arise in every arrest. *Robinson,* 414 U.S., at 236. But the government's need to conduct a breath test is present only in arrests for drunk driving. And the asserted need to conduct a breath test without a warrant arises only when a warrant cannot be obtained during the significant built-in delay between arrest and testing. The conditions that require warrantless breath searches, in short, are highly situational and defy the logical underpinnings of the search-incident-to-arrest exception and its categorical application.

In *Maryland v. King*, this Court dispensed with the warrant requirement and allowed DNA searches following an arrest. But there, it at least attempted to justify the search using the booking exception's interest in identifying arrestees. . . . Here, the Court lacks even the pretense of attempting to situate breath searches within the narrow and weighty law enforcement needs that have historically justified the limited use of warrantless searches. I fear that if the Court continues down this road, the Fourth Amendment's warrant requirement will become nothing more than a suggestion.

Justice THOMAS, concurring in judgment in part and dissenting in part.

The compromise the Court reaches today is not a good one. By deciding that some (but not all) warrantless tests revealing the blood alcohol concentration (BAC) of an arrested driver are constitutional, the Court contorts the search-incident-to-arrest exception to the Fourth Amendment's warrant requirement. The far simpler answer to the question presented is the one rejected in *Missouri v. McNeely*. . . . Here, the tests revealing the BAC of a driver suspected of driving drunk are constitutional under the exigent-circumstances exception to the warrant requirement. . . .

The better (and far simpler) way to resolve these cases is by applying the *per se* rule that I proposed in *McNeely.* Under that approach, both warrantless breath and blood tests are constitutional because "the natural metabolization of [BAC] creates an exigency once police have probable cause to believe the driver is drunk. It naturally follows that police may conduct a search in these circumstances." . . .

[C] TECHNOLOGICAL DEVICES

[3] GLOBAL POSITIONING SYSTEMS

[Page 252 – Add after *United States v. Jones*:]

In *Grady v. North Carolina*, 135 S. Ct. 1368 (2015), the Court held, per curiam, that requiring a convicted sex offender to wear a monitoring device was a search within the meaning of the

Fourth Amendment. Whether the monitoring was constitutionally reasonable was not before the Court.

[4] THERMAL IMAGING

[Page 257 – Add to Note:]

In *United States v. Denson*, 775 F.3d 1214 (10th Cir. 2014), the court considered the use by the government of "a Doppler radar device capable of detecting from outside the home the presence of 'human breathing and movement within.'" The device was used to detect the presence of an individual within a residence. Citing *Kyllo*, the court found its use impermissible.

[D] NARCOTICS DETECTING CANINES

[Page 261 – Add following Notes and Questions]

Rodriguez v. United States
United States Supreme Court

135 S. Ct. 1609 (2015)

Justice GINSBURG delivered the opinion of the Court.

In *Illinois v. Caballes*, . . . this Court held that a dog sniff conducted during a lawful traffic stop does not violate the Fourth Amendment's proscription of unreasonable seizures. This case presents the question whether the Fourth Amendment tolerates a dog sniff conducted after completion of a traffic stop. We hold that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures. A seizure justified only by a police-observed traffic violation, therefore, "become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission" of issuing a ticket for the violation. . . . The Court so recognized in *Caballes,* and we adhere to the line drawn in that decision.

I

Just after midnight on March 27, 2012, police officer Morgan Struble observed a Mercury Mountaineer veer slowly onto the shoulder of Nebraska State Highway 275 for one or two seconds and then jerk back onto the road. Nebraska law prohibits driving on highway shoulders, . . . and on that basis, Struble pulled the Mountaineer over at 12:06 a.m. Struble is a K–9 officer with the Valley Police Department in Nebraska, and his dog Floyd was in his patrol car that night. Two men were in the Mountaineer: the driver, Dennys Rodriguez, and a front-seat passenger, Scott Pollman.

Struble approached the Mountaineer on the passenger's side. After Rodriguez identified himself, Struble asked him why he had driven onto the shoulder. Rodriguez replied that he had swerved to avoid a pothole. Struble then gathered Rodriguez's license, registration, and proof of insurance,

and asked Rodriguez to accompany him to the patrol car. Rodriguez asked if he was required to do so, and Struble answered that he was not. Rodriguez decided to wait in his own vehicle.

After running a records check on Rodriguez, Struble returned to the Mountaineer. Struble asked passenger Pollman for his driver's license and began to question him about where the two men were coming from and where they were going. Pollman replied that they had traveled to Omaha, Nebraska, to look at a Ford Mustang that was for sale and that they were returning to Norfolk, Nebraska. Struble returned again to his patrol car, where he completed a records check on Pollman, and called for a second officer. Struble then began writing a warning ticket for Rodriguez for driving on the shoulder of the road.

Struble returned to Rodriguez's vehicle a third time to issue the written warning. By 12:27 or 12:28 a.m., Struble had finished explaining the warning to Rodriguez, and had given back to Rodriguez and Pollman the documents obtained from them. As Struble later testified, at that point, Rodriguez and Pollman "had all their documents back and a copy of the written warning. I got all the reason[s] for the stop out of the way[,] . . . took care of all the business." . . .

Nevertheless, Struble did not consider Rodriguez "free to leave." . . . Although justification for the traffic stop was "out of the way," . . . Struble asked for permission to walk his dog around Rodriguez's vehicle. Rodriguez said no. Struble then instructed Rodriguez to turn off the ignition, exit the vehicle, and stand in front of the patrol car to wait for the second officer. Rodriguez complied. At 12:33 a.m., a deputy sheriff arrived. Struble retrieved his dog and led him twice around the Mountaineer. The dog alerted to the presence of drugs halfway through Struble's second pass. All told, seven or eight minutes had elapsed from the time Struble issued the written warning until the dog indicated the presence of drugs. A search of the vehicle revealed a large bag of methamphetamine.

Rodriguez was indicted in the United States District Court for the District of Nebraska on one count of possession with intent to distribute 50 grams or more of methamphetamine, . . . He moved to suppress the evidence seized from his car on the ground, among others, that Struble had prolonged the traffic stop without reasonable suspicion in order to conduct the dog sniff.

After receiving evidence, a Magistrate Judge recommended that the motion be denied. The Magistrate Judge found no probable cause to search the vehicle independent of the dog alert. . . . (apart from "information given by the dog," "Officer Struble had [no]thing other than a rather large hunch"). He further found that no reasonable suspicion supported the detention once Struble issued the written warning. He concluded, however, that under Eighth Circuit precedent, extension of the stop by "seven to eight minutes" for the dog sniff was only a *de minimis* intrusion on Rodriguez's Fourth Amendment rights and was therefore permissible.

The District Court adopted the Magistrate Judge's factual findings and legal conclusions and denied Rodriguez's motion to suppress. The court noted that, in the Eighth Circuit, "dog sniffs that occur within a short time following the completion of a traffic stop are not constitutionally prohibited if they constitute only de minimis intrusions." . . . The court thus agreed with the Magistrate Judge that the "7 to 10 minutes" added to the stop by the dog sniff "was not of

constitutional significance." . . . Impelled by that decision, Rodriguez entered a conditional guilty plea and was sentenced to five years in prison.

The Eighth Circuit affirmed. The "seven-or eight-minute delay" in this case, the opinion noted, resembled delays that the court had previously ranked as permissible. . . . The Court of Appeals thus ruled that the delay here constituted an acceptable "*de minimis* intrusion on Rodriguez's personal liberty." . . . Given that ruling, the court declined to reach the question whether Struble had reasonable suspicion to continue Rodriguez's detention after issuing the written warning.

We granted certiorari to resolve a division among lower courts on the question whether police routinely may extend an otherwise-completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff. . . .

II

. . .

. . . In *Caballes,* . . . we cautioned that a traffic stop "can become unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission" of issuing a warning ticket. 543 [*Arizona v.*] *U.S.*, at 407. And we repeated that admonition in *Johnson* : The seizure remains lawful only "so long as [unrelated] inquiries do not measurably extend the duration of the stop."

Beyond determining whether to issue a traffic ticket, an officer's mission includes "ordinary inquiries incident to [the traffic] stop." *Caballes*, . . . Typically such inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance. . . .

A dog sniff, by contrast, is a measure aimed at "detect[ing] evidence of ordinary criminal wrongdoing." *Indianapolis v. Edmond*, ... See also *Florida v. Jardines*, ... Candidly, the Government acknowledged at oral argument that a dog sniff, unlike the routine measures just mentioned, is not an ordinary incident of a traffic stop. . . . Lacking the same close connection to roadway safety as the ordinary inquiries, a dog sniff is not fairly characterized as part of the officer's traffic mission.

In advancing its *de minimis* rule, the Eighth Circuit relied heavily on our decision in *Pennsylvania v. Mimms*. . . .

Unlike a general interest in criminal enforcement, however, the government's officer safety interest stems from the mission of the stop itself. Traffic stops are "especially fraught with danger to police officers," . . . On-scene investigation into other crimes, however, detours from that mission. . . . So too do safety precautions taken in order to facilitate such detours. . . . Thus, even assuming that the imposition here was no more intrusive than the exit order in *Mimms,* the dog sniff could not be justified on the same basis. Highway and officer safety are interests different in kind from the Government's endeavor to detect crime in general or drug trafficking in particular.

The Government argues that an officer may "incremental[ly]" prolong a stop to conduct a dog sniff so long as the officer is reasonably diligent in pursuing the traffic-related purpose of the stop, and the overall duration of the stop remains reasonable in relation to the duration of other traffic stops involving similar circumstances. . . . The Government's argument, in effect, is that by completing all traffic-related tasks expeditiously, an officer can earn bonus time to pursue an unrelated criminal investigation. . . . The reasonableness of a seizure, however, depends on what the police in fact do. . . . In this regard, the Government acknowledges that "an officer always has to be reasonably diligent." . . . How could diligence be gauged other than by noting what the officer actually did and how he did it? If an officer can complete traffic-based inquiries expeditiously, then that is the amount of "time reasonably required to complete [the stop's] mission." . . . As we said in *Caballes* and reiterate today, a traffic stop "prolonged beyond" that point is "unlawful." *Ibid.* The critical question, then, is not whether the dog sniff occurs before or after the officer issues a ticket, as JUSTICE ALITO supposes, . . . but whether conducting the sniff "prolongs"—*i.e.,* adds time to—"the stop," . . . .

III

The Magistrate Judge found that detention for the dog sniff in this case was not independently supported by individualized suspicion, . . . and the District Court adopted the Magistrate Judge's findings, ... The Court of Appeals, however, did not review that determination. . . . The question whether reasonable suspicion of criminal activity justified detaining Rodriguez beyond completion of the traffic infraction investigation, therefore, remains open for Eighth Circuit consideration on remand. . . .

