



Criminal Procedures

2011 Supplement

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2011 Supplement

Criminal Procedures

Cases, Statutes, and Executive Materials

Fourth Edition

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Preface

One function of a casebook supplement is to keep teachers and students current with recent events. In terms of basic doctrine, most aspects of criminal procedure have changed only modestly over the past few years. This is particularly true for a book, such as this one, that emphasizes nationwide trends within state criminal justice systems. Such nationwide changes take much longer to develop than any shifts in a single jurisdiction.

Nevertheless, these are remarkable times in criminal justice, and these remarkable events must become part of a vibrant criminal procedure course. In the long-term aftermath of the events of September 11, 2001, lawyers and judges in criminal courts all over the country continue to generate questions about how criminal procedure might change with the threat of terrorism in the background. The U.S. Supreme Court has proven remarkably active in the area for several years running, and the high state courts have added important insights of their own. These events are altering the law of *Miranda* warnings, pretrial detention, suspicionless stops, the exclusionary rule, and many other topics.

Some of the materials in this supplement will appear in the next edition; other materials may eventually disappear from the print format materials and move to the web site. Many decisions from the U.S. Supreme Court (along with some from the state supreme courts) seem on a first reading to make a dramatic shift in law and practice. However, after a year or two for reflection, some of those cases appear to be less important, because they merely restate or apply established concepts. A casebook supplement is a good opportunity to test the staying power of new cases, statutes, and policies.

This supplement is consistent with our larger goal of creating materials to extend the breadth and depth of the core casebook. We have also created internet-based pages for this casebook to enrich the resources available for students using this casebook. Our goal is not to create an electronic coursebook. Instead, the electronic resources broaden, deepen, and enliven the core text.

Preface

The *Criminal Procedures* Web pages include materials allowing students to test and expand their knowledge, such as practice problems, exams, short excerpts of articles on criminal procedure, and “extension” topics to develop themes and sub-topics that receive passing attention in the printed text. The address for these pages is <http://www.crimpro.com> (or simply type “crimpro” in your browser). We welcome suggestions for materials to post on the Web pages or to publish in this printed supplement.

We hope you find that the casebook, this supplement, and the Web pages—together—offer a complete, coherent, and challenging set of tools for learning about criminal procedure.

Marc Miller
Ron Wright

August 2011

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Chapter 2

Brief Searches and Stops

A. Brief Investigative Stops of Suspects

3. Pretextual Stops

Page 79. Add the following material at the end of note 7.

See also *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011) (an arrest of a non-citizen under the federal material support statute was based on individualized suspicion that he was a material witness to a federal crime who would soon disappear unless he was detained; because the government made the showing required by law, the detainee could not invalidate the detention by showing that the true motive for his arrest was a Department of Justice policy to use the statute as a measure to strike preemptively against terrorism suspects).

Chapter 3

Full Searches of People and Places: Basic Concepts

C. Warrants

1. The Warrant Requirement and Exigent Circumstances

Page 178. Replace *Mann v. State* with the following material.

Kentucky v. Hollis Deshaun King
131 S. Ct. 1849 (2011)

ALITO, J.*

It is well established that “exigent circumstances,” including the need to prevent the destruction of evidence, permit police officers to conduct an otherwise permissible search without first obtaining a warrant. In this case, we consider whether this rule applies when police, by knocking on the door of a residence and announcing their presence, cause the occupants to attempt to destroy evidence. The Kentucky Supreme Court held that the exigent circumstances rule does not apply in

* Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, Breyer, Sotomayor, and Kagan joined this opinion.

the case at hand because the police should have foreseen that their conduct would prompt the occupants to attempt to destroy evidence. We reject this interpretation of the exigent circumstances rule. The conduct of the police prior to their entry into the apartment was entirely lawful. They did not violate the Fourth Amendment or threaten to do so. In such a situation, the exigent circumstances rule applies.

I ...

This case concerns the search of an apartment in Lexington, Kentucky. Police officers set up a controlled buy of crack cocaine outside an apartment complex. Undercover Officer Gibbons watched the deal take place from an unmarked car in a nearby parking lot. After the deal occurred, Gibbons radioed uniformed officers to move in on the suspect. He told the officers that the suspect was moving quickly toward the breezeway of an apartment building, and he urged them to “hurry up and get there” before the suspect entered an apartment.

In response to the radio alert, the uniformed officers drove into the nearby parking lot, left their vehicles, and ran to the breezeway. Just as they entered the breezeway, they heard a door shut and detected a very strong odor of burnt marijuana. At the end of the breezeway, the officers saw two apartments, one on the left and one on the right, and they did not know which apartment the suspect had entered. Gibbons had radioed that the suspect was running into the apartment on the right, but the officers did not hear this statement because they had already left their vehicles. Because they smelled marijuana smoke emanating from the apartment on the left, they approached the door of that apartment.

Officer Steven Cobb, one of the uniformed officers who approached the door, testified that the officers banged on the left apartment door “as loud as [they] could” and announced, “This is the police” or “Police, police, police.” Cobb said that “as soon as [the officers] started banging on the door,” they “could hear people inside moving,” and “it sounded as [though] things were being moved inside the apartment.” These noises, Cobb testified, led the officers to believe that drug-related evidence was about to be destroyed.

At that point, the officers announced that they “were going to make entry inside the apartment.” Cobb then kicked in the door, the officers entered the apartment, and they found three people in the front room: respondent Hollis King, respondent’s girlfriend, and a guest who was smoking marijuana. The officers performed a protective sweep of the apartment during which they saw marijuana and powder cocaine in plain

view. In a subsequent search, they also discovered crack cocaine, cash, and drug paraphernalia.

Police eventually entered the apartment on the right. Inside, they found the suspected drug dealer who was the initial target of their investigation. ...

In the Fayette County Circuit Court, a grand jury charged respondent with trafficking in marijuana, first-degree trafficking in a controlled substance, and second-degree persistent felony offender status. Respondent filed a motion to suppress the evidence from the warrantless search, but the Circuit Court denied the motion. ... The Supreme Court of Kentucky reversed. ... To determine whether police impermissibly created the exigency, the Supreme Court of Kentucky announced a two-part test. First, the court held, police cannot “deliberately create the exigent circumstances with the bad faith intent to avoid the warrant requirement.” Second, even absent bad faith, the court concluded, police may not rely on exigent circumstances if “it was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances.” Although the court found no evidence of bad faith, it held that exigent circumstances could not justify the search because it was reasonably foreseeable that the occupants would destroy evidence when the police knocked on the door and announced their presence. ...

II

Although the text of the Fourth Amendment does not specify when a search warrant must be obtained, this Court has inferred that a warrant must generally be secured. It is a basic principle of Fourth Amendment law ... that searches and seizures inside a home without a warrant are presumptively unreasonable. But we have also recognized that this presumption may be overcome in some circumstances because the ultimate touchstone of the Fourth Amendment is “reasonableness.” Accordingly, the warrant requirement is subject to certain reasonable exceptions.

One well-recognized exception applies when “the exigencies of the situation” make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment. This Court has identified several exigencies that may justify a warrantless search of a home. Under the “emergency aid” exception, for example, officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an

occupant from imminent injury. Police officers may enter premises without a warrant when they are in hot pursuit of a fleeing suspect. And—what is relevant here—the need to prevent the imminent destruction of evidence has long been recognized as a sufficient justification for a warrantless search. ...

Over the years, lower courts have developed an exception to the exigent circumstances rule, the so-called “police-created exigency” doctrine. Under this doctrine, police may not rely on the need to prevent destruction of evidence when that exigency was “created” or “manufactured” by the conduct of the police. In applying this exception for the creation or manufacturing of an exigency by the police, courts require something more than mere proof that fear of detection by the police caused the destruction of evidence. An additional showing is obviously needed because, ... in some sense the police always create the exigent circumstances. That is to say, in the vast majority of cases in which evidence is destroyed by persons who are engaged in illegal conduct, the reason for the destruction is fear that the evidence will fall into the hands of law enforcement. ... Consequently, a rule that precludes the police from making a warrantless entry to prevent the destruction of evidence whenever their conduct causes the exigency would unreasonably shrink the reach of this well-established exception to the warrant requirement. Presumably for the purpose of avoiding such a result, the lower courts have held that the police-created exigency doctrine requires more than simple causation, but the lower courts have not agreed on the test to be applied....

III

A

[The] answer to the question presented in this case follows directly and clearly from the principle that permits warrantless searches in the first place. As previously noted, warrantless searches are allowed when the circumstances make it reasonable, within the meaning of the Fourth Amendment, to dispense with the warrant requirement. Therefore, the answer to the question before us is that the exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable in the same sense. Where, as here, the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to

prevent the destruction of evidence is reasonable and thus allowed.⁴

We have taken a similar approach in other cases involving warrantless searches. For example, we have held that law enforcement officers may seize evidence in plain view, provided that they have not violated the Fourth Amendment in arriving at the spot from which the observation of the evidence is made.... So long as this prerequisite is satisfied, however, it does not matter that the officer who makes the observation may have gone to the spot from which the evidence was seen with the hope of being able to view and seize the evidence. Instead, the Fourth Amendment requires only that the steps preceding the seizure be lawful.

Similarly, officers may seek consent-based encounters if they are lawfully present in the place where the consensual encounter occurs. See *INS v. Delgado*, 466 U.S. 210, 217, n. 5 (1984) (noting that officers who entered into consent-based encounters with employees in a factory building were “lawfully present [in the factory] pursuant to consent or a warrant”). If consent is freely given, it makes no difference that an officer may have approached the person with the hope or expectation of obtaining consent....

B

Some lower courts have adopted a rule that is similar to the one that we recognize today. But others, including the Kentucky Supreme Court, have imposed additional requirements that are unsound and that we now reject.

Bad faith. Some courts, including the Kentucky Supreme Court, ask whether law enforcement officers deliberately created the exigent circumstances with the bad faith intent to avoid the warrant requirement. This approach is fundamentally inconsistent with our Fourth Amendment jurisprudence. Our cases have repeatedly rejected a subjective approach, asking only whether the circumstances, viewed *objectively*, justify the action. Indeed, we have never held, outside limited contexts such as an inventory search or administrative inspection, that an officer’s motive invalidates objectively justifiable behavior under the Fourth Amendment. *Whren v. United States*, 517 U.S. 806, 812 (1996). ...

⁴ There is a strong argument to be made that, at least in most circumstances, the exigent circumstances rule should not apply where the police, without a warrant or any legally sound basis for a warrantless entry, threaten that they will enter without permission unless admitted. In this case, however, no such actual threat was made, and therefore we have no need to reach that question.

Reasonable foreseeability. Some courts, again including the Kentucky Supreme Court, hold that police may not rely on an exigency if it was reasonably foreseeable that the investigative tactics employed by the police would create the exigent circumstances. *Mann v. State*, 357 Ark. 159, 172, 161 S.W.3d 826, 834 (2004)). Courts applying this test have invalidated warrantless home searches on the ground that it was reasonably foreseeable that police officers, by knocking on the door and announcing their presence, would lead a drug suspect to destroy evidence.

Contrary to this reasoning, however, we have rejected the notion that police may seize evidence without a warrant only when they come across the evidence by happenstance.... Adoption of a reasonable foreseeability test would also introduce an unacceptable degree of unpredictability. For example, whenever law enforcement officers knock on the door of premises occupied by a person who may be involved in the drug trade, there is *some* possibility that the occupants may possess drugs and may seek to destroy them. Under a reasonable foreseeability test, it would be necessary to quantify the degree of predictability that must be reached before the police-created exigency doctrine comes into play.

A simple example illustrates the difficulties that such an approach would produce. Suppose that the officers in the present case did not smell marijuana smoke and thus knew only that there was a 50% chance that the fleeing suspect had entered the apartment on the left rather than the apartment on the right. Under those circumstances, would it have been reasonably foreseeable that the occupants of the apartment on the left would seek to destroy evidence upon learning that the police were at the door? Or suppose that the officers knew only that the suspect had disappeared into one of the apartments on a floor with 3, 5, 10, or even 20 units? If the police chose a door at random and knocked for the purpose of asking the occupants if they knew a person who fit the description of the suspect, would it have been reasonably foreseeable that the occupants would seek to destroy evidence?

We have noted that the calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving. The reasonable foreseeability test would create unacceptable and unwarranted difficulties for law enforcement officers who must make quick decisions in the field, as well as for judges who would be required to determine after the fact whether the destruction of evidence in response to a knock on the door was reasonably foreseeable

based on what the officers knew at the time.

Probable cause and time to secure a warrant. Some courts, in applying the police-created exigency doctrine, fault law enforcement officers if, after acquiring evidence that is sufficient to establish probable cause to search particular premises, the officers do not seek a warrant but instead knock on the door and seek either to speak with an occupant or to obtain consent to search. This approach unjustifiably interferes with legitimate law enforcement strategies. There are many entirely proper reasons why police may not want to seek a search warrant as soon as the bare minimum of evidence needed to establish probable cause is acquired. Without attempting to provide a comprehensive list of these reasons, we note a few.

First, the police may wish to speak with the occupants of a dwelling before deciding whether it is worthwhile to seek authorization for a search. They may think that a short and simple conversation may obviate the need to apply for and execute a warrant. Second, the police may want to ask an occupant of the premises for consent to search because doing so is simpler, faster, and less burdensome than applying for a warrant. A consensual search also may result in considerably less inconvenience and embarrassment to the occupants than a search conducted pursuant to a warrant. Third, law enforcement officers may wish to obtain more evidence before submitting what might otherwise be considered a marginal warrant application. Fourth, prosecutors may wish to wait until they acquire evidence that can justify a search that is broader in scope than the search that a judicial officer is likely to authorize based on the evidence then available. And finally, in many cases, law enforcement may not want to execute a search that will disclose the existence of an investigation because doing so may interfere with the acquisition of additional evidence against those already under suspicion or evidence about additional but as yet unknown participants in a criminal scheme.

[Law] enforcement officers are under no constitutional duty to call a halt to criminal investigation the moment they have the minimum evidence to establish probable cause. Faulting the police for failing to apply for a search warrant at the earliest possible time after obtaining probable cause imposes a duty that is nowhere to be found in the Constitution.

Standard or good investigative tactics. Finally, some lower court cases suggest that law enforcement officers may be found to have created or manufactured an exigency if the court concludes that the course of their investigation was contrary to standard or good law enforcement

practices (or to the policies or practices of their jurisdictions). This approach fails to provide clear guidance for law enforcement officers and authorizes courts to make judgments on matters that are the province of those who are responsible for federal and state law enforcement agencies.

C

Respondent argues for a rule that differs from those discussed above, but his rule is also flawed. Respondent contends that law enforcement officers impermissibly create an exigency when they “engage in conduct that would cause a reasonable person to believe that entry is imminent and inevitable.” In respondent’s view, relevant factors include the officers’ tone of voice in announcing their presence and the forcefulness of their knocks. But the ability of law enforcement officers to respond to an exigency cannot turn on such subtleties.

Police officers may have a very good reason to announce their presence loudly and to knock on the door with some force. A forceful knock may be necessary to alert the occupants that someone is at the door. Furthermore, unless police officers identify themselves loudly enough, occupants may not know who is at their doorstep.... Citizens who are startled by an unexpected knock on the door or by the sight of unknown persons in plain clothes on their doorstep may be relieved to learn that these persons are police officers. Others may appreciate the opportunity to make an informed decision about whether to answer the door to the police.

If respondent’s test were adopted, it would be extremely difficult for police officers to know how loudly they may announce their presence or how forcefully they may knock on a door without running afoul of the police-created exigency rule. And in most cases, it would be nearly impossible for a court to determine whether that threshold had been passed. The Fourth Amendment does not require the nebulous and impractical test that respondent proposes.

D

For these reasons, we conclude that the exigent circumstances rule applies when the police do not gain entry to premises by means of an actual or threatened violation of the Fourth Amendment. This holding provides ample protection for the privacy rights that the Amendment protects.

When law enforcement officers who are not armed with a warrant

knock on a door, they do no more than any private citizen might do. And whether the person who knocks on the door and requests the opportunity to speak is a police officer or a private citizen, the occupant has no obligation to open the door or to speak. When the police knock on a door but the occupants choose not to respond or to speak, the investigation will have reached a conspicuously low point, and the occupants will have the kind of warning that even the most elaborate security system cannot provide. And even if an occupant chooses to open the door and speak with the officers, the occupant need not allow the officers to enter the premises and may refuse to answer any questions at any time.

Occupants who choose not to stand on their constitutional rights but instead elect to attempt to destroy evidence have only themselves to blame for the warrantless exigent-circumstances search that may ensue.

IV

We now apply our interpretation of the police-created exigency doctrine to the facts of this case.... We need not decide whether exigent circumstances existed in this case. Any warrantless entry based on exigent circumstances must, of course, be supported by a genuine exigency. The trial court and the Kentucky Court of Appeals found that there was a real exigency in this case, but the Kentucky Supreme Court expressed doubt on this issue, observing that there was “certainly some question as to whether the sound of persons moving [inside the apartment] was sufficient to establish that evidence was being destroyed.” The Kentucky Supreme Court assumed for the purpose of argument that exigent circumstances existed, and it held that the police had impermissibly manufactured the exigency. We, too, assume for purposes of argument that an exigency existed....

In this case, we see no evidence that the officers either violated the Fourth Amendment or threatened to do so prior to the point when they entered the apartment. Officer Cobb testified without contradiction that the officers “banged on the door as loud as [they] could” and announced either “Police, police, police” or “This is the police.” This conduct was entirely consistent with the Fourth Amendment, and we are aware of no other evidence that might show that the officers either violated the Fourth Amendment or threatened to do so (for example, by announcing that they would break down the door if the occupants did not open the door voluntarily). Respondent argues that the officers “demanded” entry to the apartment, but he has not pointed to any evidence in the record that supports this assertion....

Finally, respondent claims that the officers “explained to [the occupants that the officers] were going to make entry inside the apartment,” but the record is clear that the officers did not make this statement until after the exigency arose. As Officer Cobb testified, the officers “knew that there was possibly something that was going to be destroyed inside the apartment,” and “at that point, they explained that they were going to make entry.” Given that this announcement was made *after* the exigency arose, it could not have created the exigency.

Like the court below, we assume for purposes of argument that an exigency existed. Because the officers in this case did not violate or threaten to violate the Fourth Amendment prior to the exigency, we hold that the exigency justified the warrantless search of the apartment....

GINSBURG, J., dissenting.

The Court today arms the police with a way routinely to dishonor the Fourth Amendment’s warrant requirement in drug cases. In lieu of presenting their evidence to a neutral magistrate, police officers may now knock, listen, then break the door down, nevermind that they had ample time to obtain a warrant. I dissent from the Court’s reduction of the Fourth Amendment’s force....

The question presented: May police, who could pause to gain the approval of a neutral magistrate, dispense with the need to get a warrant by themselves creating exigent circumstances? I would answer no, as did the Kentucky Supreme Court. The urgency must exist, I would rule, when the police come on the scene, not subsequent to their arrival, prompted by their own conduct....

In no quarter does the Fourth Amendment apply with greater force than in our homes, our most private space which, for centuries, has been regarded as entitled to special protection.... How “secure” do our homes remain if police, armed with no warrant, can pound on doors at will and, on hearing sounds indicative of things moving, forcibly enter and search for evidence of unlawful activity? ...

The existence of a genuine emergency depends not only on the state of necessity at the time of the warrantless search; it depends, first and foremost, on actions taken by the police preceding the warrantless search. Wasting a clear opportunity to obtain a warrant, therefore, disentitles the officer from relying on subsequent exigent circumstances.

Under an appropriately reined-in “emergency” or “exigent circumstances” exception, the result in this case should not be in doubt. The target of the investigation’s entry into the building, and the smell of

marijuana seeping under the apartment door into the hallway, the Kentucky Supreme Court rightly determined, gave the police probable cause sufficient to obtain a warrant to search the apartment. As that court observed, nothing made it impracticable for the police to post officers on the premises while proceeding to obtain a warrant authorizing their entry....

Chapter 6

Remedies for Unreasonable Searches and Seizures

B. Limitations on the Exclusionary Rule

1. Evidence Obtained in “Good Faith”

Page 411. Add this material before the notes.

Willie Gene Davis v. United States
131 S. Ct. 2419 (2011)

ALITO, J.*

The Fourth Amendment protects the right to be free from “unreasonable searches and seizures,” but it is silent about how this right is to be enforced. To supplement the bare text, this Court created the exclusionary rule, a deterrent sanction that bars the prosecution from introducing evidence obtained by way of a Fourth Amendment violation. The question here is whether to apply this sanction when the police conduct a search in compliance with binding precedent that is later overruled. Because suppression would do nothing to deter police misconduct in these circumstances, and because it would come at a high cost to both the truth and the public safety, we hold that searches

* Chief Justice Roberts and Justices Scalia, Kennedy, Thomas, and Kagan joined this opinion.

conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule.

I

The question presented arises in this case as a result of a shift in our Fourth Amendment jurisprudence on searches of automobiles incident to arrests of recent occupants. [The opinion then described the facts and holding in *New York v. Belton*, 453 U.S. 454 (1981)].

For years, *Belton* was widely understood to have set down a simple, bright-line rule. Numerous courts read the decision to authorize automobile searches incident to arrests of recent occupants, regardless of whether the arrestee in any particular case was within reaching distance of the vehicle at the time of the search. Even after the arrestee had stepped out of the vehicle and had been subdued by police, the prevailing understanding was that *Belton* still authorized a substantially contemporaneous search of the automobile's passenger compartment.

Not every court, however, agreed with this reading of *Belton*. In *State v. Gant*, 162 P.3d 640 (Ariz. 2007), the Arizona Supreme Court considered an automobile search conducted after the vehicle's occupant had been arrested, handcuffed, and locked in a patrol car. The court distinguished *Belton* as a case in which "four unsecured" arrestees "presented an immediate risk of loss of evidence and an obvious threat to a lone officer's safety." The court held that where no such exigencies exist—where the arrestee has been subdued and the scene secured—the rule of *Belton* does not apply.

[The opinion then described the reasoning of the majority, dissenting, and concurring opinions in *Arizona v. Gant*, 556 U.S. 332 (2009). The] Court adopted a new, two-part rule under which an automobile search incident to a recent occupant's arrest is constitutional (1) if the arrestee is within reaching distance of the vehicle during the search, or (2) if the police have reason to believe that the vehicle contains "evidence relevant to the crime of arrest." ...

The search at issue in this case took place a full two years before this Court announced its new rule in *Gant*. On an April evening in 2007, police officers in Greenville, Alabama, conducted a routine traffic stop that eventually resulted in the arrests of driver Stella Owens (for driving while intoxicated) and passenger Willie Davis (for giving a false name to police). The police handcuffed both Owens and Davis, and they placed the arrestees in the back of separate patrol cars. The police then searched the passenger compartment of Owens's vehicle and found a revolver

inside Davis's jacket pocket.

Davis was indicted in the Middle District of Alabama on one count of possession of a firearm by a convicted felon. In his motion to suppress the revolver, Davis acknowledged that the officers' search fully complied with existing Eleventh Circuit precedent. Like most courts, the Eleventh Circuit had long read *Belton* to establish a bright-line rule authorizing substantially contemporaneous vehicle searches incident to arrests of recent occupants. Davis recognized that the District Court was obligated to follow this precedent, but he raised a Fourth Amendment challenge to preserve "the issue for review" on appeal.

While Davis's appeal was pending, this Court decided *Gant*. The Eleventh Circuit, in the opinion below, applied *Gant*'s new rule and held that the vehicle search incident to Davis's arrest violated his Fourth Amendment rights. As for whether this constitutional violation warranted suppression, the Eleventh Circuit viewed that as a separate issue that turned on the potential of exclusion to deter wrongful police conduct. The court concluded that penalizing the arresting officer for following binding appellate precedent would do nothing to deter Fourth Amendment violations. It therefore declined to apply the exclusionary rule and affirmed Davis's conviction. We granted certiorari.

II

[The exclusionary] rule's sole purpose, we have repeatedly held, is to deter future Fourth Amendment violations. Our cases have thus limited the rule's operation to situations in which this purpose is thought most efficaciously served. Where suppression fails to yield "appreciable deterrence," exclusion is clearly unwarranted.

Real deterrent value is a necessary condition for exclusion, but it is not a sufficient one. The analysis must also account for the substantial social costs generated by the rule. Exclusion exacts a heavy toll on both the judicial system and society at large. It almost always requires courts to ignore reliable, trustworthy evidence bearing on guilt or innocence. And its bottom-line effect, in many cases, is to suppress the truth and set the criminal loose in the community without punishment. Our cases hold that society must swallow this bitter pill when necessary, but only as a "last resort." *Hudson v. Michigan*, 547 U.S. 586, 591 (2006). For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs.

Admittedly, there was a time when our exclusionary-rule cases were not nearly so discriminating in their approach to the doctrine. Expansive

dicta in several decisions suggested that the rule was a self-executing mandate implicit in the Fourth Amendment itself. See *Olmstead v. United States*, 277 U.S. 438, 462 (1928) (remarking on the “striking outcome of the *Weeks* case” that “the Fourth Amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction”); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (All evidence obtained by searches and seizures “in violation of the Constitution is, by that same authority, inadmissible in a state court”). ... In time, however, we came to acknowledge the exclusionary rule for what it undoubtedly is—a judicially created remedy of this Court’s own making. We abandoned the old, reflexive application of the doctrine, and imposed a more rigorous weighing of its costs and deterrence benefits. See *United States v. Calandra*, 414 U.S. 338 (1974). In a line of cases beginning with *United States v. Leon*, 468 U.S. 897 (1984), we also recalibrated our cost-benefit analysis in exclusion cases to focus the inquiry on the “flagrancy of the police misconduct” at issue.

The basic insight of the *Leon* line of cases is that the deterrence benefits of exclusion vary with the culpability of the law enforcement conduct at issue. When the police exhibit “deliberate,” “reckless,” or “grossly negligent” disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs. *Herring v. United States*, 555 U.S. 135, 144 (2009). But when the police act with an objectively “reasonable good-faith belief” that their conduct is lawful, *Leon, supra*, at 909, or when their conduct involves only simple, “isolated” negligence, *Herring, supra*, at 137, the deterrence rationale loses much of its force, and exclusion cannot “pay its way.”