Justice THOMAS, with whom Justice ALITO joins, and with whom Justice KENNEDY joins as to all but Part III, dissenting.

. . .

I

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Because Rodriguez does not dispute that Officer Struble had probable cause to stop him, the only question is whether the stop was otherwise executed in a reasonable manner. . . . I easily conclude that it was. Approximately 29 minutes passed from the time Officer Struble stopped Rodriguez until his narcotics-detection dog alerted to the presence of drugs. That amount of time is hardly out of the ordinary for a traffic stop by a single officer of a vehicle containing multiple occupants even when no dog sniff is involved. . . .

. . .

II

Rather than adhere to the reasonableness requirement that we have repeatedly characterized as the "touchstone of the Fourth Amendment," . . . the majority constructed a test of its own that is inconsistent with our precedents.

A

The majority's rule requires a traffic stop to "en[d] when tasks tied to the traffic infraction are—or reasonably should have been—completed." . . . "If an officer can complete traffic-based inquiries expeditiously, then that is the amount of time reasonably required to complete the stop's mission" and he may hold the individual no longer. . . . The majority's rule thus imposes a one-way ratchet for constitutional protection linked to the characteristics of the individual officer conducting the stop: If a driver is stopped by a particularly efficient officer, then he will be entitled to be released from the traffic stop after a shorter period of time than a driver stopped by a less efficient officer. Similarly, if a driver is stopped by an officer with access to technology that can shorten a records check, then he will be entitled to be released from the stop after a shorter period of time than an individual stopped by an officer without access to such technology.

I "cannot accept that the search and seizure protections of the Fourth Amendment are so variable and can be made to turn upon such trivialities." . . . We have repeatedly explained that the reasonableness inquiry must not hinge on the characteristics of the individual officer conducting the seizure. . . .

B

As if that were not enough, the majority also limits the duration of the stop to the time it takes the officer to complete a narrow category of "traffic-based inquiries." . . . According to the majority, these inquiries include those that "serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly." . . . Inquiries directed to "detecting evidence of ordinary criminal wrongdoing" are not traffic-related inquiries and thus cannot count toward the overall duration of the stop. *Ibid*. (internal quotation marks and alteration omitted).

The combination of that definition of traffic-related inquiries with the majority's officer- specific durational limit produces a result demonstrably at odds with our decision in *Caballes*. *Caballes* expressly anticipated that a traffic stop could be *reasonably* prolonged for officers to engage in a dog sniff. . . .

. . .

III

Today's revision of our Fourth Amendment jurisprudence was also entirely unnecessary. Rodriguez suffered no Fourth Amendment violation here for an entirely independent reason: Officer Struble had reasonable suspicion to continue to hold him for investigative purposes. . . .

Officer Struble testified that he first became suspicious that Rodriguez was engaged in criminal activity for a number of reasons. When he approached the vehicle, he smelled an "overwhelming odor of air freshener coming from the vehicle," which is, in his experience, "a common attempt to conceal an odor that [people] don't want . . . to be smelled by the police." . . . He also observed, upon approaching the front window on the passenger side of the vehicle, that Rodriguez's passenger, Scott Pollman, appeared nervous. Pollman pulled his hat down low, puffed nervously on a cigarette, and refused to make eye contact with him. The officer thought he was "more nervous than your typical passenger" who "do[esn't] have anything to worry about because [t]hey didn't commit a [traffic] violation." . . .

Officer Struble's interactions with the vehicle's occupants only increased his suspicions. When he asked Rodriguez why he had driven onto the shoulder, Rodriguez claimed that he swerved to avoid a pothole. But that story could not be squared with Officer Struble's observation of the vehicle slowly driving off the road before being jerked back onto it. . . .

. . .

* * *

I would conclude that the police did not violate the Fourth Amendment here. Officer Struble possessed probable cause to stop Rodriguez for driving on the shoulder, and he executed the subsequent stop in a reasonable manner. Our decision in *Caballes* requires no more. . . .

Justice ALITO, dissenting.

This is an unnecessary, impractical, and arbitrary decision. It addresses a purely hypothetical question: whether the traffic stop in this case *would be* unreasonable if the police officer, prior to leading a drug-sniffing dog around the exterior of petitioner's car, did not already have reasonable suspicion that the car contained drugs. In fact, however, the police officer *did have* reasonable suspicion, and, as a result, the officer was justified in detaining the occupants for the short period of time (seven or eight minutes) that is at issue.
. . .

Page 269 – After *Florida v. Jardines*

NOTE

Since its decision, *Jardines* has become more broadly relevant to searches arguably occurring within the curtilage of a dwelling without a warrant. In *Collins v. Virginia*, S. Ct. (2018), the Court was called upon to decide whether a warrantless search otherwise constitutionally permitted under the vehicle exception (to be examined later in the text) would be legal were the vehicle located within the curtilage. Justice Sotomayor, speaking for the Court, held that it would not.

§ 3.04 WARRANTLESS SEARCHES [A] INCIDENT TO ARREST

[Page 305 – Notes and Questions, Para. (5)]

Delete Note (5) and replace with *Riley v. California* (below). Notice, however, it will be most useful to read *Arizona v. Gant* (page 316) before reading *Riley*.

RILEY v. CALIFORNIA
United States Supreme Court

134 S. Ct. 2473 (2014)

Chief Justice ROBERTS delivered the opinion of the Court.

These two cases raise a common question: whether the police may, without a warrant, search digital information on a cell phone seized from an individual who has been arrested.

I A

In the first case, petitioner David Riley was stopped by a police officer for driving with expired registration tags. In the course of the stop, the officer also learned that Riley's license had been suspended. The officer impounded Riley's car, pursuant to department policy, and another officer conducted an inventory search of the car. Riley was arrested for possession of concealed and loaded firearms when that search turned up two handguns under the car's hood. . . .

An officer searched Riley incident to the arrest and found items associated with the "Bloods" street gang. He also seized a cell phone from Riley's pants pocket. According to Riley's uncontradicted assertion, the phone was a "smart phone," a cell phone with a broad range of other functions based on advanced computing capability, large storage capacity, and Internet connectivity. The officer accessed information on the phone and noticed that some words (presumably in text messages or a contacts list) were preceded by the letters "CK"—a label that, he believed, stood for "Crip Killers," a slang term for members of the Bloods gang.

At the police station about two hours after the arrest, a detective specializing in gangs further examined the contents of the phone. The detective testified that he "went through" Riley's phone "looking for evidence, because . . . gang members will often video themselves with guns or take pictures of themselves with the guns." . . . Although there was "a lot of stuff" on the phone, particular files that "caught [the detective's] eye" included videos of young men sparring while someone yelled encouragement using the moniker "Blood." . . . The police also found photographs of Riley standing in front of a car they suspected had been involved in a shooting a few weeks earlier.

Riley was ultimately charged, in connection with that earlier shooting, with firing at an occupied vehicle, assault with a semiautomatic firearm, and attempted murder. The State alleged that Riley had committed those crimes for the benefit of a criminal street gang, an aggravating factor that carries an enhanced sentence. . . . Prior to trial, Riley moved to suppress all evidence that the

police had obtained from his cell phone. He contended that the searches of his phone violated the Fourth Amendment, because they had been performed without a warrant and were not otherwise justified by exigent circumstances. The trial court rejected that argument. . . . At

Riley's trial, police officers testified about the photographs and videos found on the phone, and some of the photographs were admitted into evidence. Riley was convicted on all three counts and received an enhanced sentence of 15 years to life in prison.

The California Court of Appeal affirmed . . .

The California Supreme Court denied Riley's petition for review . . .

B

In the second case, a police officer performing routine surveillance observed respondent Brima Wurie make an apparent drug sale from a car. Officers subsequently arrested Wurie and took him to the police station. At the station, the officers seized two cell phones from Wurie's person. The one at issue here was a "flip phone," a kind of phone that is flipped open for use and that generally has a smaller range of features than a smart phone. Five to ten minutes after arriving at the station, the officers noticed that the phone was repeatedly receiving calls from a source identified as "my house" on the phone's external screen. A few minutes later, they opened the phone and saw a photograph of a woman and a baby set as the phone's wallpaper. They pressed one button on the phone to access its call log, then another button to determine the phone number associated with the "my house" label. They next used an online phone directory to trace that phone number to an apartment building.

When the officers went to the building, they saw Wurie's name on a mailbox and observed through a window a woman who resembled the woman in the photograph on Wurie's phone. They secured the apartment while obtaining a search warrant and, upon later executing the warrant, found and seized 215 grams of crack cocaine, marijuana, drug paraphernalia, a firearm and ammunition, and cash.

Wurie was charged with distributing crack cocaine, possessing crack cocaine with intent to distribute, and being a felon in possession of a firearm and ammunition. . . . He moved to suppress the evidence obtained from the search of the apartment, arguing that it was the fruit of an unconstitutional search of his cell phone. The District Court denied the motion. . . . Wurie was convicted on all three counts and sentenced to 262 months in prison.

A divided panel of the First Circuit reversed the denial of Wurie's motion to suppress and vacated Wurie's convictions for possession with intent to distribute and possession of a firearm as a felon. . . . The court held that cell phones are distinct from other physical possessions that may be searched incident to arrest without a warrant, because of the amount of personal data cell phones contain and the negligible threat they pose to law enforcement interests. . . .

We granted certiorari . . .

II

* * *

The two cases before us concern the reasonableness of a warrantless search incident to a lawful arrest. In 1914, this Court first acknowledged in dictum "the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime." Weeks v. United States, 232 U.S. 383, 392. Since that time, it has been well accepted that such a search constitutes an exception to the warrant requirement. Indeed, the label "exception" is something of a misnomer in this context, as warrantless searches incident to arrest occur with far greater frequency than searches conducted pursuant to a warrant. . . .

* * *

III

These cases *Chimel, Robinson*, and *Gant* require us to decide how the search incident to arrest doctrine applies to modern cell phones, which are now such a pervasive and insistent part of daily life that the proverbial visitor from Mars might conclude they were an important feature of human anatomy. A smart phone of the sort taken from Riley was unheard of ten years ago; a significant majority of American adults now own such phones. . . . Even less sophisticated phones like Wurie's, which have already faded in popularity since Wurie was arrested in 2007, have been around for less than 15 years. Both phones are based on technology nearly inconceivable just a few decades ago, when *Chimel* and *Robinson* were decided.

Absent more precise guidance from the founding era, we generally determine whether to exempt a given type of search from the warrant requirement "by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." . . . Such a balancing of interests supported the search incident to arrest exception in *Robinson*, and a mechanical application of *Robinson* might well support the warrantless searches at issue here.