The Court has over time applied this “good-faith” exception across a range of cases. *Leon* itself, for example, held that the exclusionary rule does not apply when the police conduct a search in “objectively reasonable reliance” on a warrant later held invalid. The error in such a case rests with the issuing magistrate, not the police officer, and punishing the errors of judges is not the office of the exclusionary rule. See also *Massachusetts v. Sheppard*, 468 U.S. 981 (1984) (companion case declining to apply exclusionary rule where warrant held invalid as a result of judge’s clerical error).

Other good-faith cases have sounded a similar theme. *Illinois v. Krull*, 480 U.S. 340 (1987), extended the good-faith exception to searches conducted in reasonable reliance on subsequently invalidated statutes. In *Arizona v. Evans*, 514 U.S. 1 (1995), the Court applied the good-faith exception in a case where the police reasonably relied on

erroneous information concerning an arrest warrant in a database maintained by judicial employees. Most recently, in *Herring v. United States*, 555 U.S. 135 (2009), we extended *Evans* in a case where *police* employees erred in maintaining records in a warrant database. Isolated, nonrecurring police negligence, we determined, lacks the culpability required to justify the harsh sanction of exclusion.

III

The question in this case is whether to apply the exclusionary rule when the police conduct a search in objectively reasonable reliance on binding judicial precedent. At the time of the search at issue here, we had not yet decided *Arizona v. Gant*, 556 U.S. 332 (2009), and the Eleventh Circuit had interpreted our decision in *New York v. Belton*, 453 U.S. 454 (1984), to establish a bright-line rule authorizing the search of a vehicle's passenger compartment incident to a recent occupant's arrest. *United States v. Gonzalez*, 71 F.3d 819, 825 (11th Cir. 1996). The search incident to Davis's arrest in this case followed the Eleventh Circuit's *Gonzalez* precedent to the letter. Although the search turned out to be unconstitutional under *Gant*, all agree that the officers' conduct was in strict compliance with then-binding Circuit law and was not culpable in any way.

Under our exclusionary-rule precedents, this acknowledged absence of police culpability dooms Davis's claim. Police practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield meaningful deterrence, and culpable enough to be worth the price paid by the justice system. The conduct of the officers here was neither of these things. The officers who conducted the search did not violate Davis's Fourth Amendment rights deliberately, recklessly, or with gross negligence. Nor does this case involve any recurring or systemic negligence on the part of law enforcement. The police acted in strict compliance with binding precedent, and their behavior was not wrongful. Unless the exclusionary rule is to become a strict-liability regime, it can have no application in this case....

About all that exclusion would deter in this case is conscientious police work. Responsible law-enforcement officers will take care to learn what is required of them under Fourth Amendment precedent and will conform their conduct to these rules. But by the same token, when binding appellate precedent specifically *authorizes* a particular police practice, well-trained officers will and should use that tool to fulfill their crime-detection and public-safety responsibilities.... The deterrent effect

of exclusion in such a case can only be to discourage the officer from doing his duty.

That is not the kind of deterrence the exclusionary rule seeks to foster. We have stated before, and we reaffirm today, that the harsh sanction of exclusion should not be applied to deter objectively reasonable law enforcement activity. Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule.

IV

Justice Breyer's dissent and Davis argue that, although the police conduct in this case was in no way culpable, other considerations should prevent the good-faith exception from applying. We are not persuaded.

A ...

The principal argument of both the dissent and Davis is that the exclusionary rule's availability to enforce new Fourth Amendment precedent is a retroactivity issue, see *Griffith v. Kentucky*, 479 U.S. 314 (1987), not a good-faith issue. They contend that applying the good-faith exception where police have relied on overruled precedent effectively revives the discarded retroactivity regime of *Linkletter v. Walker*, 381 U.S. 618 (1965).

In *Linkletter*, we held that the retroactive effect of a new constitutional rule of criminal procedure should be determined on a case-by-case weighing of interests. For each new rule, *Linkletter* required courts to consider a three-factor balancing test that looked to the "purpose" of the new rule, "reliance" on the old rule by law enforcement and others, and the effect retroactivity would have "on the administration of justice." After weighing the merits and demerits in each case, courts decided whether and to what extent a new rule should be given retroactive effect....

Over time, *Linkletter* proved difficult to apply in a consistent, coherent way. Individual applications of the standard produced strikingly divergent results.... Justice Harlan in particular, who had endorsed the *Linkletter* standard early on, offered a strong critique in which he argued that "basic judicial" norms required full retroactive application of new rules to all cases still subject to direct review. Eventually, and after more than 20 years of toil under *Linkletter*, the Court adopted Justice Harlan's view and held that newly announced rules of constitutional criminal procedure must apply "retroactively to all cases, state or federal, pending

on direct review or not yet final, with no exception.” *Griffith, supra*, at 328. ...

The dissent and Davis argue that applying the good-faith exception in this case is incompatible with our retroactivity precedent under *Griffith*. We think this argument conflates what are two distinct doctrines.

Our retroactivity jurisprudence is concerned with whether, as a categorical matter, a new rule is available on direct review as a *potential* ground for relief. Retroactive application under *Griffith* lifts what would otherwise be a categorical bar to obtaining redress for the government’s violation of a newly announced constitutional rule. Retroactive application does not, however, determine what “appropriate remedy” (if any) the defendant should obtain. See *Powell v. Nevada*, 511 U.S. 79, 84 (1994) (noting that it “does not necessarily follow” from retroactive application of a new rule that the defendant will gain relief). Remedy is a separate, analytically distinct issue. As a result, the retroactive application of a new rule of substantive Fourth Amendment law *raises* the question whether a suppression remedy applies; it does not answer that question.

When this Court announced its decision in *Gant*, Davis’s conviction had not yet become final on direct review. *Gant* therefore applies retroactively to this case. Davis may invoke its newly announced rule of substantive Fourth Amendment law as a basis for seeking relief. The question, then, becomes one of remedy, and on that issue Davis seeks application of the exclusionary rule. But exclusion of evidence does not automatically follow from the fact that a Fourth Amendment violation occurred. The remedy is subject to exceptions and applies only where its purpose is effectively advanced.

[Suppression would] be inappropriate, the dissent and Davis acknowledge, if the inevitable-discovery exception were applicable in this case. The good-faith exception, however, is no less an established limit on the *remedy* of exclusion than is inevitable discovery. Its application here neither contravenes *Griffith* nor denies retroactive effect to *Gant*. ...

B

Davis also contends that applying the good-faith exception to searches conducted in reliance on binding precedent will stunt the development of Fourth Amendment law. With no possibility of suppression, criminal defendants will have no incentive, Davis

maintains, to request that courts overrule precedent. ...

This argument is difficult to reconcile with our modern understanding of the role of the exclusionary rule. We have never held that facilitating the overruling of precedent is a relevant consideration in an exclusionary-rule case. Rather, we have said time and again that the *sole* purpose of the exclusionary rule is to deter misconduct by law enforcement....

And in any event, applying the good-faith exception in this context will not prevent judicial reconsideration of prior Fourth Amendment precedents. In most instances, as in this case, the precedent sought to be challenged will be a decision of a Federal Court of Appeals or State Supreme Court. But a good-faith exception for objectively reasonable reliance on binding precedent will not prevent review and correction of such decisions. This Court reviews criminal convictions from 12 Federal Courts of Appeals, 50 state courts of last resort, and the District of Columbia Court of Appeals. If one or even many of these courts uphold a particular type of search or seizure, defendants in jurisdictions in which the question remains open will still have an undiminished incentive to litigate the issue. This Court can then grant certiorari, and the development of Fourth Amendment law will in no way be stunted.

Davis argues that Fourth Amendment precedents of *this* Court will be effectively insulated from challenge under a good-faith exception for reliance on appellate precedent. But this argument is overblown. For one thing, it is important to keep in mind that this argument applies to an exceedingly small set of cases. Decisions overruling this Court's Fourth Amendment precedents are rare. Indeed, it has been more than 40 years since the Court last handed down a decision of the type to which Davis refers. *Chimel v. California*, 395 U.S. 752 (1969) (overruling *United States v. Rabinowitz*, 339 U.S. 56 (1950), and *Harris v. United States*, 331 U.S. 145 (1947)). And even in those cases, Davis points out that no fewer than eight separate doctrines may preclude a defendant who successfully challenges an existing precedent from getting any relief. Moreover, as a practical matter, defense counsel in many cases will test this Court's Fourth Amendment precedents in the same way that *Belton* was tested in *Gant*—by arguing that the precedent is distinguishable.

At most, Davis's argument might suggest that—to prevent Fourth Amendment law from becoming ossified—the petitioner in a case that results in the overruling of one of this Court's Fourth Amendment precedents should be given the benefit of the victory by permitting the suppression of evidence in that one case. Such a result would

undoubtedly be a windfall to this one random litigant. But the exclusionary rule is not a personal constitutional right. It is a judicially created sanction, specifically designed as a “windfall” remedy to deter future Fourth Amendment violations. The good-faith exception is a judicially created exception to this judicially created rule. Therefore, in a future case, we could, if necessary, recognize a limited exception to the good-faith exception for a defendant who obtains a judgment overruling one of our Fourth Amendment precedents. But this is not such a case. Davis did not secure a decision overturning a Supreme Court precedent; the police in his case reasonably relied on binding Circuit precedent. ...

It is one thing for the criminal “to go free because the constable has blundered.” *People v. Defore*, 150 N.E. 585, 587 (N.Y. 1926) (Cardozo, J.). It is quite another to set the criminal free because the constable has scrupulously adhered to governing law. Excluding evidence in such cases deters no police misconduct and imposes substantial social costs. We therefore hold that when the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply....

SOTOMAYOR, J., concurring in the judgment.

Under our precedents, the primary purpose of the exclusionary rule is to deter future Fourth Amendment violations. Accordingly, we have held, application of the exclusionary rule is unwarranted when it does not result in appreciable deterrence. In the circumstances of this case, where binding appellate precedent specifically *authorized* a particular police practice, in accord with the holdings of nearly every other court in the country—application of the exclusionary rule cannot reasonably be expected to yield appreciable deterrence. I am thus compelled to conclude that the exclusionary rule does not apply in this case and to agree with the Court’s disposition.

This case does not present the markedly different question whether the exclusionary rule applies when the law governing the constitutionality of a particular search is unsettled.... The Court of Appeals recognized as much in limiting its application of the good-faith exception it articulated in this case to situations where its precedent on a given point is “unequivocal.” 598 F.3d at 1266; see *id.*, at 1266–1267 (“[We] do not mean to encourage police to adopt a ‘let’s-wait-until-it’s-decided approach’ to unsettled questions of Fourth Amendment law”). Whether exclusion would deter Fourth Amendment violations where appellate precedent does not specifically authorize a certain practice and,

if so, whether the benefits of exclusion would outweigh its costs are questions unanswered by our previous decisions.

The dissent suggests that today's decision essentially answers those questions, noting that an officer who conducts a search in the face of unsettled precedent "is no more culpable than an officer who follows erroneous binding precedent." The Court does not address this issue. In my view, whether an officer's conduct can be characterized as "culpable" is not itself dispositive. We have never refused to apply the exclusionary rule where its application would appreciably deter Fourth Amendment violations on the mere ground that the officer's conduct could be characterized as nonculpable. Rather, an officer's culpability is relevant because it may inform the overarching inquiry whether exclusion would result in appreciable deterrence. Whatever we have said about culpability, the ultimate questions have always been, one, whether exclusion would result in appreciable deterrence and, two, whether the benefits of exclusion outweigh its costs.

As stated, whether exclusion would result in appreciable deterrence in the circumstances of this case is a different question from whether exclusion would appreciably deter Fourth Amendment violations when the governing law is unsettled. The Court's answer to the former question in this case thus does not resolve the latter one.

BREYER, J., dissenting.*

In 2009, in *Arizona v. Gant*, this Court held that a police search of an automobile without a warrant violates the Fourth Amendment if the police have previously removed the automobile's occupants and placed them securely in a squad car. The present case involves these same circumstances, and it was pending on appeal when this Court decided *Gant*. Because *Gant* represents a "shift" in the Court's Fourth Amendment jurisprudence, we must decide *whether* and *how* *Gant*'s new rule applies here.

I

I agree with the Court about *whether* *Gant*'s new rule applies. It does apply. Between 1965 and 1987, [after the Court decided *Linkletter* and before it decided *Griffith*], that conclusion would have been more difficult to reach. Under *Linkletter*, the Court determined a new rule's retroactivity by looking to several different factors, including whether the

* Justice Ginsburg joined this opinion.

new rule represented a “clear break” with the past and the degree of “reliance by law enforcement authorities on the old standards.” And the Court would often not apply the new rule to identical cases still pending on appeal.

After 22 years of struggling with its *Linkletter* approach, however, the Court decided in *Griffith* that *Linkletter* had proved unfair and unworkable. It then substituted a clearer approach, stating that “a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a ‘clear break’ with the past.” 479 U.S., at 328. The Court today, following *Griffith*, concludes that *Gant*’s new rule applies here. And to that extent I agree with its decision.