But while *Robinson*'s categorical rule strikes the appropriate balance in the context of physical objects, neither of its rationales has much force with respect to digital content on cell phones. On the government interest side, *Robinson* concluded that the two risks identified in *Chimel*—harm to officers and destruction of evidence—are present in all custodial arrests. There are no comparable risks when the search is of digital data. In addition, *Robinson* regarded any privacy interests retained by an individual after arrest as significantly diminished by the fact of the arrest itself. Cell phones, however, place vast quantities of personal information literally in the hands of individuals. A search of the information on a cell phone bears little resemblance to the type of brief physical search considered in *Robinson*.

We therefore decline to extend *Robinson* to searches of data on cell phones, and hold instead that officers must generally secure a warrant before conducting such a search.

A

We first consider each *Chimel* concern in turn. In doing so, we do not overlook *Robinson*'s admonition that searches of a person incident to arrest, "while based upon the need to disarm and to discover evidence," are reasonable regardless of "the probability in a particular arrest situation that weapons or evidence would in fact be found." . . . Rather than requiring the "case-by-case adjudication" that *Robinson* rejected, *ibid*., we ask instead whether application of the search incident to arrest doctrine to this particular category of effects would "untether the rule from the justifications underlying the *Chimel* exception." . . .

1

Digital data stored on a cell phone cannot itself be used as a weapon to harm an arresting officer or to effectuate the arrestee's escape. Law enforcement officers remain free to examine the physical aspects of a phone to ensure that it will not be used as a weapon—say, to determine whether there is a razor blade hidden between the phone and its case. Once an officer has secured a phone and eliminated any potential physical threats, however, data on the phone can endanger no one.

Perhaps the same might have been said of the cigarette pack seized from Robinson's pocket. Once an officer gained control of the pack, it was unlikely that Robinson could have accessed the pack's contents. But unknown physical objects may always pose risks, no matter how slight, during the tense atmosphere of a custodial arrest. The officer in *Robinson* testified that he could not identify the objects in the cigarette pack but knew they were not cigarettes. . . . Given that, a further search was a reasonable protective measure. No such unknowns exist with respect to digital data. As the First Circuit explained, the officers who searched Wurie's cell phone "knew exactly what they would find therein: data. They also knew that the data could not harm them." 728 F. 3d, at 10.

The United States and California both suggest that a search of cell phone data might help ensure officer safety in more indirect ways, for example by alerting officers that confederates of the arrestee are headed to the scene. There is undoubtedly a strong government interest in warning officers about such possibilities, but neither the United States nor California offers evidence to suggest that their concerns are based on actual experience. The proposed consideration would also represent a broadening of *Chimel*'s concern that an *arrestee himself* might grab a weapon and use it against an officer "to resist arrest or effect his escape." . . . And any such threats from outside the arrest scene do not "lurk[] in all custodial arrests." . . . Accordingly, the interest in protecting officer safety does not justify dispensing with the warrant requirement across the board. To the extent dangers to arresting officers may be implicated in a particular way in a particular case, they are better addressed through consideration of case- specific exceptions to the warrant requirement, such as the one for exigent circumstances. . . .

2

The United States and California focus primarily on the second *Chimel* rationale: preventing the destruction of evidence.

Both Riley and Wurie concede that officers could have seized and secured their cell phones to prevent destruction of evidence while seeking a warrant. . . . And once law enforcement officers have secured a cell phone, there is no longer any risk that the arrestee himself will be able to delete incriminating data from the phone.

The United States and California argue that information on a cell phone may nevertheless be vulnerable to two types of evidence destruction unique to digital data—remote wiping and data encryption. Remote wiping occurs when a phone, connected to a wireless network, receives a signal that erases stored data. This can happen when a third party sends a remote signal or when a phone is preprogrammed to delete data upon entering or leaving certain geographic areas (so-called "geofencing"). . . . Encryption is a security feature that some modern cell phones use in addition to password protection. When such phones lock, data becomes protected by sophisticated encryption that renders a phone all but "unbreakable" unless police know the password. . . .

As an initial matter, these broader concerns about the loss of evidence are distinct from *Chimel*'s focus on a defendant who responds to arrest by trying to conceal or destroy evidence within his reach. . . . With respect to remote wiping, the Government's primary concern turns on the actions of third parties who are not present at the scene of arrest. And data encryption is even further afield. There, the Government focuses on the ordinary operation of a phone's security features, apart from *any* active attempt by a defendant or his associates to conceal or destroy evidence upon arrest.

We have also been given little reason to believe that either problem is prevalent. The briefing reveals only a couple of anecdotal examples of remote wiping triggered by an arrest. . . . Similarly, the opportunities for officers to search a password-protected phone before data becomes encrypted are quite limited. Law enforcement officers are very unlikely to come upon such a phone in an unlocked state because most phones lock at the touch of a button or, as a default, after some very short period of inactivity. . . .

Moreover, in situations in which an arrest might trigger a remote-wipe attempt or an officer discovers an unlocked phone, it is not clear that the ability to conduct a warrantless search would make much of a difference. The need to effect the arrest, secure the scene, and tend to other pressing matters means that law enforcement officers may well not be able to turn their attention to a cell phone right away. . . . Cell phone data would be vulnerable to remote wiping from the time an individual anticipates arrest to the time any eventual search of the phone is completed, which might be at the station house hours later. Likewise, an officer who seizes a phone in an unlocked state might not be able to begin his search in the short time remaining before the phone locks and data becomes encrypted.

In any event, as to remote wiping, law enforcement is not without specific means to address the threat. Remote wiping can be fully prevented by disconnecting a phone from the network. There are at least two simple ways to do this: First, law enforcement officers can turn the phone off or remove its battery. Second, if they are concerned about encryption or other potential problems, they can leave a phone powered on and place it in an enclosure that isolates the phone from radio waves. . . .

* * *

B

* * *

The fact that an arrestee has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely. Not every search "is acceptable solely because a person is in custody." . . . To the contrary, when "privacy-related concerns are weighty enough" a "search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee." . . . One such example, of course, is *Chimel*. *Chimel* refused to "characteriz[e] the invasion of privacy that results from a top-to-bottom search of a man's house as 'minor.'" . . . Because a search of the arrestee's entire house was a substantial invasion beyond the arrest itself, the Court concluded that a warrant was required.

Robinson is the only decision from this Court applying *Chimel* to a search of the contents of an item found on an arrestee's person. In an earlier case, this Court had approved a search of a zipper bag carried by an arrestee, but the Court analyzed only the validity of the arrest itself. See *Draper v. United States* . . .

* * *

Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse. A conclusion that inspecting the contents of an arrestee's pockets works no substantial additional intrusion on privacy beyond the arrest itself may make sense as applied to physical items, but any extension of that reasoning to digital data has to rest on its own bottom.

1

Cell phones differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person. The term "cell phone" is itself misleading shorthand; many of these devices are in fact minicomputers that also happen to have the capacity to be used as a telephone. They could just as easily be called cameras, video players, rolodexes, calendars, tape recorders, libraries, diaries, albums, televisions, maps, or newspapers.

One of the most notable distinguishing features of modern cell phones is their immense storage capacity. Before cell phones, a search of a person was limited by physical realities and tended as a general matter to constitute only a narrow intrusion on privacy. . . . Most people cannot lug around every piece of mail they have received for the past several months, every picture

they have taken, or every book or article they have read—nor would they have any reason to attempt to do so. And if they did, they would have to drag behind them a trunk of the sort held to require a search warrant on *Chadwick*, supra, rather than a container the size of the cigarette package in *Robinson*.

* * *

The storage capacity of cell phones has several interrelated consequences for privacy. First, a cell phone collects in one place many distinct types of information—an address, a note, a prescription, a bank statement, a video—that reveal much more in combination than any isolated record. Second, a cell phone's capacity allows even just one type of information to convey far more than previously possible. The sum of an individual's private life can be reconstructed through a thousand photographs labeled with dates, locations, and descriptions; the same cannot be said of a photograph or two of loved ones tucked into a wallet. Third, the data on a phone can date back to the purchase of the phone, or even earlier. A person might carry in his pocket a slip of paper reminding him to call Mr. Jones; he would not carry a record of all his communications with Mr. Jones for the past several months, as would routinely be kept on a phone.[4]

Finally, there is an element of pervasiveness that characterizes cell phones but not physical records. Prior to the digital age, people did not typically carry a cache of sensitive personal information with them as they went about their day. Now it is the person who is not carrying a cell phone, with all that it contains, who is the exception. . . .

* * *

2

To further complicate the scope of the privacy interests at stake, the data a user views on many modern cell phones may not in fact be stored on the device itself. Treating a cell phone as a container whose contents may be searched incident to an arrest is a bit strained as an initial matter. . . . But the analogy crumbles entirely when a cell phone is used to access data located elsewhere, at the tap of a screen. That is what cell phones, with increasing frequency, are designed to do by taking advantage of "cloud computing." Cloud computing is the capacity of Internet-connected devices to display data stored on remote servers rather than on the device itself. Cell phone users often may not know whether particular information is stored on the device or in the cloud, and it generally makes little difference. . . .

* * *

C

* * *

[4] Because the United States and California agree that these cases involve searches incident to arrest, these cases do not implicate the question whether the collection or inspection of aggregated digital information amounts to a search under other circumstances.

The United States first proposes that the *Gant* standard be imported from the vehicle context, allowing a warrantless search of an arrestee's cell phone whenever it is reasonable to believe that the phone contains evidence of the crime of arrest. But *Gant* relied on "circumstances unique to the vehicle context" to endorse a search solely for the purpose of gathering evidence. . . . Justice SCALIA's *Thornton*, opinion, on which *Gant* was based, explained that those unique circumstances are "a reduced expectation of privacy" and "heightened law enforcement needs" when it comes to motor vehicles. . . . For reasons that we have explained, cell phone searches bear neither of those characteristics.

At any rate, a *Gant* standard would prove no practical limit at all when it comes to cell phone searches. In the vehicle context, *Gant* generally protects against searches for evidence of past crimes. . . . In the cell phone context, however, it is reasonable to expect that incriminating information will be found on a phone regardless of when the crime occurred. Similarly, in the vehicle context *Gant* restricts broad searches resulting from minor crimes such as traffic violations. . . . That would not necessarily be true for cell phones. It would be a particularly inexperienced or unimaginative law enforcement officer who could not come up with several reasons to suppose evidence of just about any crime could be found on a cell phone. Even an individual pulled over for something as basic as speeding might well have locational data dispositive of guilt on his phone. An individual pulled over for reckless driving might have evidence on the phone that shows whether he was texting while driving. The sources of potential pertinent information are virtually unlimited, so applying the *Gant* standard to cell phones would in effect give "police officers unbridled discretion to rummage at will among a person's private effects." . . .

* * *

IV

We cannot deny that our decision today will have an impact on the ability of law enforcement to combat crime. Cell phones have become important tools in facilitating coordination and communication among members of criminal enterprises, and can provide valuable incriminating information about dangerous criminals. Privacy comes at a cost.

Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest. Our cases have historically recognized that the warrant requirement is "an important working part of our machinery of government," not merely "an inconvenience to be somehow 'weighed' against the claims of police efficiency." . . .

Moreover, even though the search incident to arrest exception does not apply to cell phones, other case-specific exceptions may still justify a warrantless search of a particular phone. "One well-recognized exception applies when "'the exigencies of the situation" make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.'" *Kentucky v. King* . . .

* * *

Modern cell phones are not just another technological convenience. With all they contain and all they may reveal, they hold for many Americans "the privacies of life." . . . The fact that technology now allows an individual to carry such information in his hand does not make the information any less worthy of the protection for which the Founders fought. Our answer to the question of what police must do before searching a cell phone seized incident to an arrest is accordingly simple—get a warrant.

* * *

Justice ALITO, concurring in part and concurring in the judgment.

I agree with the Court that law enforcement officers, in conducting a lawful search incident to arrest, must generally obtain a warrant before searching information stored or accessible on a cell phone. I write separately to address two points.

I A

First, I am not convinced at this time that the ancient rule on searches incident to arrest is based exclusively (or even primarily) on the need to protect the safety of arresting officers and the need to prevent the destruction of evidence. . . .

On the contrary, when pre-*Weeks* authorities discussed the basis for the rule, what was mentioned was the need to obtain probative evidence. For example, an 1839 case stated that "it is clear, and beyond doubt, that . . . constables . . . are entitled, upon a lawful arrest by them of one charged with treason or felony, to take and detain property found in his possession which will form material evidence in his prosecution for that crime." See *Dillon v. O'Brien*, 16 Cox Crim. Cas. 245, 249-251 (1887) (citing *Regina v. Frost*, 9 Car. & P. 129, 173 Eng. Rep. 771). . . .

* * *

What ultimately convinces me that the rule is not closely linked to the need for officer safety and evidence preservation is that these rationales fail to explain the rule's well-recognized scope. It has long been accepted that written items found on the person of an arrestee may be examined and used at trial. But once these items are taken away from an arrestee (something that obviously must be done before the items are read), there is no risk that the arrestee will destroy them. Nor is there any risk that leaving these items unread will endanger the arresting officers.

* * *

B

Despite my view on the point discussed above, I agree that we should not mechanically apply the rule used in the predigital era to the search of a cell phone. Many cell phones now in use are capable of storing and accessing a quantity of information, some highly personal, that no person would ever have had on his person in hard-copy form. This calls for a new balancing of law enforcement and privacy interests.

The Court strikes this balance in favor of privacy interests with respect to all cell phones and all information found in them, and this approach leads to anomalies. For example, the Court's broad holding favors information in digital form over information in hard-copy form. Suppose that two suspects are arrested. Suspect number one has in his pocket a monthly bill for his land-line phone, and the bill lists an incriminating call to a long-distance number. He also has in his wallet a few snapshots, and one of these is incriminating. Suspect number two has in his pocket a cell phone, the call log of which shows a call to the same incriminating number. In addition, a number of photos are stored in the memory of the cell phone, and one of these is incriminating. Under established law, the police may seize and examine the phone bill and the snapshots in the wallet without obtaining a warrant, but under the Court's holding today, the information stored in the cell phone is out.

While the Court's approach leads to anomalies, I do not see a workable alternative. Law enforcement officers need clear rules regarding searches incident to arrest, and it would take many cases and many years for the courts to develop more nuanced rules. And during that time, the nature of the electronic devices that ordinary Americans carry on their persons would continue to change.

II

This brings me to my second point. While I agree with the holding of the Court, I would reconsider the question presented here if either Congress or state legislatures, after assessing the legitimate needs of law enforcement and the privacy interests of cell phone owners, enact legislation that draws reasonable distinctions based on categories of information or perhaps other variables.

The regulation of electronic surveillance provides an instructive example. After this Court held that electronic surveillance constitutes a search even when no property interest is invaded, *see Katz* . . . Congress responded by enacting Title III of the Omnibus Crime Control and Safe Streets Act of 1968. Since that time, electronic surveillance has been governed primarily, not by decisions of this Court, but by the statute, which authorizes but imposes detailed restrictions on electronic surveillance.

Modern cell phones are of great value for both lawful and unlawful purposes. They can be used in committing many serious crimes, and they present new and difficult law enforcement problems. At the same time, because of the role that these devices have come to play in contemporary life, searching their contents implicates very sensitive privacy interests that this Court is poorly positioned to understand and evaluate. Many forms of modern technology are making it easier and easier for both government and private entities to amass a wealth of information about the lives of ordinary Americans, and at the same time, many ordinary Americans are choosing to make public much information that was seldom revealed to outsiders just a few decades ago.

In light of these developments, it would be very unfortunate if privacy protection in the 21st century were left primarily to the federal courts using the blunt instrument of the Fourth Amendment. Legislatures, elected by the people, are in a better position than we are to assess

and respond to the changes that have already occurred and those that almost certainly will take place in the future.

[Page 354 – Add to Note (5):]

[F] ABANDONED PROPERTY

In a later North Carolina decision, *State v. Williford*, 767 S.E.2d 139 (N.C. App. 2015), the seizure of a cigarette butt publicly abandoned was sustained.

Chapter 4

THE RIGHT TO COUNSEL

§ 4.01 RECOGNITION OF THE RIGHT

[Page 423 - Add to Note (1):]

For thoughtful overviews of the impact of *Gideon*, *see*, Symposium, *Implementing* Gideon*'s Promise: The Right to Counsel in the Nation and Indiana,* 51 IND. L. REV. 39-209 (2018), and, Mayeux, *What* Gideon *Did*, 116 COLUM. L. REV. 15 (2016).

[Page 446 – Add to Notes and Questions:]

The Court in *McWilliams v. Dunn*, 137 S. Ct. 1790 (2017) clarified the *Ake* principle by holding that where mental health is a significant factor at trial, the defendant is entitled to the assistance of a mental health professional as a member of the defense team. The state there had provided a neutral expert who assisted both the prosecution and the defense.

The trial judge denied Ayestas' request for funding to receive "reasonably necessary" services of experts and investigators, under the federal statute authorizing these sorts of expenditures. The court of appeals affirmed the decision finding that Ayestas failed to show a "substantial need" for such services. The Supreme Court unanimously reversed, deciding that the standard of "substantial need" went beyond the statutory element of showing services were "reasonably necessary." Ayestas v. Davis, 138 S. Ct. 1080 (2018).

Should the head of the public defender's office be elected? Federal prosecutors and defenders are appointed. State and local prosecutors typically are elected. A few public defenders in the United States are elected. Is this a good idea? A recent editorial in the Los Angeles Times strongly rejected this approach.

> Like other counties, we elect our district attorney to represent us in court and to protect us from lawbreakers. If we pick a lousy lawyer, we suffer the consequences, at least in theory. Guilty people are acquitted, or perhaps charges are never brought. Crime proliferates. If need be, we make a change, ousting the D.A. at election time and picking a replacement.
>
> Public defenders are different. They don't represent The People. They are lawyers in a more traditional sense, representing individuals accused of crimes. They are employed by us, but they don't work for us. They work for people who our lawyer, the district attorney, is trying to convict.
>
> If L.A. were going through one of its fear-of-crime waves, voters who want to crack down on crime might, if they elected a public defender, find themselves in the perverse position of choosing the least effective defense lawyer for indigent people accused of crimes.

Why L.A. Doesn't Need an Elected Public Defender, LOS ANGELES TIMES, Mar. 19, 2018, *available at* http://www.latimes.com/opinion/editorials/la-ed-public-defender-20180319-story.html

§ 4.03 THE RIGHT TO A *PRO SE* DEFENSE

[Page 466 – Add to Note (4):]

The court in *McDaniel v. State*, 761 S.E.2d 82, 84–85 (Ga. App. 2014) made clear that before allowing the defendant to proceed pro se, she must be "made aware of the dangers of self-representation and nevertheless [make] a knowing and intelligent waiver." To achieve this, it will be helpful if the defendant has "an apprehension of [1] the nature of the charges, [2] the statutory offenses included within them, [3] the range of allowable punishments thereunder, [4] possible defenses to the charges and [5] circumstances in mitigation thereof, and [6] all other facts essential to a broad understanding of the matter."

§ 4.04 WHEN THE RIGHT APPLIES

[Page 485 – Add to Note (2):]

For a very different result on a showup, see *People v. Cruz*, 125 A.D.3d 119 (N.Y. App. Div. 2015) where the court split.

> Majority:
>
> Nor were there exigent circumstances warranting a showup identification. The 55 year old complainant, though bruised and visibly shaken, was not suffering from any life threatening wounds that would have made her otherwise unable or unavailable to make an identification at a later time or at the precinct where she was already located . . . and public safety was no longer an issue.
>
> In any event, the showup identifications in this case were unduly suggestive. While suggestiveness is inherent and tolerated in all showup identifications, that does not mean that such law enforcement procedures are without limitations. The cumulative techniques the police employed in the showup identification before us renders it unduly suggestive.
>
> Here, the three suspects were standing side by side after the complainant had described her attack by multiple attackers. Defendants were flanked by as many as eight officers and, apart from the complainant, they were the only civilians present. Defendants were visibly restrained. This was obvious, not only from the fact that their hands were behind their backs, but also from the fact that defendant Santiago, who had visible physical injuries to his face indicative of a recent scuffle, was being physically restrained by one of the officers as the complainant made her identification. Defendants were covered in soot, such that it affected their

> appearance, particularly as to skin color. Previously, the complainant had described her assailants' "black" skin color as a prominent identifying feature, along with their ages. As the complainant was driven from the precinct to the location of the showup identification, she was told that she would be looking at people, and that she should tell the officers if she had seen them before. When defendants were shown to the complainant, they were illuminated by the patrol car's headlights and takedown flood lights, even though the garage lighting itself was good.
>
> Dissent:
>
> While Marshall further complained that resort to the identification procedure was unwarranted due to the lack of exigent circumstances, it is settled that a showup is nevertheless permissible as long as it is conducted within reasonable geographic and temporal proximity to the crime. Defendants were identified at the location of their arrest and approximately one quarter of a block from the crime scene. The majority's argument that this was not a "fast paced situation" to justify a showup identification is without substance. The police were already canvassing the area approximately four minutes after the robbery. A very short time thereafter, defendants were cornered inside a locked room of the garage. The police acted as promptly as they could and, in fact, any delay in the identification by the victim was caused by defendants. Notably, locking themselves in a maintenance room and refusing to open the door required responding officers to arrange for an emergency services unit to arrive at the scene and wait until a forcible entry could be effected. Defendants then resisted efforts to take them into custody. Once they were secured, the victim was promptly brought to the scene to make an identification. Any alleged lack of promptness in conducting the identification is entirely attributable to defendants. The showup identification, which took place approximately one hour after the commission of the robbery and in the context of an immediate and continuous investigation, cannot be said to have been unreasonable under the circumstances.