II

The Court goes on, however, to decide *how Gant*’s new rule will apply. And here it adds a fatal twist. While conceding that, like the search in *Gant*, this search violated the Fourth Amendment, it holds that, unlike *Gant*, this defendant is not entitled to a remedy. That is because the Court finds a new “good faith” exception which prevents application of the normal remedy for a Fourth Amendment violation, namely, suppression of the illegally seized evidence. Leaving *Davis* with a right but not a remedy, the Court “keep[s] the word of promise to our ear” but “break[s] it to our hope.”

A

At this point I can no longer agree with the Court. A new “good faith” exception and this Court’s retroactivity decisions are incompatible. For one thing, the Court’s distinction between (1) retroactive application of a new rule and (2) availability of a remedy is highly artificial and runs counter to precedent. To determine that a new rule is retroactive *is* to determine that, at least in the normal case, there is a remedy. As we have previously said, the source of a “new rule” is the Constitution itself, not any judicial power to create new rules of law; hence, what we are actually determining when we assess the “retroactivity” of a new rule is not the temporal scope of a newly announced right, but whether a violation of the right that occurred prior to the announcement of the new rule will entitle a criminal defendant to the relief sought. The Court’s “good faith” exception (unlike, say, inevitable discovery, a remedial doctrine that applies only upon occasion) creates “a categorical bar to

obtaining redress” in *every* case pending when a precedent is overturned.

For another thing, the Court’s holding re-creates the very problems that led the Court to abandon *Linkletter*’s approach to retroactivity in favor of *Griffith*’s. One such problem concerns workability. The Court says that its exception applies where there is “objectively reasonable” police “reliance on binding appellate precedent.” But to apply the term “binding appellate precedent” often requires resolution of complex questions of degree. Davis conceded that he faced binding anti-*Gant* precedent in the Eleventh Circuit. But future litigants will be less forthcoming. Indeed, those litigants will now have to create distinctions to show that previous Circuit precedent was not “binding” lest they find relief foreclosed even if they win their constitutional claim.

At the same time, Fourth Amendment precedents frequently require courts to “slosh” their way through the factbound morass of “reasonableness.” *Scott v. Harris*, 550 U.S. 372, 383 (2007). Suppose an officer’s conduct is consistent with the language of a Fourth Amendment rule that a court of appeals announced in a case with clearly distinguishable facts? Suppose the case creating the relevant precedent did not directly announce any general rule but involved highly analogous facts? What about a rule that all other jurisdictions, but not the defendant’s jurisdiction, had previously accepted? What rules can be developed for determining when, where, and how these different kinds of precedents do, or do not, count as relevant “binding precedent”? The *Linkletter*-like result is likely complex legal argument and police force confusion.

Another such problem concerns fairness. Today’s holding, like that in *Linkletter*, violates basic norms of constitutional adjudication. It treats the defendant in a case announcing a new rule one way while treating similarly situated defendants whose cases are pending on appeal in a different way. ...

Of course, the Court may, as it suggests, avoid this unfairness by refusing to apply the exclusionary rule even to the defendant in the very case in which it announces a “new rule.” But that approach would make matters worse. What would then happen in the lower courts? How would courts of appeals, for example, come to reconsider their prior decisions when other circuits’ cases lead them to believe those decisions may be wrong? Why would a defendant seek to overturn any such decision? After all, if the (incorrect) circuit precedent is clear, then even if the defendant wins (on the constitutional question), he loses (on relief). To what extent then could this Court rely upon lower courts to work out

Fourth Amendment differences among themselves—through circuit reconsideration of a precedent that other circuits have criticized?

B

Perhaps more important, the Court's rationale for creating its new "good faith" exception threatens to undermine well-settled Fourth Amendment law. The Court [reasons that the deterrence benefits] are sufficient to justify exclusion where "police exhibit deliberate, reckless, or grossly negligent disregard for Fourth Amendment rights." But those benefits do not justify exclusion where, as here, the police act with "simple, isolated negligence" or an "objectively reasonable good-faith belief that their conduct is lawful."

If the Court means what it says, what will happen to the exclusionary rule, a rule that the Court adopted nearly a century ago for federal courts, and made applicable to state courts a half century ago through the Fourteenth Amendment? The Court has thought of that rule not as punishment for the individual officer or as reparation for the individual defendant but more generally as an effective way to secure enforcement of the Fourth Amendment's commands. This Court has deviated from the "suppression" norm in the name of "good faith" only a handful of times and in limited, atypical circumstances: where a magistrate has erroneously issued a warrant, where a database has erroneously informed police that they have a warrant, and where an unconstitutional statute purported to authorize the search.

The fact that such exceptions are few and far between is understandable. Defendants frequently move to suppress evidence on Fourth Amendment grounds. In many, perhaps most, of these instances the police, uncertain of how the Fourth Amendment applied to the particular factual circumstances they faced, will have acted in objective good faith. Yet, in a significant percentage of these instances, courts will find that the police were wrong. And, unless the police conduct falls into one of the exceptions previously noted, courts have required the suppression of the evidence seized. See Valdes, *Frequency and Success: An Empirical Study of Criminal Law Defenses, Federal Constitutional Evidentiary Claims, and Plea Negotiations*, 153 U. Pa. L. Rev. 1709, 1728 (2005) (suppression motions are filed in approximately 7% of criminal cases; approximately 12% of suppression motions are successful).

But an officer who conducts a search that he believes complies with the Constitution but which, it ultimately turns out, falls just outside the

Fourth Amendment's bounds is no more culpable than an officer who follows erroneous "binding precedent." Nor is an officer more culpable where circuit precedent is simply suggestive rather than "binding," where it only describes how to treat roughly analogous instances, or where it just does not exist. Thus, if the Court means what it now says, if it would place determinative weight upon the culpability of an individual officer's conduct, and if it would apply the exclusionary rule only where a Fourth Amendment violation was "deliberate, reckless, or grossly negligent," then the "good faith" exception will swallow the exclusionary rule. Indeed, our broad dicta in *Herring*—dicta the Court repeats and expands upon today—may already be leading lower courts in this direction. Today's decision will doubtless accelerate this trend. ...

Chapter 8

Interrogations

B. Miranda Warnings

2. “Triggering” *Miranda* Warnings

Page 558. Add this material before *State v. Elmarr*.

Federal and state courts agree that the determination of whether a suspect is in custody requires an objective determination of whether a reasonable person in the suspect’s position would believe they had been constrained in a manner akin to arrest. The seminal opinion is *Berkemer v. McCarty*, 468 U.S. 420 (1984), a framework embraced as well by state courts.

But as any student of torts knows—and virtually every law student in the United States has studied the law of torts—there is no sharp line between what is objective or subjective. Nor does saying a test is “objective” settle the extent to which an assessment should be conducted in light of a few factual categories or all the particular facts of the case. As with the infinitely pliable concept of the reasonable person, the choice between simple categories and more contextual determination echoes throughout the law in battles over using more precise rules versus more flexible standards. These grand battles are illustrated in the following two cases.

J.D.B. v. North Carolina
131 S. Ct. 2394 (2011)

SOTOMAYOR, J. *

This case presents the question whether the age of a child subjected to police questioning is relevant to the custody analysis of *Miranda v. Arizona*, 384 U.S. 436 (1966). It is beyond dispute that children will often feel bound to submit to police questioning when an adult in the same circumstances would feel free to leave. Seeing no reason for police officers or courts to blind themselves to that commonsense reality, we hold that a child's age properly informs the *Miranda* custody analysis.

I

... Petitioner J.D.B. was a 13-year-old, seventh-grade student attending class at Smith Middle School in Chapel Hill, North Carolina when he was removed from his classroom by a uniformed police officer, escorted to a closed-door conference room, and questioned by police for at least half an hour.

This was the second time that police questioned J.D.B. in the span of a week. Five days earlier, two home break-ins occurred, and various items were stolen. Police stopped and questioned J.D.B. after he was seen behind a residence in the neighborhood where the crimes occurred. That same day, police also spoke to J.D.B.'s grandmother—his legal guardian—as well as his aunt.

Police later learned that a digital camera matching the description of one of the stolen items had been found at J.D.B.'s middle school and seen in J.D.B.'s possession. Investigator DiCostanzo, the juvenile investigator with the local police force who had been assigned to the case, went to the school to question J.D.B. Upon arrival, DiCostanzo informed the uniformed police officer on detail to the school (a so-called school resource officer), the assistant principal, and an administrative intern that he was there to question J.D.B. about the break-ins. Although DiCostanzo asked the school administrators to verify J.D.B.'s date of birth, address, and parent contact information from school records, neither the police officers nor the school administrators contacted J.D.B.'s grandmother.

The uniformed officer interrupted J.D.B.'s afternoon social studies class, removed J.D.B. from the classroom, and escorted him to a school conference room. There, J.D.B. was met by DiCostanzo, the assistant principal, and the administrative intern. The door to the conference room was closed. With the two police officers and the two administrators present, J.D.B. was questioned for the next 30 to 45 minutes. Prior to the commencement of questioning, J.D.B. was given neither *Miranda* warnings nor the opportunity to speak to his grandmother. Nor was he informed that he was free to leave the room.

Questioning began with small talk—discussion of sports and J.D.B.'s

* Justices Kennedy, Ginsburg, Breyer and Kagan joined this opinion.

family life. DiCostanzo asked, and J.D.B. agreed, to discuss the events of the prior weekend. Denying any wrongdoing, J.D.B. explained that he had been in the neighborhood where the crimes occurred because he was seeking work mowing lawns. DiCostanzo pressed J.D.B. for additional detail about his efforts to obtain work; asked J.D.B. to explain a prior incident, when one of the victims returned home to find J.D.B. behind her house; and confronted J.D.B. with the stolen camera. The assistant principal urged J.D.B. to “do the right thing,” warning J.D.B. that “the truth always comes out in the end.”

Eventually, J.D.B. asked whether he would “still be in trouble” if he returned the “stuff.” In response, DiCostanzo explained that return of the stolen items would be helpful, but “this thing is going to court” regardless. (“What’s done is done; now you need to help yourself by making it right”). DiCostanzo then warned that he may need to seek a secure custody order if he believed that J.D.B. would continue to break into other homes. When J.D.B. asked what a secure custody order was, DiCostanzo explained that “it’s where you get sent to juvenile detention before court.”

After learning of the prospect of juvenile detention, J.D.B. confessed that he and a friend were responsible for the break-ins. DiCostanzo only then informed J.D.B. that he could refuse to answer the investigator’s questions and that he was free to leave. Asked whether he understood, J.D.B. nodded and provided further detail, including information about the location of the stolen items. Eventually J.D.B. wrote a statement, at DiCostanzo’s request. When the bell rang indicating the end of the schoolday, J.D.B. was allowed to leave to catch the bus home....

Two juvenile petitions were filed against J.D.B., each alleging one count of breaking and entering and one count of larceny. J.D.B.’s public defender moved to suppress his statements and the evidence derived therefrom, arguing that suppression was necessary because J.D.B. had been interrogated by police in a custodial setting without being afforded *Miranda* warnings, and because his statements were involuntary under the totality of the circumstances test. After a suppression hearing at which DiCostanzo and J.D.B. testified, the trial court denied the motion, deciding that J.D.B. was not in custody at the time of the schoolhouse interrogation and that his statements were voluntary. As a result, J.D.B. entered a transcript of admission to all four counts, renewing his objection to the denial of his motion to suppress, and the court adjudicated J.D.B. delinquent. ... We granted certiorari to determine whether the *Miranda* custody analysis includes consideration of a juvenile suspect’s age.

II

A

Any police interview of an individual suspected of a crime has coercive aspects to it. Only those interrogations that occur while a suspect is in police custody, however, heighten the risk that statements obtained are not the product of the suspect’s free choice.

By its very nature, custodial police interrogation entails inherently

compelling pressures. Even for an adult, the physical and psychological isolation of custodial interrogation can undermine the individual's will to resist and compel him to speak where he would not otherwise do so freely. Indeed, the pressure of custodial interrogation is so immense that it "can induce a frighteningly high percentage of people to confess to crimes they never committed." *Corley v. United States*, 556 U.S. 303 (2009) (citing Drizin & Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. Rev. 891 (2004)). That risk is all the more troubling—and recent studies suggest, all the more acute—when the subject of custodial interrogation is a juvenile.

Recognizing that the inherently coercive nature of custodial interrogation "blurs the line between voluntary and involuntary statements," this Court in *Miranda* adopted a set of prophylactic measures designed to safeguard the constitutional guarantee against self-incrimination.... Because these measures protect the individual against the coercive nature of custodial interrogation, they are required only where there has been such a restriction on a person's freedom as to render him "in custody." As we have repeatedly emphasized, whether a suspect is "in custody" is an objective inquiry.

Two discrete inquiries are essential to the determination: first, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave. Once the scene is set and the players' lines and actions are reconstructed, the court must apply an objective test to resolve the ultimate inquiry: was there a formal arrest or restraint on freedom of movement of the degree associated with formal arrest.