[Page 509 – Add to Note (5):]

The litigation surrounding unduly suggestive identifications continues. *See, e.g.*, State v. Frazier, 2016 WL768705 (Ohio App. 2016) (lineup showing defendant with distinctive tattoo allowed, others in lineup also had tattoos); United States v. Perkins, 787 F.3d 1329 (11th Cir. 2015) (photo display valid even though defendant was only person to have gold teeth, others were of same race with similar features.). The Court of Appeals of New York considered the especially difficult identification issues with cross-racial identifications in *People v. Boone*, 30 N.Y.3d 521 (N.Y. 2017). It held:

> In light of the near consensus among cognitive and social psychologists that people have significantly greater difficulty in accurately identifying members of a different race than in accurately identifying members of their own race, the risk of wrongful convictions involving cross-racial identifications demands a new approach. We hold that when identification is an issue in a criminal case and the identifying

witness and defendant appear to be of different races, upon request, a party is entitled to a charge on cross-racial identification.

[Page 510 – Add to Note (6):]

The witness in *State v. Newman*, 861 N.W.2d 123 (Neb. 2015), identified the defendant without doubt only after he viewed photographs of the defendant in two photo lineups on successive days. Error? No, found the court, as the witness was only "about 50 percent," sure after the first viewing, and the witness told the police that he might be able to make a more certain identification if he saw a more recent picture of the suspect. The court relied heavily on the fact that the use of multiple photograph lineups was prompted by the witness, not initiated by the detectives.

The Massachusetts Supreme Court gave guidance to trial judges in dealing with eyewitness identification. The trial judges should identify five principles "so generally accepted that it is appropriate for judges to instruct juries regarding these principles so that the jurors may apply the principles in their evaluation of eyewitness identification evidence."

1. Human memory does not function like a video recording but is a complex process that consists of three stages: acquisition, retention and retrieval….

2. An eyewitness's expressed certainty in an identification, standing alone, may not indicate the accuracy of the identification, especially where the witness did not describe that level of certainty when the witness first made the identification….

3. High levels of stress can reduce an eyewitness's ability to make an accurate identification….

4. Information that is unrelated to the initial viewing of the event, which an eyewitness receives before or after making identification, can influence the witness's later recollection of the memory or of the identification….

5. A prior viewing of a suspect at an identification procedure may reduce the reliability of a subsequent identification procedure in which the same suspect is shown. A prior viewing of a suspect in an identification procedure raises doubts about the reliability of a subsequent identification procedure involving the same suspect.

The court made clear that the list was not to be viewed as exhaustive. Commonwealth v. Gomes, 22 A.3d 897 (Mass. 2015).

§ 4.05 INEFFECTIVE ASSISTANCE OF COUNSEL

[Page 575 – Add to Note:]

In *Hinton v. Alabama*, 571 U.S. 263 (2014), the Justices again considered the application of the *Strickland* standard to a capital case. The defendant's lawyer retained a "low cost" expert believing that there was a strict limit to what the defense could spend in an appointed case for such an expert.

As the Court noted, "that belief was wrong: Alabama law in effect beginning more than a year before Hinton was arrested provided for state reimbursement of 'any expenses reasonably incurred in such defense to be approved in advance by the trial court.'" The Court found that misunderstanding the law and thus not requesting funds to replace the expert "he knew to be inadequate" was a violation of the lawyer's duty under the first prong of Strickland. "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Ultimately, the Justices in the per curiam opinion remanded the case "for reconsideration of whether Hinton's attorney's deficient performance was prejudicial under *Strickland*.

The Supreme Court in *Davila v. Davis*, 137 S. Ct. 2058, 2066 (2017)—considering a narrow collateral attack—refused to extend the ineffective assistance of counsel trial review to the performance of defense counsel on appeal.

> The criminal trial enjoys pride of place in our criminal justice system in a way that an appeal from that trial does not. The Constitution twice guarantees the right to a criminal trial. The trial "is the main event at which a defendant's rights are to be determined," …. "and not simply a tryout on the road to appellate review." And it is where the stakes for the defendant are highest, not least because it is where a presumptively innocent defendant is adjudged guilty, and where the trial judge or jury makes factual findings that nearly always receive deference on appeal and collateral review.

During the trial in *United States v. Ragin*, 820 F. 3d 609 (4th Cir. 2016), "counsel was asleep '[f]requently . . . almost every day . . . morning and evening' for '30 minutes at least' at a time. These circumstances suggest 'a breakdown in the adversarial process that our system counts on to produce just results' and from which we must presume prejudice." The appeals court found a violation of the Sixth Amendment right to counsel "when counsel sleeps during a substantial portion of the defendant's trial." As to what constitutes sleeping through a substantial portion of the trial, the judges wrote:

> Whether a lawyer slept for a substantial portion of the trial should be determined on a case-by-case basis, considering, but not limited to, the length of time counsel slept, the proportion of the trial missed, and the significance of the portion counsel slept through. At the same time, however, while we decline to dictate precise parameters for what must necessarily be a case-by-case assessment, we caution district courts that the scope of our holding today should not be limited to only the most egregious instances of attorney slumber.

The defendant in *McCoy v. Louisiana*, __ S. Ct. __ (2018) was convicted of a capital murder charge. He "vociferously insisted that he did not engage in the charged acts and adamantly objected to any admission of guilt." Defense counsel, however, admitted guilt on the defendant's part, reasonably believing "that confessing guilt [would] offer[] the best chance to avoid the death penalty." Ineffective assistance of counsel? The Supreme Court did not reach that question, finding instead that it was the "client's autonomy, not counsel's competence" which was at

issue. The Justices found a constitutional violation when the lawyer chose to override the client's expressed wish. They concluded that the case did not involve the difficult burden imposed by *Strickland v. Washington*. "To gain redress for attorney error, a defendant ordinarily must show prejudice. See *Strickland*. Here, however, the violation of McCoy's protected autonomy right was complete when the court allowed counsel to usurp control of an issue within McCoy's sole prerogative. Violation of a defendant's Sixth Amendment-secured autonomy ranks as error of the kind our decisions have called 'structural'; when present, such an error is not subject to harmless-error review."

[Page 588 – Add to Note (2):]

The court of appeals in Ohio declared that it will no longer accept motions to withdraw under *Anders*, and would consider appointing new counsel if the lawyer seeks to withdraw. "An *Anders* withdrawal prejudices an appellant and compromises his appeal by flagging the case as without merit, which invites perfunctory review by the court… The *Anders* procedure also creates tension between counsel's duty to the client and to the court." State v. Wilson, 83 N.E.3d 942, 946 (Ohio App. 2017).

Chapter 5

CONFESSIONS AND OTHER INCRIMINATING STATEMENTS

§ 5.01 THE DUE PROCESS APPROACH

[Page 592 – Add to Note (2):]

Many courts hold "that a criminal defendant's statements to law enforcement officers are 'involuntary and inadmissible when the motivating cause of the decision to speak was an express or clearly implied promise of leniency of advantage.'" For recent cases applying this doctrine and ruling inadmissible incriminating statements, see *Squire v. State*, 2016 WL717128 (Fla. App. 2016); *People v. Perez*, 243 Cal. App. 4th 863 (Cal. App. 2016).

[Page 594 – Add to Note (4):]

The Due Process claim in this area continues to raise troubling concerns. Consider, for example, these cases:

- *Little v. United States*, 125 A.3d 1119, 1133–34 (D.C. App. 2015), the court explained its ruling.

> [H]ard-hitting tactics in and of themselves do not render involuntary any statements elicited by those tactics. Yet in this case, where police were interrogating a teenage suspect who was chained to the floor in a small stationhouse interrogation room, where they instilled in him a fear of being raped in jail, where they played up the risk that he would be prosecuted for myriad robberies they did not suspect him of committing, and where the suspect emphatically denied he had robbed anybody until police told him, when he inquired "So where my lawyer at?," that he had to confess before he could arrange a meeting with his lawyer, the combination of the timing and the nature and intensity of these tactics leads us to the conclusion that the confession was not voluntary, that its centrality to the government's case precludes it from being deemed harmless, and that Mr. Little should have a new trial at which his confession is excluded.

- *United States v. Jacques*, 744 F.3d 804 (1st Cir. 2014). The defendant was interrogated for more than seven hours and the officer told the defendant that a confession might lead to "softer treatment by the prosecutor and the sentencing judge, while a failure to cooperate was likely to result in the maximum sentence." Resulting confession found to be voluntary:

> A defendant in multiple criminal matters in the past, Jacques was experienced with the justice system. Throughout the interrogation and his subsequent confession, Jacques remained calm and provided a level-headed account of his involvement in the arson. His decision to confess was not a sudden or immediate response to any of the agents' questions or threats, indicating the agents' coercive impact, but rather came after a cigarette break during which Jacques was relieved of all interrogation.

> Perhaps most importantly, Jacques himself explained his decision to confess based on his belief that [the officer] had ‘‘proved’’ the allegations.

- *People v. Thomas*, 22 N.Y.3d 629 (N.Y. 2014). In New York the burden is on the government to prove the voluntariness of a confession beyond a reasonable doubt. Held that the burden had not been satisfied with a showing that the interrogators threatened

> that if defendant continued to deny responsibility for his child's injury, his wife would be arrested and removed from his ailing child's bedside. … Another patently coercive representation made to defendant—one repeated some 21 times in the course of the interrogation—was that his disclosure of the circumstances under which he injured his child was essential to assist the doctors attempting to save the child's life.

- *Bond v. State*, 9 N.E.3d 134 (Ind. 2014). The detective there, in questioning the defendant—an African American male—made this statement:

> Don’t let twelve people who are from Schererville, Crown Point—white people, Hispanic people, other people that aren’t from Gary, from your part of the hood—judge you. Because they’re not gonna put people on there who are from your neck of the woods. You know that. They’re not gonna be the ones to decide what happens to you. You know that. I know that. Everybody knows that. All they’re gonna see is, oh, look at this, another young motherf***** who didn’t give a f***.

The court was deeply troubled by this line of interrogation and ordered suppression of the confession.

> This is not a police tactic that we simply “do not condone” because it is deceptive. Instead, this was an intentional misrepresentation of rights ensconced in the very fabric of our nation’s justice system—the rights to a fair trial and an impartial jury, and the right not to be judged by or for the color of your skin—carried out as leverage to convince a suspect in a criminal case that his only recourse was to forego his claim of innocence and confess. [We] condemn it.
>
> This country has waged a long and difficult campaign aimed at ensuring equal access to justice for all its citizens—a campaign whose courtroom aspect has been perhaps marked most visibly by the efforts to ban racial discrimination in jury selection after the enactment of the Fourteenth Amendment. Such a police interrogation technique as we see here flies in the face of those efforts by implying that they were all for naught.

- The majority in *People v. Phillips*, 2018 WL 992321 (Ill. App. 2018) laid out the basic facts in the murder case:

> The interview lasted from approximately 11 a.m. to 3:30 p.m. and included breaks for the restroom, food, and water. Phillips, who was then 18 years old, did not have an attorney or family member present at any time during the interview.
>
> At the outset of the interview, Phillips was shown a copy of the first degree murder charge and was told that he was under arrest. Phillips began to cry. Phillips was told that this was his last chance to tell the detectives what had been going on. Phillips asked to see his mother several times over the next few minutes, but those requests were denied. He was told that he could see his mother once the interview was done. Phillips was told that the detectives were there to help him, not to hurt him, and Phillips was read his Miranda rights. Phillips said that he understood those rights, and he was told to sign a sheet of paper that indicated he understood the rights as they were read to him Phillips signed the sheet without any attempt at reading it first.
>
> Over the next approximately 45 minutes, Phillips and the officers discussed what had transpired with the minor over the week leading up to his death. It was after this discussion that the detectives took a more aggressive approach to the interview. Phillips was told that the cause of the minor's death was not an accident and that the minor had been shaken. For the next hour or so, Phillips continually denied that he shook or otherwise injured his son.
>
> At around 1:15 p.m., which was over two hours into the interview, Hufford entered the room and began aggressively interrogating Phillips. Variously, Hufford told Phillips that he was trying to save Phillips's life and that a lot of things could change going forward, including the first degree murder charge. Hufford also asked Phillips if he knew what happened to baby killers in prison and stated that Phillips's life would not last long as a baby killer in prison. Hufford also told Phillips that unless he told the truth, neither God nor the minor would forgive him.

Just after this exchange, the defendant made an incriminating statement. Coerced? Yes, wrote the majority:

> Here, the detectives did not tell Phillips that they would recommend a lowering of the charge. Certainly, the detectives did not clarify that the prosecutor was the only one who could lower the charge. Rather, the clear import of Hufford's statement was that the defendant could avoid the first degree murder charge if he confessed, which weighs in favor of finding the confession involuntary.
>
> Second, the "baby killer" comments indicate improper coercion....The statements made to Phillips regarding the charge changing and what happens to baby killers in prison must be considered in light of the totality of the circumstances. Thus, we also note that numerous comments were made to Phillips that the officers were trying to help him and/or save his life. They also told him that he was too young to go to prison for the rest of his life and that "when a person is truthful and honest and tells the police what happened, that goes a long way as it goes down through

> the court system. One of the things that the courts really like is the fact that somebody takes responsibility for their actions."

No, wrote the dissent:

> [N]o officer made any promise to do anything for the defendant. Rather, Officer Hufford merely suggested that things would go better for the defendant and the charge might be reduced if he confessed truthfully and showed remorse.
>
> Under current law, we measure whether a confession was unconstitutionally coerced by the totality of the circumstances, and we examine whether the defendant's will was overborne by the circumstances surrounding the giving of the confession, taking into consideration both the characteristics of the accused and the details of the interrogation. [Earlier cases] involved a specific promise that the state's attorney would "do the best" for the defendant if he confessed. No such specific promise of leniency or benefit was offered to Phillips in this case....
>
> Credible threats of physical violence may render a confession involuntary but only if the defendant is offered protection from the threatened violence in exchange for his confession.

A prominent commentator recently agreed with Professor Kamisar's view of the voluntariness test.

> Not surprisingly, however, the first thirty years of the Court's experiment with regulating confession law demonstrated the unworkability of a completely open-ended standard. The lower courts were all over the map in their descriptions of what made a confession involuntary and were consistent only in their pervasive tendency to uphold whatever the police might do in a given case. It was well understood that police were beating suspects—particularly African American men in the South—and using extreme psychological and physical pressure to get suspects to confess. But the voluntariness test was too vague to force police to stop these abusive interrogation methods. Potentially innocent people were being convicted. . . .

- Primus, *The Future of Confession Law: Toward Rules for the Voluntariness Test*, 114 MICH. L. REV. 1, 6 (2015).

[Page 608 – Add to Problem B:]

Should the trier of fact be allowed to hear from an expert on false confessions? No, held the court in *Commonwealth v. Hoose*, 5 N.E.3d 843, 862–63 (Mass. 2014) (no showing of improper police tactics which could lead to a false confession); Yes, held the court in *People v. Days*, 15 N.Y.S.3d 823, 831–32 (N.Y. App. 2015) ("the defendant made a thorough proffer that he was 'more likely to be coerced into giving a false confession' than other individuals. His proffer clearly indicated that he was intellectually impaired, highly compliant, and suffered from a diagnosable psychiatric disorder, and also that the techniques used during the interrogation were likely to elicit a false confession from him.")

The interview with the defendant in *United States v. Giddins*, 858 F.3d 870, 885 (4th Cir. 2017) "took place in a police station under false pretenses that Giddins was required to submit to questioning in order to have his vehicle returned to him, and that he was not 'in trouble.'" The court majority found the resulting statement of the defendant to have been coerced.

> [T]here can be no question that Det. Morano and Det. Taylor affirmatively misled Giddins as to the true nature of the investigation by failing to inform him that he was the subject of the investigation. This form of deceit thus constitutes coercion.

Id. at 884. The dissenter disagreed.

> "[M]isrepresentations are insufficient, in and of themselves, to render a confession involuntary." All this is to say, even if part of the detectives' responses suggested Giddins was not in trouble, that's not enough to create a constitutional problem. Here, the detectives' combination of truthful statements and passing reassurances did not rise to the level of deceptiveness that implicated Giddins' due process rights.

Id. at 894.

§ 5.03 THE SELF-INCRIMINATION APPROACH

[Page 671 – Add to Question:]

The defendant in *People v. Carter*, 2015 WL1660977 (Colo. App. 2015), was told only that he had "the right to have an attorney." The court found this to be in violation of *Miranda*.

> The need for a clear *Miranda* warning is particularly important where law enforcement officers intentionally downplay the significance of the *Miranda* rights by de-emphasizing their importance. This is so because *Miranda* "established a number of prophylactic rights designed to counteract the 'inherently compelling pressures' of custodial interrogation," including the use of deception to obtain a confession. The practice of minimizing *Miranda* was evident here where the detective prefaced her warning by saying that she had to go over "formal little rights things" before she could talk to Carter—a routine she developed after attending a seminar on how to minimize the impact of *Miranda*.

[Page 672 – Add to Note, "Custodial Interrogations":]

In 2014, the United States Department of Justice announced that several federal law enforcement agencies would now be required to videotape interviews with suspects generally. The new procedure applies to the F.B.I., the Bureau of Alcohol, Tobacco, Firearms and Explosives, the Drug Enforcement Administration and the Marshals Service. The announcement was made in a memorandum issued by the Deputy Attorney General. *See*, NPR, Johnson, *New DOJ Policy Urges Agents To Videotape Interrogations*, May 21, 2014, *available at* http://www.npr—.org/blogs/thetwo-way/2014/05/21/314616254/new-doj-policy-calls-for-videotaping-the-questioning-of-suspects

[Page 677 – Add to Note (2):]

The custody issue continues to be difficult, especially when the interrogation occurs in the suspect's home. *See, e.g., Spencer v. United States*, 132 A.3d 1163 (D.C. App. 2016) (officers told suspect he had to come to station with them, no custody as he "was still permitted to use his cell phone, he was never handcuffed, and he was told multiple times that he was not under arrest"); *United States v. Borostowski*, 775 F.3d 851 (7th Cir. 2014) (custody found where suspect was handcuffed in his bedroom while more than a dozen officers executed a search warrant, even though he was told that he was not under arrest); *United States v. Williams*, 760 F.3d 811 (8th Cir. 2014) (no custody, as the defendant was at home—officers used a battering ram to enter the house and he arrived home while the officers were searching the house; key was that he was told he was not under arrest); *State v. McKenna*, 103 A.3d 756 (N.H. 2014) (defendant in custody in his own front yard, he was told he could not walk away and the process took more than an hour); *People v. Castillo*, 175 Cal. Rptr. 3d 192 (Cal. App. 2014) (no custody even though he was handcuffed in his home while a SWAT team searched his house; he was told he was not under arrest and he was being held so that the search of the house could be completed.)

Under *Davis*, were these statements sufficiently clear to be a request for an attorney or silence:

- "I want to go home." No, simply expressing fatigue after seven hours of interrogation. *People v. Marko*, 2015 WL5895540 (Colo. App. 2015).

- Defendant asked to see his uncle, he is "even better than a freaking attorney." Yes, defendant "affirmatively asserted his right to remain silent." *State v. Maltese*, 221 N.J. 611 (N.J. 2015).

- Defendant had a lawyer on retainer and during questioning said, "I mean can we get him down here now, or . . . .?" No, "he was weighing his options and asked a question to help him decide whether to request his counsel's presence." *People v. Kutlak,* 364 P.3d 199, 206 (Colo. 2016).

- "So can you provide me with an attorney?" Yes, "Instead of using a [hedge] word like 'should' or 'might,' which would suggest that [Allegra was] still undecided about whether [he] wanted a lawyer [he] used the word 'can.'" *United States v. Allegra*, 187 F. Supp. 3d 918, 924 (N.D. Ill. 2015).

- "I don't want to say nothing. I don't know." No, "the addition of 'I don't know' to the preceding sentence of 'I don't want to say nothing' created ambiguity as to whether Williams wanted to invoke his right to remain silent." *Williams v. State*, 128 A.3d 30, 44 (Md. 2015). But see the dissenting opinion there which concluded that the "statements would have communicated (and did communicate) to reasonable officers that he chose to say nothing." *Id.* at 50.

[Page 696 – Add to Note (3):]

Was this defendant in custody when the officer asked him questions and he made an incriminating response?

> When the driver of the vehicle, Matthew Hopkins, exited the bathroom, he had his hands in his pants pockets. Officer Wagner asked that Hopkins remove his hands from his pockets and step outside with her because she had a couple questions for him. Officer Wagner testified that he initially removed his hands from his pockets but then placed them back inside the pockets. She asked him twice to take his hands out of his pockets but he refused. Officer Wagner testified that when she got outside with Hopkins, she told him, "I'm going to put you in cuffs for my safety because you continue to put your hands in your pocket. At this point you're just being detained, you're not under arrest." She then frisked him and asked him why he was driving so fast. He responded that he had to get his car to his mother before she finished work. During this encounter, she could smell alcohol. While he was still in handcuffs, she asked him if he had been drinking. He responded that he drank a couple of beers.