Thompson v. Keohane, 516 U.S. 99, 112 (1995). Rather than demarcate a limited set of relevant circumstances, we have required police officers and courts to examine all of the circumstances surrounding the interrogation, including any circumstance that would have affected how a reasonable person in the suspect's position "would perceive his or her freedom to leave." *Stansbury v. California*, 511 U.S. 318, 325 (1994). On the other hand, the subjective views harbored by either the interrogating officers or the person being questioned are irrelevant. The test, in other words, involves no consideration of the actual mindset of the particular suspect subjected to police questioning.

The benefit of the objective custody analysis is that it is designed to give clear guidance to the police. Police must make in-the-moment judgments as to when to administer *Miranda* warnings. By limiting analysis to the objective circumstances of the interrogation, and asking how a reasonable person in the suspect's position would understand his freedom to terminate questioning and leave, the objective test avoids burdening police with the task of anticipating the idiosyncrasies of every individual suspect and divining how those particular traits affect each person's subjective state of mind.

B

The State and its *amici* contend that a child's age has no place in the custody analysis, no matter how young the child subjected to police questioning. We cannot agree. In some circumstances, a child's age would have affected how a "reasonable person" in the suspect's position would perceive his or her freedom to leave. That is, a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. We think it clear that courts can account for that reality without doing any damage to the objective nature of the custody analysis.

A child's age is far more than a chronological fact. It is a fact that generates commonsense conclusions about behavior and perception. Such conclusions apply broadly to children as a class. And, they are self-evident to anyone who was a child once himself, including any police officer or judge.

Time and again, this Court has drawn these commonsense conclusions for itself. We have observed that children "generally are less mature and responsible than adults"; that they "often lack the experience, perspective, and judgment to recognize and avoid choices that could be detrimental to them"; that they "are more vulnerable or susceptible to ... outside pressures" than adults. Addressing the specific context of police interrogation, we have observed that events that "would leave a man cold and unimpressed can overawe and overwhelm a lad in his early teens." *Haley v. Ohio*, 332 U.S. 596 (1948) (plurality opinion). Describing no one child in particular, these observations restate what any parent knows—indeed, what any person knows—about children generally.⁵

Our various statements to this effect are far from unique. The law has historically reflected the same assumption that children characteristically lack the capacity to exercise mature judgment and possess only an incomplete ability to understand the world around them. See, e.g., 1 W. Blackstone, *Commentaries on the Laws of England* *464–*465 (explaining that limits on children's legal capacity under the common law "secure them from hurting themselves by their own improvident acts"). Like this Court's own generalizations, the legal disqualifications placed on children as a class—e.g., limitations on their ability to alienate property, enter a binding contract enforceable against them, and marry without parental consent—exhibit the settled understanding that the differentiating characteristics of youth are universal.

Indeed, even where a "reasonable person" standard otherwise applies, the common law has reflected the reality that children are not adults. In negligence suits, for instance, where liability turns on what an objectively reasonable person would do in the circumstances, "all American jurisdictions accept the idea that a

⁵ Although citation to social science and cognitive science authorities is unnecessary to establish these commonsense propositions, the literature confirms what experience bears out. See, e.g., *Graham v. Florida*, 130 S. Ct. 2011, 2026 (2010) ("Developments in psychology and brain science continue to show fundamental differences between juvenile and adult minds").

person's childhood is a relevant circumstance" to be considered. Restatement (Third) of Torts §10, Comment *b*, p. 117 (2005).

As this discussion establishes, our history is replete with laws and judicial recognition that children cannot be viewed simply as miniature adults. We see no justification for taking a different course here. So long as the child's age was known to the officer at the time of the interview, or would have been objectively apparent to any reasonable officer, including age as part of the custody analysis requires officers neither to consider circumstances "unknowable" to them, nor to anticipate the frailties or idiosyncrasies of the particular suspect whom they question. The same "wide basis of community experience" that makes it possible, as an objective matter, "to determine what is to be expected" of children in other contexts, Restatement (Second) of Torts § 283A, at 15, likewise makes it possible to know what to expect of children subjected to police questioning.

In other words, a child's age differs from other personal characteristics that, even when known to police, have no objectively discernible relationship to a reasonable person's understanding of his freedom of action. *Yarborough v. Alvarado*, 541 U.S. 652 (2004), holds, for instance, that a suspect's prior interrogation history with law enforcement has no role to play in the custody analysis because such experience could just as easily lead a reasonable person to feel free to walk away as to feel compelled to stay in place. Because the effect in any given case would be contingent on the psychology of the individual suspect, the Court explained, such experience cannot be considered without compromising the objective nature of the custody analysis. A child's age, however, is different. Precisely because childhood yields objective conclusions like those we have drawn ourselves—among others, that children are "most susceptible to influence" and "outside pressures"—considering age in the custody analysis in no way involves a determination of how youth "subjectively affects the mindset" of any particular child.

In fact, in many cases involving juvenile suspects, the custody analysis would be nonsensical absent some consideration of the suspect's age. This case is a prime example. Were the court precluded from taking J.D.B.'s youth into account, it would be forced to evaluate the circumstances present here through the eyes of a reasonable person of average years. In other words, how would a reasonable adult understand his situation, after being removed from a seventh-grade social studies class by a uniformed school resource officer; being encouraged by his assistant principal to "do the right thing"; and being warned by a police investigator of the prospect of juvenile detention and separation from his guardian and primary caretaker? To describe such an inquiry is to demonstrate its absurdity. Neither officers nor courts can reasonably evaluate the effect of objective circumstances that, by their nature, are specific to children without accounting for the age of the child subjected to those circumstances.

Indeed, although the dissent suggests that concerns "regarding the application of the *Miranda* custody rule to minors can be accommodated by

considering the unique circumstances present when minors are questioned in school,” the effect of the schoolhouse setting cannot be disentangled from the identity of the person questioned. A student—whose presence at school is compulsory and whose disobedience at school is cause for disciplinary action—is in a far different position than, say, a parent volunteer on school grounds to chaperone an event, or an adult from the community on school grounds to attend a basketball game. Without asking whether the person questioned in school is a minor, the coercive effect of the schoolhouse setting is unknowable....

Reviewing the question *de novo* today, we hold that so long as the child’s age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test.⁸ This is not to say that a child’s age will be a determinative, or even a significant, factor in every case. It is, however, a reality that courts cannot simply ignore.

III

The State and its *amici* offer numerous reasons that courts must blind themselves to a juvenile defendant’s age. None is persuasive....

Relying on our statements that the objective custody test is “designed to give clear guidance to the police,” the State ... argues that a child’s age must be excluded from the analysis in order to preserve clarity. Similarly, the dissent insists that the clarity of the custody analysis will be destroyed unless a “one-size-fits-all reasonable-person test” applies. In reality, however, ignoring a juvenile defendant’s age will often make the inquiry more artificial, and thus only add confusion. And in any event, a child’s age, when known or apparent, is hardly an obscure factor to assess. Though the State and the dissent worry about gradations among children of different ages, that concern cannot justify ignoring a child’s age altogether. Just as police officers are competent to account for other objective circumstances that are a matter of degree such as the length of questioning or the number of officers present, so too are they competent to evaluate the effect of relative age. Indeed, they are competent to do so even though an interrogation room lacks the “reflective atmosphere” of a jury deliberation room. The same is true of judges, including those whose childhoods have long since passed. In short, officers and judges need no imaginative powers, knowledge of developmental psychology, training in cognitive science, or expertise in social and cultural anthropology to account for a child’s age.

⁸ This approach does not undermine the basic principle that an interrogating officer’s unarticulated, internal thoughts are never—in and of themselves—objective circumstances of an interrogation. Unlike a child’s youth, an officer’s purely internal thoughts have no conceivable effect on how a reasonable person in the suspect’s position would understand his freedom of action. Rather than overturn that settled principle, the limitation that a child’s age may inform the custody analysis only when known or knowable simply reflects our unwillingness to require officers to “make guesses” as to circumstances “unknowable” to them in deciding when to give *Miranda* warnings.

They simply need the common sense to know that a 7-year-old is not a 13-year-old and neither is an adult.

There is, however, an even more fundamental flaw with the State's plea for clarity and the dissent's singular focus on simplifying the analysis: Not once have we excluded from the custody analysis a circumstance that we determined was relevant and objective, simply to make the fault line between custodial and noncustodial "brighter." Indeed, were the guiding concern clarity and nothing else, the custody test would presumably ask only whether the suspect had been placed under formal arrest. But we have rejected that "more easily administered line," recognizing that it would simply enable the police to circumvent the constraints on custodial interrogations established by *Miranda*....

Finally, the State and the dissent suggest that excluding age from the custody analysis comes at no cost to juveniles' constitutional rights because the due process voluntariness test independently accounts for a child's youth. To be sure, that test permits consideration of a child's age, and it erects its own barrier to admission of a defendant's inculpatory statements at trial. But *Miranda*'s procedural safeguards exist precisely because the voluntariness test is an inadequate barrier when custodial interrogation is at stake. To hold, as the State requests, that a child's age is never relevant to whether a suspect has been taken into custody—and thus to ignore the very real differences between children and adults—would be to deny children the full scope of the procedural safeguards that *Miranda* guarantees to adults....

The question remains whether J.D.B. was in custody when police interrogated him. We remand for the state courts to address that question, this time taking account of all of the relevant circumstances of the interrogation, including J.D.B.'s age at the time....

ALITO, J., dissenting.*

The Court's decision in this case may seem on first consideration to be modest and sensible, but in truth it is neither. It is fundamentally inconsistent with one of the main justifications for the *Miranda* rule: the perceived need for a clear rule that can be easily applied in all cases. And today's holding is not needed to protect the constitutional rights of minors who are questioned by the police.

Miranda's prophylactic regime places a high value on clarity and certainty.... A key contributor to this clarity, at least up until now, has been *Miranda*'s objective reasonable-person test for determining custody. [In] the interest of simplicity, the custody analysis considers only whether, under the circumstances, a hypothetical reasonable person would consider himself to be confined. Many suspects, of course, will differ from this hypothetical reasonable person....

Today's decision shifts the *Miranda* custody determination from a one-size-

* Chief Justice Roberts and Justices Scalia and Thomas joined this opinion.

fits-all reasonable-person test into an inquiry that must account for at least one individualized characteristic—age—that is thought to correlate with susceptibility to coercive pressures. Age, however, is in no way the only personal characteristic that may correlate with pliability, and in future cases the Court will be forced to choose between two unpalatable alternatives. It may choose to limit today’s decision by arbitrarily distinguishing a suspect’s age from other personal characteristics—such as intelligence, education, occupation, or prior experience with law enforcement—that may also correlate with susceptibility to coercive pressures. Or, if the Court is unwilling to draw these arbitrary lines, it will be forced to effect a fundamental transformation of the *Miranda* custody test—from a clear, easily applied prophylactic rule into a highly fact-intensive standard resembling the voluntariness test that the *Miranda* Court found to be unsatisfactory. ...

I do not dispute that many suspects who are under 18 will be more susceptible to police pressure than the average adult.... It is no less a reality, however, that many persons *over* the age of 18 are also more susceptible to police pressure than the hypothetical reasonable person. Yet the *Miranda* custody standard has never accounted for the personal characteristics of these or any other individual defendants.

Indeed, it has always been the case under *Miranda* that the unusually meek or compliant are subject to the same fixed rules, including the same custody requirement, as those who are unusually resistant to police pressure. *Miranda*’s rigid standards are both overinclusive and underinclusive. They are overinclusive to the extent that they provide a windfall to the most hardened and savvy of suspects, who often have no need for *Miranda*’s protections. And *Miranda*’s requirements are underinclusive to the extent that they fail to account for frailties, idiosyncrasies, and other individualized considerations that might cause a person to bend more easily during a confrontation with the police. Members of this Court have seen this rigidity as a major weakness in *Miranda*’s “code of rules for confessions.” But if it is, then the weakness is an inescapable consequence of the *Miranda* Court’s decision to supplement the more holistic voluntariness requirement with a one-size-fits-all prophylactic rule.

That is undoubtedly why this Court’s *Miranda* cases have never before mentioned “the suspect’s age” or any other individualized consideration in applying the custody standard. And unless the *Miranda* custody rule is now to be radically transformed into one that takes into account the wide range of individual characteristics that are relevant in determining whether a confession is voluntary, the Court must shoulder the burden of explaining why age is different from these other personal characteristics.

Why, for example, is age different from intelligence? Suppose that an officer, upon going to a school to question a student, is told by the principal that the student has an I.Q. of 75 and is in a special-education class. Are those facts more or less important than the student’s age in determining whether he or she “felt at liberty to terminate the interrogation and leave”? An I.Q. score, like age,

is more than just a number. And an individual's intelligence can also yield conclusions similar to those we have drawn ourselves in cases far afield of *Miranda*.

How about the suspect's cultural background? Suppose the police learn (or should have learned) that a suspect they wish to question is a recent immigrant from a country in which dire consequences often befall any person who dares to attempt to cut short any meeting with the police. Is this really less relevant than the fact that a suspect is a month or so away from his 18th birthday?

The defendant's education is another personal characteristic that may generate "conclusions about behavior and perception." Under today's decision, why should police officers and courts "blind themselves," to the fact that a suspect has "only a fifth-grade education"? Alternatively, what if the police know or should know that the suspect is "a college-educated man with law school training"? How are these individual considerations meaningfully different from age in their relationship to a reasonable person's understanding of his freedom of action? The Court proclaims that a child's age is "different," but the basis for this *ipse dixit* is dubious.

I have little doubt that today's decision will soon be cited by defendants—and perhaps by prosecutors as well—for the proposition that all manner of other individual characteristics should be treated like age and taken into account in the *Miranda* custody calculus. Indeed, there are already lower court decisions that take this approach. [Citing cases from the Ninth Circuit, Arizona, Idaho and Maryland].

Petitioner and the Court attempt to show that [consideration of age in determining custody for purposes of *Miranda*] is not unmanageable by pointing out that ... the age of a defendant is a relevant factor under the reasonable-person standard applicable in negligence suits. But negligence is generally a question for the jury, the members of which can draw on their varied experiences with persons of different ages. It also involves a *post hoc* determination, in the reflective atmosphere of a deliberation room, about whether the defendant conformed to a standard of care. The *Miranda* custody determination, by contrast, must be made in the first instance by police officers in the course of an investigation that may require quick decisionmaking....

Nor do state laws affording extra protection for juveniles during custodial interrogation provide any support for petitioner's arguments. States are free to enact additional restrictions on the police over and above those demanded by the Constitution or *Miranda*. In addition, these state statutes generally create clear, workable rules to guide police conduct. See Brief for Petitioner 16–17 (citing statutes that require or permit parents to be present during custodial interrogation of a minor, that require minors to be advised of a statutory right to communicate with a parent or guardian, and that require parental consent to custodial interrogation). Today's decision, by contrast, injects a new, complicating factor into what had been a clear, easily applied prophylactic rule....

The Court rests its decision to inject personal characteristics into the *Miranda* custody inquiry on the principle that judges applying *Miranda* cannot “blind themselves to ... commonsense reality.” But the Court’s shift is fundamentally at odds with the clear prophylactic rules that *Miranda* has long enforced. *Miranda* frequently requires judges to blind themselves to the reality that many un-Mirandized custodial confessions are “by no means involuntary” or coerced. It also requires police to provide a rote recitation of *Miranda* warnings that many suspects already know and could likely recite from memory.¹³ Under today’s new, “reality”-based approach to the doctrine, perhaps these and other principles of our *Miranda* jurisprudence will, like the custody standard, now be ripe for modification. Then, bit by bit, *Miranda* will lose the clarity and ease of application that has long been viewed as one of its chief justifications.

I respectfully dissent.

¹³ Surveys have shown that large majorities of the public are aware that “individuals arrested for a crime” have a right to remain silent (81%), a right to a lawyer (95%), and a right to have a lawyer appointed if the arrestee cannot afford one (88%). See Belden, Russonello & Stewart, Developing a National Message for Indigent Defense: Analysis of National Survey 4 (Oct.2001), online at <http://www.nlada.org/DMS/Documents/1211996548.53/Pollingresultsreport.pdf>.

Chapter 11

Defense Counsel

A. When Will Counsel Be Provided?

2. Types of Proceedings

Page 781. Add this material at the end of note 1.

The Supreme Court in *Turner v. Rogers*, 131 S. Ct. 2507 (2011), considered the right to appointed counsel during civil proceedings that can lead to imprisonment for a spouse who fails to make court-ordered child support payments and as a result is held in contempt of court. Michael Turner failed to make numerous child support payments. A judge in the Family Court ultimately found him in contempt of court and ordered him to serve a twelve-month jail term. The Supreme Court concluded that appointed counsel is not strictly necessary for the respondent in such civil proceedings, so long as the complaining party is also unrepresented by counsel, the respondent receives notice that his ability to pay the arrears will be the critical issue, and the court creates adequate opportunities to learn about his ability to pay. Because Turner received neither appointed counsel nor such “alternative procedural safeguards” in the civil contempt proceedings in this case, the Court ruled that his imprisonment violated due process.

Chapter 12

Pretrial Release and Detention

C. Detention of Excludable Aliens and Enemy Combatants

Page 885. Add this material at the end of note 2.

Cf. *Ashcroft v. al-Kidd*, 131 S. Ct. 2074 (2011) (an arrest of a non-citizen under the federal material support statute was based on individualized suspicion that he was a material witness to a federal crime who would soon disappear unless he was detained; because the government made the showing required by law, the detainee could not invalidate the detention by showing that the true motive for his arrest was a Department of Justice policy to use the statute as a measure to strike preemptively against terrorism suspects).

Chapter 15

Discovery and Speedy Trial

A. Discovery

1. Prosecution Disclosure of Exculpatory Information

Page 1052. Insert the following material at the end of note 8.

However clear-cut the *Brady* violation may be, monetary damages for wronged defendants are extremely limited under the federal civil rights statute, 42 U.S.C. §1983. In *Connick v. Thompson*, 131 S. Ct. 1350 (2011), the Supreme Court overturned a jury verdict for \$14 million against the District Attorney of Orleans Parish, Harry Connick. The plaintiff, John Thompson, was wrongly convicted of robbery and capital murder after prosecutors knowingly failed to disclose to defense attorneys the existence of a blood test confirming the innocence of the defendant, as well as tape recordings that impeached the credibility of key prosecution witnesses. He spent 18 years in prison (and 14 years on death row) before his investigator discovered the evidence and a reviewing court vacated his conviction. The District Attorney's office retried Thompson for the murder despite the exculpatory evidence, but the jury acquitted him.

Recovery in tort against the individual prosecutors was impossible because of absolute prosecutorial immunity. According to Justice Thomas, recovery against the district attorney's office was also barred under the federal statute because there was no adequate proof that the *Brady* violation resulted from a "policy or custom" of the office. A

failure by the office supervisors to train prosecutors about their discovery obligations would amount to a Section 1983 violation only if that failure reflected a “deliberate indifference” to the violation of defendants’ rights. The court characterized the failure of multiple prosecutors over many years to disclose the evidence in the case as a “single violation,” and therefore not enough to prove the necessary pattern or practice. Although other prosecutors in the office had committed *Brady* violations during the ten years prior to Thompson’s trial (leading to four reversals of convictions in the appellate courts), Justice Thomas declared that those other violations were different in character and unrelated to the violation in Thompson’s case. The *Brady* violations in the other cases, the Court explained, did not involve the failure to disclose physical evidence or crime lab reports.

Based on this holding, it appears that monetary damages under Section 1983 will be available only in cases when plaintiffs can prove multiple closely-related *Brady* violations in a single office over a short period of time. Given the difficulty of uncovering even a single *Brady* violation, such damages will prove to be a practical impossibility. Will any civil plaintiff in any case ever meet this standard, or ever even obtain discovery on the question? Cf. *United States v. Armstrong*, 517 U.S. 456 (1996) (establishing an extremely demanding standard for obtaining discovery on selective prosecution claims).

Chapter 18

Witnesses and Proof

B. Confrontation of Witnesses

2. Unavailable Prosecution Witnesses

Page 1315. Replace *Crawford v. Washington* with this material.

Michigan v. Richard Perry Bryant 131 S. Ct. 1142 (2011)

SOTOMAYOR, J.*

At respondent Richard Bryant’s trial, the court admitted statements that the victim, Anthony Covington, made to police officers who discovered him mortally wounded in a gas station parking lot. A jury convicted Bryant of, *inter alia*, second-degree murder.... We hold that the circumstances of the interaction between Covington and the police objectively indicate that the primary purpose of the interrogation was “to enable police assistance to meet an ongoing emergency.” Therefore, Covington’s identification and description of the shooter and the location of the shooting were not testimonial statements, and their admission at Bryant’s trial did not violate the Confrontation Clause....

I

Around 3:25 A.M. on April 29, 2001, Detroit, Michigan police

* Chief Justice Roberts and Justices Kennedy, Breyer, and Alito joined this opinion.

officers responded to a radio dispatch indicating that a man had been shot. At the scene, they found the victim, Anthony Covington, lying on the ground next to his car in a gas station parking lot. Covington had a gunshot wound to his abdomen, appeared to be in great pain, and spoke with difficulty.

The police asked him what had happened, who had shot him, and where the shooting had occurred. Covington stated that “Rick” shot him at around 3 A.M. He also indicated that he had a conversation with Bryant, whom he recognized based on his voice, through the back door of Bryant’s house. Covington explained that when he turned to leave, he was shot through the door and then drove to the gas station, where police found him.

Covington’s conversation with the police ended within 5 to 10 minutes when emergency medical services arrived. Covington was transported to a hospital and died within hours. The police left the gas station after speaking with Covington, called for backup, and traveled to Bryant’s house. They did not find Bryant there but did find blood and a bullet on the back porch and an apparent bullet hole in the back door. Police also found Covington’s wallet and identification outside the house.

At trial, which occurred prior to our decisions in *Crawford* and *Davis*, the police officers who spoke with Covington at the gas station testified about what Covington had told them. The jury returned a guilty verdict on charges of second-degree murder, being a felon in possession of a firearm, and possession of a firearm during the commission of a felony. Bryant appealed, and the [Supreme Court of Michigan] reversed his conviction. ...

II

The Confrontation Clause of the Sixth Amendment states: “In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him.” ... In *Ohio v. Roberts*, 448 U.S. 56 (1980), we explained that the confrontation right does not bar admission of statements of an unavailable witness if the statements bear adequate “indicia of reliability.” We held that reliability can be established if “the evidence falls within a firmly rooted hearsay exception,” or if it does not fall within such an exception, then if it bears “particularized guarantees of trustworthiness.”

Nearly a quarter century later, we decided *Crawford v. Washington*, 541 U.S. 36 (2004). Petitioner Michael Crawford was prosecuted for

stabbing a man who had allegedly attempted to rape his wife, Sylvia. Sylvia witnessed the stabbing, and later that night, after she and her husband were both arrested, police interrogated her about the incident. At trial, Sylvia Crawford claimed spousal privilege and did not testify, but the State introduced a tape recording of Sylvia's statement to the police in an effort to prove that the stabbing was not in self-defense, as Michael Crawford claimed. The Washington Supreme Court affirmed Crawford's conviction because it found Sylvia's statement to be reliable, as required under *Ohio v. Roberts*. We reversed, overruling *Ohio v. Roberts*.

Crawford examined the common-law history of the confrontation right and explained that "the principal evil at which the Confrontation Clause was directed was the civil-law mode of criminal procedure, and particularly its use of *ex parte* examinations as evidence against the accused." We noted that in England, pretrial examinations of suspects and witnesses by government officials "were sometimes read in court in lieu of live testimony." In light of this history, we emphasized the word "witnesses" in the Sixth Amendment, defining it as those who "bear testimony." We defined "testimony" as a "solemn declaration or affirmation made for the purpose of establishing or proving some fact." We noted that an accuser who makes a formal statement to government officers "bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." We therefore limited the Confrontation Clause's reach to testimonial statements and held that in order for testimonial evidence to be admissible, the Sixth Amendment "demands what the common law required: unavailability and a prior opportunity for cross-examination." Although leaving for another day any effort to spell out a comprehensive definition of "testimonial," *Crawford* noted that "at a minimum" it includes "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and ... police interrogations." ...

In 2006, the Court in *Davis v. Washington* and *Hammon v. Indiana* took a further step to determine more precisely which police interrogations produce testimony and therefore implicate a Confrontation Clause bar. ... *Davis* and *Hammon* were both domestic violence cases. In *Davis*, Michelle McCottry made the statements at issue to a 911 operator during a domestic disturbance with Adrian Davis, her former boyfriend. McCottry told the operator, "He's here jumpin' on me again," and, "He's usin' his fists." The operator then asked McCottry for Davis' first and last names and middle initial, and at that point in the conversation McCottry reported that Davis had fled in a car. McCottry did not appear

at Davis' trial, and the State introduced the recording of her conversation with the 911 operator.

In *Hammon*, decided along with *Davis*, police responded to a domestic disturbance call at the home of Amy and Hershel Hammon, where they found Amy alone on the front porch. She appeared "somewhat frightened," but told them "nothing was the matter." She gave the police permission to enter the house, where they saw a gas heating unit with the glass front shattered on the floor. One officer remained in the kitchen with Hershel, while another officer talked to Amy in the living room about what had happened. Hershel tried several times to participate in Amy's conversation with the police and became angry when the police required him to stay separated from Amy. The police asked Amy to fill out and sign a battery affidavit. She wrote: "Broke our Furnace & shoved me down on the floor into the broken glass. Hit me in the chest and threw me down. Broke our lamps & phone. Tore up my van where I couldn't leave the house. Attacked my daughter." Amy did not appear at Hershel's trial, so the police officers who spoke with her testified as to her statements and authenticated the affidavit. ...