No custody, according to South Dakota Supreme Court in *State v. Hopkins*, 893 N.W.2d 536, 538 (S.D. 2017):

> Hopkins was not subject to custodial interrogation. The encounter took place immediately outside of a gas station, in a public area. Officer Wagner was the only law enforcement officer present during the encounter. When she placed Hopkins in handcuffs, she informed him that he was not under arrest and that she was securing him for her safety. He indicated that he understood. She testified that Hopkins was in handcuffs for probably three minutes during which she frisked him and placed him in the back of her patrol car while she ran a check on his driver's license. There is no indication how long it took her to frisk him, but it would have been less than those three minutes. It was during that brief frisk that she asked him general questions about his driving and drinking because she had smelled alcohol. At that point in time and under these circumstances, we conclude that a reasonable person would have understood that the detention would be temporary and brief.

Id. at 541.

[Page 731 – Add to Note (4):]

The suspect in *Commonwealth v. Bell*, 39 N.E.3d 1190, 1199 (Mass. 2015), was under the influence of alcohol and was in pain because of burn injuries. The court found his waiver to be proper, as

> [he] spoke voluntarily to police, continuing to talk despite their statements that he should stop talking. The defendant's coherent and appropriate responses to medical personnel, his evident understanding that [a friend] had been seriously injured and his efforts to get help for her, and his statements to police about the fire and his own

> injuries indicate a rational understanding of the situation and a voluntary decision to speak to police.

For thoughtful analyses of several issues connected to *Miranda*, see Rossman, *Resurrecting* Miranda*'s Right to Counsel*, 97 B.U. L. REV. 1127 (2017); Jacobi, Miranda *2.0*, 50 U.C. DAVIS L. REV. 1 (2016); Howe, *Moving Beyond* Miranda*: Concessions for Confessions*, 110 N.W.U. L. REV. 905 (2015); Maclin, *A Comprehensive Analysis of the History of Interrogation Law, with Some Shots Directed at* Miranda v. Arizona, 95 B.U. L. REV. 1387 (2015). One author goes well beyond *Miranda* in arguing that deceptions by interrogating officers should not be allowed. *See*, Kitai-Sangero, *Extending* Miranda: *Prohibition on Police Lies Regarding the Incriminating Evidence,* 54 SAN DIEGO L. REV. 611, 647 (2017):

> The constitutional protections of *Miranda* ought to extend to bar the use of lies concerning incriminating evidence against suspects, aimed at extracting confessions. Lies concerning incriminating evidence force suspects to provide their version of events without knowledge of the true facts, and to shape their defense based on false evidence. They assume guilt, do not allow suspects to respond intelligently to the accusation leveled against them, and create the false impression that remaining silent is futile. Consequently, such lies violate the fundamental principles of constitutional criminal law—imposition of the obligation to prove the accusations on the state, the presumption of innocence, and the Fifth Amendment right to remain silent. They increase the risk of suspects becoming entangled in lies and making false confessions, resulting in false convictions.

Chapter 6

VINDICATING CONSTITUTIONAL VIOLATIONS

§ 6.01 STANDING

[A] Standing in the Fourth Amendment Context

[Page 752 – Add before *Minnesota v. Carter*:]

BYRD v. UNITED STATES

UNITED STATES SUPREME COURT

___ U.S. ___ (2018)

MR. JUSTICE KENNEDY delivered the opinion of the Court.

In September 2014, Pennsylvania State Troopers pulled over a car driven by petitioner Terrence Byrd. Byrd was the only person in the car. In the course of the traffic stop the troopers learned that the car was rented and that Byrd was not listed on the rental agreement as an authorized driver. For this reason, the troopers told Byrd they did not need his consent to search the car, including its trunk where he had stored personal effects. A search of the trunk uncovered body armor and 49 bricks of heroin.

The evidence was turned over to federal authorities, who charged Byrd with distribution and possession of heroin with the intent to distribute in violation of 21 U. S. C. §841(a)(1) and possession of body armor by a prohibited person in violation of 18 U. S. C. §931(a)(1). Byrd moved to suppress the evidence as the fruit of an unlawful search. The United States District Court for the Middle District of Pennsylvania denied the motion, and the Court of Appeals for the Third Circuit affirmed. Both courts concluded that, because Byrd was not listed on the rental agreement, he lacked a reasonable expectation of privacy in the car. Based on this conclusion, it appears that both the District Court and Court of Appeals deemed it unnecessary to consider whether the troopers had probable cause to search the car.

This Court granted certiorari to address the question whether a driver has a reasonable expectation of privacy in a rental car when he or she is not listed as an authorized driver on the rental agreement. The Court now holds that, as a general rule, someone in otherwise lawful possession and control of a rental car has a reasonable expectation of privacy in it even if the rental agreement does not list him or her as an authorized driver.

The Court concludes a remand is necessary to address in the first instance the Government's argument that this general rule is inapplicable because, in the circumstances here, Byrd had no greater expectation of privacy than a car thief. If that is so, our cases make clear he would lack a

legitimate expectation of privacy. It is necessary to remand as well to determine whether, even if Byrd had a right to object to the search, probable cause justified it in any event.

I

On September 17, 2014, petitioner Terrence Byrd and Latasha Reed drove in Byrd's Honda Accord to a Budget car-rental facility in Wayne, New Jersey. Byrd stayed in the parking lot in the Honda while Reed went to the Budget desk and rented a Ford Fusion. The agreement Reed signed required her to certify that she had a valid driver's license and had not committed certain vehicle-related offenses within the previous three years. An addendum to the agreement, which Reed initialed, provides the following restriction on who may drive the rental car:

> "I understand that the only ones permitted to drive the vehicle other than the renter are the renter's spouse, the renter's co-employee (with the renter's permission, while on company business), or a person who appears at the time of the rental and signs an Additional Driver Form. These other drivers must also be at least 25 years old and validly licensed."
>
> "PERMITTING AN UNAUTHORIZED DRIVER TO OPERATE THE VEHICLE IS A VIOLATION OF THE RENTAL AGREEMENT. THIS MAY RESULT IN ANY AND ALL COVERAGE OTHERWISE PROVIDED BY THE RENTAL AGREEMENT BEING VOID AND MY BEING FULLY RESPONSIBLE FOR ALL LOSS OR DAMAGE, INCLUDING LIABILITY TO THIRD PARTIES." App. 19.

In filling out the paperwork for the rental agreement, Reed did not list an additional driver.

With the rental keys in hand, Reed returned to the parking lot and gave them to Byrd. The two then left the facility in separate cars—she in his Honda, he in the rental car. Byrd returned to his home in Patterson, New Jersey, and put his personal belongings in the trunk of the rental car. Later that afternoon, he departed in the car alone and headed toward Pittsburgh, Pennsylvania.

After driving nearly three hours, or roughly half the distance to Pittsburgh, Byrd passed State Trooper David Long, who was parked in the median of Interstate 81 near Harrisburg, Pennsylvania. Long was suspicious of Byrd because he was driving with his hands at the "10 and 2" position on the steering wheel, sitting far back from the steering wheel, and driving a rental car. Long knew the Ford Fusion was a rental car because one of its windows contained a barcode. Based on these observations, he decided to follow Byrd and, a short time later, stopped him for a possible traffic infraction.

When Long approached the passenger window of Byrd's car to explain the basis for the stop and to ask for identification, Byrd was "visibly nervous" and "was shaking and had a hard time obtaining his driver's license." *Id.,* at 37. He handed an interim license and the rental agreement to Long, stating that a friend had rented the car. Long returned to his vehicle to verify Byrd's license and noticed Byrd was not listed as an additional driver on the rental agreement.

. . .

[Officers told Byrd] they did not need [his] consent because he was not listed on the rental agreement. The troopers then opened the passenger and driver doors and began a thorough search of the passenger compartment. [Troopers later searched the trunk.]

. . .

This Court granted Byrd's petition for a writ of certiorari, 582 U. S. ___ (2017), to address the conflict among the Courts of Appeals over whether an unauthorized driver has a reasonable expectation of privacy in a rental car.

. . .

II

Few protections are as essential to individual liberty as the right to be free from unreasonable searches and seizures. . . . Ever mindful of the Fourth Amendment and its history, the Court has viewed with disfavor practices that permit "police officers unbridled discretion to rummage at will among a person's private effects." *Arizona* v. *Gant*, 556 U. S. 332, 345 (2009).

This concern attends the search of an automobile. See *Delaware* v. *Prouse*, 440 U. S. 648, 662 (1979). The Court has acknowledged, however, that there is a diminished expectation of privacy in automobiles, which often permits officers to dispense with obtaining a warrant before conducting a lawful search. See, *e.g.*, *California* v. *Acevedo*, 500 U. S. 565, 579 (1991).

Whether a warrant is required is a separate question from the one the Court addresses here, which is whether the person claiming a constitutional violation "has had his own Fourth Amendment rights infringed by the search and seizure which he seeks to challenge." *Rakas* v. *Illinois*, 439 U. S. 128, 133 (1978). Answering that question requires examination of whether the person claiming the constitutional violation had a "legitimate expectation of privacy in the premises" searched. *Id.,* at 143. "Expectations of privacy protected by the Fourth Amendment, of course, need not be based on a common-law interest in real or personal property, or on the invasion of such an interest." *Id.,* at 144, n. 12. Still, "property concepts" are instructive in "determining the presence or absence of the privacy interests protected by that Amendment." *Ibid.*

. . .

Reference to property concepts…aids the Court in assessing the precise question here: Does a driver of a rental car have a reasonable expectation of privacy in the car when he or she is not listed as an authorized driver on the rental agreement?

III

A

One who owns and possesses a car, like one who owns and possesses a house, almost always has a reasonable expectation of privacy in it. More difficult to define and delineate are the legitimate expectations of privacy of others.

On the one hand, as noted above, it is by now well established that a person need not always have a recognized common-law property interest in the place searched to be able to claim a reasonable expectation of privacy in it. See *Jones* v. *United States*, 362 U. S. 257, 259 (1960); *Katz*, *supra*, at 352; *Mancusi* v. *DeForte*, 392 U. S. 364, 368 (1968); *Minnesota* v. *Olson*, 495 U. S. 91, 98 (1990).

On the other hand, it is also clear that legitimate presence on the premises of the place searched, standing alone, is not enough to accord a reasonable expectation of privacy, because it "creates too broad a gauge for measurement of Fourth Amendment rights." *Rakas*, 439 U. S., at 142; see also *id.,* at 148.

. . .

Although the Court has not set forth a single metric or exhaustive list of considerations to resolve the circumstances in which a person can be said to have a reasonable expectation of privacy, it has explained that "[l]egitimation of expectations of privacy by law must have a source outside of the Fourth Amendment, either by reference to concepts of real or personal property law or to understandings that are recognized and permitted by society." *Rakas*, 439 U. S., at 144, n. 12. The two concepts in cases like this one are often linked. "One of the main rights attaching to property is the right to exclude others," and, in the main, "one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of the right to exclude." *Ibid.* (citing 2 W. Blackstone, Commentaries on the Laws of England, ch. 1). This general property-based concept guides resolution of this case.