To address the facts of both cases, we expanded upon the meaning of "testimonial" that we first employed in *Crawford* and discussed the concept of an ongoing emergency. We explained:

Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Examining the *Davis* and *Hammon* statements in light of those definitions, we held that the statements at issue in *Davis* were nontestimonial and the statements in *Hammon* were testimonial. We distinguished the statements in *Davis* from the testimonial statements in *Crawford* on several grounds, including that the victim in *Davis* was speaking about events *as they were actually happening*, rather than describing past events, that there was an ongoing emergency, that the elicited statements were necessary to be able to *resolve* the present emergency, and that the statements were not formal. In *Hammon*, on the

other hand, we held that, “it is entirely clear from the circumstances that the interrogation was part of an investigation into possibly criminal past conduct.” There was no emergency in progress. The officer questioning Amy “was not seeking to determine ‘what is happening,’ but rather ‘what happened.’” It was “formal enough” that the police interrogated Amy in a room separate from her husband where, “some time after the events described were over,” she “deliberately recounted, in response to police questioning, how potentially criminal past events began and progressed.” Because her statements “were neither a cry for help nor the provision of information enabling officers immediately to end a threatening situation,” we held that they were testimonial. . . .

The basic purpose of the Confrontation Clause was to target the sort of abuses exemplified at the notorious treason trial of Sir Walter Raleigh. Thus, the most important instances in which the Clause restricts the introduction of out-of-court statements are those in which state actors are involved in a formal, out-of-court interrogation of a witness to obtain evidence for trial. Even where such an interrogation is conducted with all good faith, introduction of the resulting statements at trial can be unfair to the accused if they are untested by cross-examination. Whether formal or informal, out-of-court statements can evade the basic objective of the Confrontation Clause, which is to prevent the accused from being deprived of the opportunity to cross-examine the declarant about statements taken for use at trial. When, as in *Davis*, the primary purpose of an interrogation is to respond to an “ongoing emergency,” its purpose is not to create a record for trial and thus is not within the scope of the Clause. But there may be *other* circumstances, aside from ongoing emergencies, when a statement is not procured with a primary purpose of creating an out-of-court substitute for trial testimony. In making the primary purpose determination, standard rules of hearsay, designed to identify some statements as reliable, will be relevant. Where no such primary purpose exists, the admissibility of a statement is the concern of state and federal rules of evidence, not the Confrontation Clause. . . .

III

To determine whether the primary purpose of an interrogation is “to enable police assistance to meet an ongoing emergency,” which would render the resulting statements nontestimonial, we objectively evaluate the circumstances in which the encounter occurs and the statements and actions of the parties.

A ...

An objective analysis of the circumstances of an encounter and the statements and actions of the parties to it provides the most accurate assessment of the “primary purpose of the interrogation.” The circumstances in which an encounter occurs—*e.g.*, at or near the scene of the crime versus at a police station, during an ongoing emergency or afterwards—are clearly matters of objective fact. The statements and actions of the parties must also be objectively evaluated. That is, the relevant inquiry is not the subjective or actual purpose of the individuals involved in a particular encounter, but rather the purpose that reasonable participants would have had, as ascertained from the individuals’ statements and actions and the circumstances in which the encounter occurred.

B

... The existence of an ongoing emergency is relevant to determining the primary purpose of the interrogation because an emergency focuses the participants on something other than proving past events potentially relevant to later criminal prosecution. Rather, it focuses them on ending a threatening situation. Implicit in *Davis* is the idea that because the prospect of fabrication in statements given for the primary purpose of resolving that emergency is presumably significantly diminished, the Confrontation Clause does not require such statements to be subject to the crucible of cross-examination.

This logic is not unlike that justifying the excited utterance exception in hearsay law. Statements “relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition,” Fed. Rule Evid. 803(2); see also Mich. Rule Evid. 803(2) (2010), are considered reliable because the declarant, in the excitement, presumably cannot form a falsehood. An ongoing emergency has a similar effect of focusing an individual’s attention on responding to the emergency.

[The question of whether an emergency exists] is a highly context-dependent inquiry.... Domestic violence cases like *Davis* and *Hammon* often have a narrower zone of potential victims than cases involving threats to public safety. An assessment of whether an emergency that threatens the police and public is ongoing cannot narrowly focus on whether the threat solely to the first victim has been neutralized because the threat to the first responders and public may continue.

The ... duration and scope of an emergency may depend in part on

the type of weapon employed. The court relied on *Davis* and *Hammon*, in which the assailants used their fists, as controlling the scope of the emergency here, which involved the use of a gun. The problem with that reasoning is clear when considered in light of the assault on Amy Hammon. Hershel Hammon was armed only with his fists when he attacked his wife, so removing Amy to a separate room was sufficient to end the emergency. If Hershel had been reported to be armed with a gun, however, separation by a single household wall might not have been sufficient to end the emergency....

The medical condition of the victim is important to the primary purpose inquiry to the extent that it sheds light on the ability of the victim to have any purpose at all in responding to police questions and on the likelihood that any purpose formed would necessarily be a testimonial one. The victim's medical state also provides important context for first responders to judge the existence and magnitude of a continuing threat to the victim, themselves, and the public.

[None] of this suggests that an emergency is ongoing in every place or even just surrounding the victim for the entire time that the perpetrator of a violent crime is on the loose. [A] conversation which begins as an interrogation to determine the need for emergency assistance can evolve into testimonial statements. This evolution may occur if, for example, a declarant provides police with information that makes clear that what appeared to be an emergency is not or is no longer an emergency or that what appeared to be a public threat is actually a private dispute. It could also occur if a perpetrator is disarmed, surrenders, is apprehended, or, as in *Davis*, flees with little prospect of posing a threat to the public. Trial courts can determine in the first instance when any transition from nontestimonial to testimonial occurs, and exclude the portions of any statement that have become testimonial, as they do, for example, with unduly prejudicial portions of otherwise admissible evidence.

[Whether] an ongoing emergency exists is simply one factor—albeit an important factor—that informs the ultimate inquiry regarding the “primary purpose” of an interrogation. Another factor ... is the importance of *informality* in an encounter between a victim and police. [The] questioning in this case occurred in an exposed, public area, prior to the arrival of emergency medical services, and in a disorganized fashion. All of those facts make this case distinguishable from the formal station-house interrogation in *Crawford*.

In addition to the circumstances in which an encounter occurs, the statements and actions of both the declarant and interrogators provide objective evidence of the primary purpose of the interrogation.... In many instances, the primary purpose of the interrogation will be most accurately ascertained by looking to the contents of both the questions and the answers. To give an extreme example, if the police say to a victim, "Tell us who did this to you so that we can arrest and prosecute them," the victim's response that "Rick did it," appears purely accusatory because by virtue of the phrasing of the question, the victim necessarily has prosecution in mind when she answers.

The combined approach also ameliorates problems that could arise from looking solely to one participant. Predominant among these is the problem of mixed motives on the part of both interrogators and declarants. Police officers in our society function as both first responders and criminal investigators. Their dual responsibilities may mean that they act with different motives simultaneously or in quick succession. See *New York v. Quarles*, 467 U.S. 649 (1984) ("Undoubtedly most police officers [deciding whether to give *Miranda* warnings in a possible emergency situation] would act out of a host of different, instinctive, and largely unverifiable motives—their own safety, the safety of others, and perhaps as well the desire to obtain incriminating evidence from the suspect").

Victims are also likely to have mixed motives when they make statements to the police. During an ongoing emergency, a victim is most likely to want the threat to her and to other potential victims to end, but that does not necessarily mean that the victim wants or envisions prosecution of the assailant. A victim may want the attacker to be incapacitated temporarily or rehabilitated. Alternatively, a severely injured victim may have no purpose at all in answering questions posed; the answers may be simply reflexive. The victim's injuries could be so debilitating as to prevent her from thinking sufficiently clearly to understand whether her statements are for the purpose of addressing an ongoing emergency or for the purpose of future prosecution. ...

The dissent suggests that we intend to give controlling weight to the "intentions of the police." That is a misreading of our opinion. At trial, the declarant's statements, not the interrogator's questions, will be introduced to "establish the truth of the matter asserted," and must therefore pass the Sixth Amendment test. In determining whether a declarant's statements are testimonial, courts should look to all of the relevant circumstances.... The dissent criticizes the complexity of our

approach, but we, at least, are unwilling to sacrifice accuracy for simplicity. Simpler is not always better, and courts making a “primary purpose” assessment should not be unjustifiably restrained from consulting all relevant information, including the statements and actions of interrogators. ...

IV

... As the context of this case brings into sharp relief, the existence and duration of an emergency depend on the type and scope of danger posed to the victim, the police, and the public. [The] scope of an emergency in terms of its threat to individuals other than the initial assailant and victim will often depend on the type of dispute involved. Nothing Covington said to the police indicated that the cause of the shooting was a purely private dispute or that the threat from the shooter had ended. The record reveals little about the motive for the shooting. The police officers who spoke with Covington at the gas station testified that Covington did not tell them what words Covington and Rick had exchanged prior to the shooting. What Covington did tell the officers was that he fled Bryant’s back porch, indicating that he perceived an ongoing threat. The police did not know, and Covington did not tell them, whether the threat was limited to him. The potential scope of the dispute and therefore the emergency in this case thus stretches more broadly than those at issue in *Davis* and *Hammon* and encompasses a threat potentially to the police and the public.

This is also the first of our post-*Crawford* Confrontation Clause cases to involve a gun. The physical separation that was sufficient to end the emergency in *Hammon* was not necessarily sufficient to end the threat in this case; Covington was shot through the back door of Bryant’s house. Bryant’s argument that there was no ongoing emergency because “no shots were being fired” surely construes ongoing emergency too narrowly. An emergency does not last only for the time between when the assailant pulls the trigger and the bullet hits the victim. If an out-of-sight sniper pauses between shots, no one would say that the emergency ceases during the pause. That is an extreme example and not the situation here, but it serves to highlight the implausibility, at least as to certain weapons, of construing the emergency to last only precisely as long as the violent act itself, as some have construed our opinion in *Davis*.

At no point during the questioning did either Covington or the police know the location of the shooter. In fact, Bryant was not at home by the time the police searched his house at approximately 5:30 A.M. At some

point between 3 A.M. and 5:30 A.M., Bryant left his house. At bottom, there was an ongoing emergency here where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded Covington within a few blocks and a few minutes of the location where the police found Covington.

This is not to suggest that the emergency continued until Bryant was arrested in California a year after the shooting. We need not decide precisely when the emergency ended because Covington's encounter with the police and all of the statements he made during that interaction occurred within the first few minutes of the police officers' arrival and well before they secured the scene of the shooting—the shooter's last known location.

We reiterate, moreover, that the existence *vel non* of an ongoing emergency is not the touchstone of the testimonial inquiry; rather, the ultimate inquiry is whether the primary purpose of the interrogation was to enable police assistance to meet the ongoing emergency. We turn now to that inquiry, as informed by the circumstances of the ongoing emergency just described. The circumstances of the encounter provide important context for understanding Covington's statements to the police. When the police arrived at Covington's side, their first question to him was "What happened?" Covington's response was either "Rick shot me" or "I was shot," followed very quickly by an identification of "Rick" as the shooter. In response to further questions, Covington explained that the shooting occurred through the back door of Bryant's house and provided a physical description of the shooter. When he made the statements, Covington was lying in a gas station parking lot bleeding from a mortal gunshot wound to his abdomen. His answers to the police officers' questions were punctuated with questions about when emergency medical services would arrive. He was obviously in considerable pain and had difficulty breathing and talking. From this description of his condition and report of his statements, we cannot say that a person in Covington's situation would have had a "primary purpose" to establish or prove past events potentially relevant to later criminal prosecution.

For their part, the police responded to a call that a man had been shot. As discussed above, they did not know why, where, or when the shooting had occurred. Nor did they know the location of the shooter or anything else about the circumstances in which the crime occurred. The questions they asked—what had happened, who had shot him, and where the shooting occurred—were the exact type of questions necessary to

allow the police to assess the situation, the threat to their own safety, and possible danger to the potential victim and to the public, including to allow them to ascertain whether they would be encountering a violent felon. In other words, they solicited the information necessary to enable them to meet an ongoing emergency....

Finally, we consider the informality of the situation and the interrogation. This situation is more similar, though not identical, to the informal, harried 911 call in *Davis* than to the structured, station-house interview in *Crawford*. As the officers' trial testimony reflects, the situation was fluid and somewhat confused: the officers arrived at different times; apparently each, upon arrival, asked Covington "what happened?"; and, contrary to the dissent's portrayal, they did not conduct a structured interrogation. The informality suggests that the interrogators' primary purpose was simply to address what they perceived to be an ongoing emergency, and the circumstances lacked any formality that would have alerted Covington to or focused him on the possible future prosecutorial use of his statements.

Because the circumstances of the encounter as well as the statements and actions of Covington and the police objectively indicate that the "primary purpose of the interrogation" was to enable police assistance to meet an ongoing emergency, Covington's identification and description of the shooter and the location of the shooting were not testimonial hearsay. The Confrontation Clause did not bar their admission at Bryant's trial.

For the foregoing reasons, we hold that Covington's statements were not testimonial and that their admission at Bryant's trial did not violate the Confrontation Clause. We leave for the Michigan courts to decide on remand whether the statements' admission was otherwise permitted by state hearsay rules....

THOMAS, J., concurring in the judgment.

I agree with the Court that the admission of Covington's out-of-court statements did not violate the Confrontation Clause, but I reach this conclusion because Covington's questioning by police lacked sufficient formality and solemnity for his statements to be considered "testimonial." ...

Rather than attempting to reconstruct the "primary purpose" of the participants, I would consider the extent to which the interrogation resembles those historical practices that the Confrontation Clause addressed. As the majority notes, Covington interacted with the police

under highly informal circumstances, while he bled from a fatal gunshot wound. The police questioning was not “a formalized dialogue,” did not result in “formalized testimonial materials” such as a deposition or affidavit, and bore no “indicia of solemnity.” Nor is there any indication that the statements were offered at trial in order to evade confrontation. This interrogation bears little if any resemblance to the historical practices that the Confrontation Clause aimed to eliminate....

SCALIA, J., dissenting.

Today’s tale—a story of five officers conducting successive examinations of a dying man with the primary purpose, not of obtaining and preserving his testimony regarding his killer, but of protecting him, them, and others from a murderer somewhere on the loose—is so transparently false that professing to believe it demeans this institution. But reaching a patently incorrect conclusion on the facts is a relatively benign judicial mischief; it affects, after all, only the case at hand. In its vain attempt to make the incredible plausible, however—or perhaps as an intended second goal—today’s opinion distorts our Confrontation Clause jurisprudence and leaves it in a shambles. Instead of clarifying the law, the Court makes itself the obfuscator of last resort. Because I continue to adhere to the Confrontation Clause that the People adopted, as described in *Crawford v. Washington*, 541 U.S. 36 (2004), I dissent.

I

A ...

Crawford and *Davis* did not address whose perspective matters—the declarant’s, the interrogator’s, or both—when assessing “the primary purpose of [an] interrogation.” In those cases the statements were testimonial from any perspective. I think the same is true here, but because the Court picks a perspective so will I: The declarant’s intent is what counts. In-court testimony is more than a narrative of past events; it is a solemn declaration made in the course of a criminal trial. For an out-of-court statement to qualify as testimonial, the declarant must intend the statement to be a solemn declaration rather than an unconsidered or offhand remark; and he must make the statement with the understanding that it may be used to invoke the coercive machinery of the State against the accused. That is what distinguishes a narrative told to a friend over dinner from a statement to the police. The hidden purpose of an interrogator cannot substitute for the declarant’s intentional solemnity or his understanding of how his words may be used.... (This does not mean

the interrogator is irrelevant. The identity of an interrogator, and the content and tenor of his questions, can bear upon whether a declarant intends to make a solemn statement, and envisions its use at a criminal trial. But none of this means that the interrogator's purpose matters.)

In an unsuccessful attempt to make its finding of emergency plausible, the Court instead adopts a test that looks to the purposes of both the police and the declarant. ... The Court claims one affirmative virtue for its focus on the purposes of both the declarant and the police: It ameliorates problems that arise when declarants have "mixed motives." I am at a loss to know how. Sorting out the primary purpose of a declarant with mixed motives is sometimes difficult. But adding in the mixed motives of the police only compounds the problem. Now courts will have to sort through two sets of mixed motives to determine the primary purpose of an interrogation. And the Court's solution creates a mixed-motive problem where (under the proper theory) it does not exist—viz., where the police and the declarant each have one motive, but those motives conflict. ...

The only virtue of the Court's approach (if it can be misnamed a virtue) is that it leaves judges free to reach the "fairest" result under the totality of the circumstances. If the dastardly police trick a declarant into giving an incriminating statement against a sympathetic defendant, a court can focus on the police's intent and declare the statement testimonial. If the defendant "deserves" to go to jail, then a court can focus on whatever perspective is necessary to declare damning hearsay nontestimonial. And when all else fails, a court can mix-and-match perspectives to reach its desired outcome. Unfortunately, under this malleable approach the guarantee of confrontation is no guarantee at all.

B

Looking to the declarant's purpose (as we should), this is an absurdly easy case. ... From Covington's perspective, his statements had little value except to ensure the arrest and eventual prosecution of Richard Bryant. He knew the threatening situation had ended six blocks away and 25 minutes earlier when he fled from Bryant's back porch. Bryant had not confronted him face-to-face before he was mortally wounded, instead shooting him through a door. Even if Bryant had pursued him (unlikely), and after seeing that Covington had ended up at the gas station was unable to confront him there before the police arrived (doubly unlikely), it was entirely beyond imagination that Bryant would again open fire while Covington was surrounded by five armed police officers. And

Covington knew the shooting was the work of a drug dealer, not a spree killer who might randomly threaten others....

Covington's pressing medical needs do not suggest that he was responding to an emergency, but to the contrary reinforce the testimonial character of his statements. He understood the police were focused on investigating a past crime, not his medical needs. [The officers] primarily asked questions with little, if any, relevance to Covington's dire situation. Police, paramedics, and doctors do not need to know the address where a shooting took place, the name of the shooter, or the shooter's height and weight to provide proper medical care. Underscoring that Covington understood the officers' investigative role, he interrupted their interrogation to ask "when is EMS coming?" When, in other words, would the focus shift to his medical needs rather than Bryant's crime? ...

C

Worse still for the repute of today's opinion, this is an absurdly easy case even if one (erroneously) takes the interrogating officers' purpose into account. The five officers interrogated Covington primarily to investigate past criminal events. None—absolutely none—of their actions indicated that they perceived an imminent threat. They did not draw their weapons, and indeed did not immediately search the gas station for potential shooters. To the contrary, all five testified that they questioned Covington *before conducting any investigation at the scene*. Would this have made any sense if they feared the presence of a shooter? Most tellingly, none of the officers started his interrogation by asking what would have been the obvious first question if any hint of such a fear existed: Where is the shooter? ...

At the very least, the officers' intentions *turned* investigative during their 10-minute encounter with Covington, and the conversation "evolved into testimonial statements." The fifth officer to arrive at the scene did not need to run straight to Covington and ask a battery of questions to determine the need for emergency assistance. He could have asked his fellow officers, who presumably had a better sense of that than Covington—and a better sense of what he could do to assist. No, the value of asking the same battery of questions a fifth time was to ensure that Covington told a consistent story and to see if any new details helpful to the investigation and eventual prosecution would emerge....

D ...

The Court's distorted view creates an expansive exception to the Confrontation Clause for violent crimes. Because Bryant posed a continuing threat to public safety in the Court's imagination, the emergency persisted for confrontation purposes at least until the police learned his motive for and location after the shooting. It may have persisted in this case until the police secured the scene of the shooting two-and-a-half hours later. (The relevance of securing the scene is unclear so long as the killer is still at large—especially if, as the Court speculates, he may be a spree-killer.) This is a dangerous definition of emergency. Many individuals who testify against a defendant at trial first offer their accounts to police in the hours after a violent act....

The 16th- and 17th-century English treason trials that helped inspire the Confrontation Clause show that today's decision is a mistake. The Court's expansive definition of an "ongoing emergency" and its willingness to consider the perspective of the interrogator and the declarant cast a more favorable light on those trials than history or our past decisions suggest they deserve. Royal officials conducted many of the *ex parte* examinations introduced against Sir Walter Raleigh and Sir John Fenwick while investigating alleged treasonous conspiracies of unknown scope, aimed at killing or overthrowing the King. Social stability in 16th- and 17th-century England depended mainly on the continuity of the ruling monarch, so such a conspiracy posed the most pressing emergency imaginable. Presumably, the royal officials investigating it would have understood the gravity of the situation and would have focused their interrogations primarily on ending the threat, not on generating testimony for trial. I therefore doubt that under the Court's test English officials acted improperly by denying Raleigh and Fenwick the opportunity to confront their accusers "face to face." ...

II

... But today's decision is not only a gross distortion of the facts. It is a gross distortion of the law—a revisionist narrative in which reliability continues to guide our Confrontation Clause jurisprudence, at least where emergencies and faux emergencies are concerned.

According to today's opinion, the *Davis* inquiry into whether a declarant spoke to end an ongoing emergency or rather to "prove past events potentially relevant to later criminal prosecution," is *not* aimed at answering whether the declarant acted as a witness. Instead, the *Davis* inquiry probes the *reliability* of a declarant's statements, implicitly importing the excited-utterances hearsay exception into the Constitution.

A statement during an ongoing emergency is sufficiently reliable, the Court says, “because the prospect of fabrication ... is presumably significantly diminished,” so it does not need to be subject to the crucible of cross-examination. Compare that with the holding of *Crawford*: “Where testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation.” 541 U.S., at 68–69. ...

The Court announces that in future cases it will look to “standard rules of hearsay, designed to identify some statements as reliable,” when deciding whether a statement is testimonial. *Ohio v. Roberts*, 448 U.S. 56 (1980) said something remarkably similar: An out-of-court statement is admissible if it “falls within a firmly rooted hearsay exception” or otherwise bears adequate “indicia of reliability.” We tried that approach to the Confrontation Clause for nearly 25 years before *Crawford* rejected it as an unworkable standard unmoored from the text and the historical roots of the Confrontation Clause. ...

The Court attempts to fit its resurrected interest in reliability into the *Crawford* framework, but the result is incoherent. Reliability, the Court tells us, is a good indicator of whether “a statement is ... an out-of-court substitute for trial testimony.” That is patently false. Reliability tells us *nothing* about whether a statement is testimonial. Testimonial and nontestimonial statements alike come in varying degrees of reliability. An eyewitness’s statements to the police after a fender-bender, for example, are both reliable and testimonial. Statements to the police from one driver attempting to blame the other would be similarly testimonial but rarely reliable.

The Court suggests otherwise because it misunderstands the relationship between qualification for one of the standard hearsay exceptions and exemption from the confrontation requirement. That relationship is not a causal one. Hearsay law exempts business records, for example, because businesses have a financial incentive to keep reliable records. See Fed. Rule Evid. 803(6). The Sixth Amendment also generally admits business records into evidence, but not because the records are reliable or because hearsay law says so. It admits them “because—having been created for the administration of an entity’s affairs and not for the purpose of establishing or proving some fact at trial—they are not” weaker substitutes for live testimony. *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009)....

The Court recedes from *Crawford* in a second significant way. It requires judges to conduct open-ended balancing tests and amorphous, if

not entirely subjective, inquiries into the totality of the circumstances bearing upon reliability. Where the prosecution cries “emergency,” the admissibility of a statement now turns on “a highly context-dependent inquiry” into the type of weapon the defendant wielded, the type of crime the defendant committed, the medical condition of the declarant, if the declarant is injured, whether paramedics have arrived on the scene, whether the encounter takes place in an “exposed public area,” whether the encounter appears disorganized, whether the declarant is capable of forming a purpose, whether the police have secured the scene of the crime, the formality of the statement, and finally, whether the statement strikes us as reliable. This is no better than the nine-factor balancing test we rejected in *Crawford*. I do not look forward to resolving conflicts in the future over whether knives and poison are more like guns or fists for Confrontation Clause purposes, or whether rape and armed robbery are more like murder or domestic violence. ...

In any case, we did not disavow multifactor balancing for reliability in *Crawford* out of a preference for rules over standards. We did so because it did violence to the Framers’ design. It was judges’ open-ended determination of what was reliable that violated the trial rights of Englishmen in the political trials of the 16th and 17th centuries. ... Not even the least dangerous branch can be trusted to assess the reliability of uncross-examined testimony in politically charged trials or trials implicating threats to national security.

Judicial decisions, like the Constitution itself, are nothing more than “parchment barriers,” 5 Writings of James Madison 269, 272 (G. Hunt ed.1901). Both depend on a judicial culture that understands its constitutionally assigned role, has the courage to persist in that role when it means announcing unpopular decisions, and has the modesty to persist when it produces results that go against the judges’ policy preferences....

Page 1323. Insert this material at the end of note 3.

See also *Bullcoming v. New Mexico*, 131 S. Ct. 2705 (2011) (report describing a blood alcohol analysis was “testimonial” within the meaning of the Confrontation Clause because the report addressed chain of custody and certified the use of a precise testing protocol with the testing equipment; therefore the defendant in a DWI case had the right to confront at trial the analyst who certified the report).

Chapter 19

Sentencing

D. New Information about the Offender and the Victim

1. Offender Information

Page 1433. Insert this material at the end of note 4.

In *Pepper v. United States*, 131 S. Ct. 1229 (2011), the Supreme Court ruled that the sentencing judge, when resentencing a defendant after his initial sentence had been set aside on appeal, can consider evidence of the defendant's efforts at rehabilitation since the time of his initial sentencing. The defendant in this case demonstrated that he enrolled at a local community college as a full-time student and obtained part-time employment soon after his release from prison. Pepper also testified that he had recently married and was now supporting his wife and her daughter. Although a federal statute expressly bars the sentencing judge at resentencing from imposing a non-guideline sentence based on any factor other than those relied upon in the original sentence, the Court invalidated that statute under the Sixth Amendment principles described in *United States v. Booker*, 543 U.S. 220 (2005).

Chapter 20

Appeals

D. Retroactivity

Page 1521. Insert this material at the end of note 1.

The Supreme Court discussed the relationship between retroactivity and the availability of the exclusionary rule remedy in *Davis v. United States*, 131 S. Ct. 2419 (2011) (exclusion not available as remedy for defendant when police reasonably relied on established precedent before a change in search and seizure doctrine, even if the new doctrine applies retroactively under *Griffith*).