B

. . .

1

Stripped to its essentials, the Government's position is that only authorized drivers of rental cars have expectations of privacy in those vehicles. This position is based on the following syllogism: Under *Rakas*, passengers do not have an expectation of privacy in an automobile glove compartment or like places; an unauthorized driver like Byrd would have been the passenger had the renter been driving; and the unauthorized driver cannot obtain greater protection when he takes the wheel and leaves the renter behind. The flaw in this syllogism is its major premise, for it is a misreading of *Rakas*.

The Court in *Rakas* did not hold that passengers cannot have an expectation of privacy in automobiles. . . . The Court instead rejected the argument that legitimate presence alone was sufficient to assert a Fourth Amendment interest, which was fatal to the petitioners' case there because they had "claimed only that they were 'legitimately on [the] premises' and did not claim that they had any legitimate expectation of privacy in the areas of the car which were searched."

What is more, the Government's syllogism is beside the point, because this case does not involve a passenger at all but instead the driver and sole occupant of a rental car.

. . .

The Court sees no reason why the expectation of privacy that comes from lawful possession and control and the attendant right to exclude would differ depending on whether the car in question is rented or privately owned by someone other than the person in current possession of it, much as it did not seem to matter whether the friend of the defendant in *Jones* owned or leased the apartment he permitted the defendant to use in his absence. Both would have the expectation of privacy that comes with the right to exclude.

. . .

2

The Government further stresses that Byrd's driving the rental car violated the rental agreement that Reed signed, and it contends this violation meant Byrd could not have had any basis for claiming an expectation of privacy in the rental car at the time of the search.

. . .

True, this constitutes a breach of the rental agreement, and perhaps a serious one, but the Government fails to explain what bearing this breach of contract, standing alone, has on expectations of privacy in the car. Stated in different terms, for Fourth Amendment purposes there is no meaningful difference between the authorized-driver provision and the other provisions the Government agrees do not eliminate an expectation of privacy, all of which concern risk allocation between private parties—violators might pay additional fees, lose insurance coverage, or assume liability for damage resulting from the breach. But that risk allocation has little to do with whether one would have a reasonable expectation of privacy in the rental car if, for example, he or she other- wise has lawful possession of and control over the car.

3

The central inquiry at this point turns on the concept of lawful possession, and this is where an important qualification of Byrd's proposed rule comes into play. *Rakas* makes clear that " 'wrongful' presence at the scene of a search would not enable a defendant to object to the legality of the search." 439 U. S., at 141, n. 9. "A burglar plying his trade in a summer cabin during the off season," for example, "may have a thoroughly justified subjective expectation of privacy, but it is not one which the law recognizes as 'legitimate.' " *Id.*, at 143, n. 12. Likewise, "a person

present in a stolen automobile at the time of the search may [not] object to the lawfulness of the search of the automobile." *Id.,* at 141, n. 9. No matter the degree of possession and control, the car thief would not have a reasonable expectation of privacy in a stolen car.

On this point, in its merits brief, the Government asserts that, on the facts here, Byrd should have no greater expectation of privacy than a car thief because he intentionally used a third party as a strawman in a calculated plan to mislead the rental company from the very outset, all to aid him in committing a crime.

. . .

It is unclear whether the Government's allegations, if true, would constitute a criminal offense in the acquisition of the rental car under applicable law. And it may be that there is no reason that the law should distinguish between one who obtains a vehicle through subterfuge of the type the Government alleges occurred here and one who steals the car outright.

The Government did not raise this argument in the District Court or the Court of Appeals, however. . . . The proper course is to remand for the argument and potentially further factual development to be considered in the first instance by the Court of Appeals or by the District Court.

IV

The Government argued in its brief in opposition to certiorari that, even if Byrd had a Fourth Amendment interest in the rental car, the troopers had probable cause to believe it contained evidence of a crime when they initiated their search. If that were true, the troopers may have been permitted to conduct a warrantless search of the car in line with the Court's cases concerning the automobile exception to the warrant requirement. See, *e.g.*, *Acevedo*, 500 U. S., at 580. The Court of Appeals did not reach this question.

. . .

V

Though new, the fact pattern here continues a well-traveled path in this Court's Fourth Amendment jurisprudence. Those cases support the proposition, and the Court now holds, that the mere fact that a driver in lawful possession or control of a rental car is not listed on the rental agreement will not defeat his or her otherwise reasonable expectation of privacy. The Court leaves for remand two of the Government's arguments: that one who intention- ally uses a third party to procure a rental car by a fraudulent scheme for the purpose of committing a crime is no better situated than a car thief; and that probable cause justified the search in any event.

* * *

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

It is so ordered.

MR. JUSTICE THOMAS, with whom MR. JUSTICE GORSUCH joins, concurring.

Although I have serious doubts about the "reasonable expectation of privacy" test from *Katz* v. *United States*, 389 U. S. 347, 360–361 (1967) (Harlan, J., concurring), I join the Court's opinion because it correctly navigates our precedents, which no party has asked us to reconsider.

. . .

The Fourth Amendment guarantees the people's right to be secure from unreasonable searches of "their persons, houses, papers, and effects." With this language, the Fourth Amendment gives "*each* person . . . the right to be secure against unreasonable searches and seizures in *his own* person, house, papers, and effects." *Minnesota* v. *Carter*, 525 U. S. 83, 92 (1998) (Scalia, J., concurring). The issue, then, is whether Byrd can prove that the rental car was *his* effect.

That issue seems to turn on at least three threshold questions. First, what kind of property interest do individuals need before something can be considered "their . . . effec[t]" under the original meaning of the Fourth Amendment? Second, what body of law determines whether that property interest is present—modern state law, the common law of 1791, or something else? Third, is the unauthorized use of a rental car illegal or otherwise wrongful under the relevant law, and, if so, does that illegality or wrongfulness affect the Fourth Amendment analysis?

. . . In an appropriate case, I would welcome briefing and argument on these questions.

MR. JUSTICE ALITO filed a separate concurring opinion.

§ 6.02 THE EXCLUSIONARY RULE(S)

[D] The Limits to the Exclusionary Rules

[2] The Good-Faith Exception to the Fourth Amendment Exclusionary Rule

[Page 804 – Add to end of Note following *Davis v. United States*:]

In *Heien v. North Carolina*, 135 S. Ct. 530 (2014), the Supreme Court held that a police officer's mistake of law, if objectively reasonable, can create reasonable suspicion necessary for a search or seizure permitted by the Fourth Amendment.

§ 6.03 THE FRUIT OF THE POISONOUS TREE

[C] Limits to the Exclusion of "Fruit"

. . .

[3] Attenuation

[Page 857 – Add to end of Note (2):]

In *Utah v. Strieff*, 136 S. Ct. 2056 (2016), the Supreme Court applied three of the factors identified in *Brown* to a situation involving an (assumed) unconstitutional stop, subsequent arrest, and the discovery of drug evidence in a search incident to that arrest. Over the terse dissents of Justices Sotomayor, Ginsburg and Kagan, the majority held the drugs admissible "because the officer's discovery of [an] arrest warrant [during the stop] attenuated the connection between the unlawful stop and the evidence seized incident to arrest." In so holding, the Court considered the "temporal proximity" between the unconstitutional police conduct and the discovery of evidence, the "presence of intervening circumstances," and the "flagrancy of the official misconduct." The Court found the proximity factor to favor suppression because of the short time between stop and search but deemed both other factors to favor the government. With regard to the intervening circumstances, the Court emphasized that the arrest warrant was valid, predated the unlawful stop, and "was entirely unconnected" to the stop. On the flagrancy point, the Court found the officer "at most negligent," explaining: "While [the officer's] decision to initiate the stop was mistaken, his conduct thereafter was lawful."

§ 6.04 HARMLESS ERROR

[Page 859 Add to end of section:]

See also McCoy v. Louisiana, ___ U.S. ___ (2018) (holding that trial court's error to allow defense counsel in death penalty case to concede defendant's guilt as a strategy to save defendant's life despite defendant's strong objection was a structural error).

Chapter 7

PRINCIPLES OF FAIR TRIAL

§ 7.02 THE RIGHT TO TRIAL BY JURY

[Page 873 – Replace second paragraph in Note with:]

In addition to guaranteeing to a criminal defendant a jury to evaluate guilt and a public trial, the Court in *Batson v. Kentucky*, 476 U.S. 79 (1986), held that a defendant's constitutional rights can be violated by purposeful racial discrimination during jury selection. The Court explained: "Purposeful racial discrimination in selection of the [jury] venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." The Court then held that the government violates the Equal Protection Clause when a prosecutor exercises her peremptory challenges "solely on account of . . . race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Id.* at 89.

Although the Court's rule from *Batson* is clear, establishing purposeful racial discrimination is difficult. In *Foster v. Chatman*, 136 S. Ct. 1737 (2016), the Court found enough proof of such discrimination. There, on habeas review, the defendant presented: 1) four copies of the jury venire list with every black prospective juror highlighted in green marker; 2) a written statement by the prosecutor's investigator that "[i]f it comes down to having to pick one of the black jurors, this one might be okay." 3) three handwritten notes on black prospective jurors denoting these jurors as "B#1, B#2, and B#3"; 4) a handwritten paper titled "definite No's," listing six names, five of which were the five qualified black prospective jurors; and 5) the jury questionnaires completed by several black prospective jurors on which someone had circled the race of each juror. The Court acknowledged that there were "questions about the background of particular notes" from the prosecutor's files, but emphasized that "determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial . . . evidence of intent as may be available." The Court went on to find misrepresentations by the state in its explanations for striking the black jurors and a failure to strike similarly-situated white jurors.

The principles established by *Batson* have been extended to gender, see *J.E.B. Alabama ex rel. T.B.*, 511 U.S. 127 (1994) (gender, like race, is an unconstitutional proxy for jury impartiality), and to strikes applied by the defendant as well. *See Georgia v. McCollum*, 505 U.S. 42 (1992).

§7.05 THE PROSECUTOR'S DUTY TO PRODUCE EXCULPATORY EVIDENCE

[Page 912 – Add to end of Note (2):]

In *Wearry v. Cain*, 136 S. Ct. 1002 (2016), the Court found a *Brady* violation when the prosecutor failed to disclose three categories of information: 1) police records showing that two inmates who were incarcerated with the state's primary witness had made statements tending to exculpate the accused; 2) evidence that a second witness against the accused had "twice sought a deal to reduce his existing sentence" in exchange for his testimony; and 3) medical records that contradicted

testimony from the primary witness. In finding the accused's rights violated, the Court emphasized that trial courts must evaluate the materiality of the evidence "cumulatively," rather than in isolation.