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Criminal Law Brief

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In This Issue

Contents

Letter from the Editor

To Our Readers,

The question, "What is justice?" has existed since the time of Plato's Republic. "Justice" has become the foundation upon which our nation was built, and remains the overarching goal of the court system when weighing social conflict and administering remedial measures. Yet, the word has evaded precise definition. Is the concept of justice a product of human creation, or derived from a greater power—be it natural or divine law? Is justice best depicted by Hobbes' social contract, or Lady Justice's three symbols: a sword, a scale and a blindfold? Does justice mean equality?

In a year in which stop and frisk policies were scrutinized, controversy over Stand Your Ground laws engrossed a nation, state legislatures fought overcriminalization, and warrantless surveillance and wiretapping on American citizens increased, the question has become pertinent. This year also marks the 50th anniversary of one of the most historic calls for justice, the March on Washington, and thus should invite reflection on whether the nation has made the type of progress about which Dr. Martin Luther King, Jr. dreamt. The legal community has a strong responsibility to explore the varying definitions of justice—to defend those who have suffered injustice, to prosecute those who have caused such suffering, and to advocate for a definition which will serve the best interests of all individual. In hopes of inviting such exploration, this issue of the Criminal Law Brief analyzes some of the most pressing issues of the past year, and examines the scenarios in which justice is arguably absent.

The Spring Issue of the Criminal Law Brief represents the tireless efforts of all those who contributed to our success–our authors, editors and dedicated staff–and I am extremely grateful for their invaluable contributions. The Criminal Law Brief's Blog, inspired by the creativity and dedication of its editors has greatly advanced our publication's goal of creating a knowledgeable forum for discussion and debate. The combination of the Brief's emphasis on legal analysis and academic quality with the Blog's timeliness and ingenuity has enriched our organization's ability to more completely address the issues raised in the criminal law community. I would like to personally thank all the members of the Criminal Law Brief, who have dedicated their time and efforts in making this publication such a success.

At the end of this academic year, we will transition to our new Executive Board. Megan Petry, our current Articles Editor, will take the lead as Editor-in-Chief. She will be supported by Joseph Hernandez, Destiny Fullwood, Calen Weiss, Rochelle Brunot and Sarah Tynan. Always looking forward, the Brief will be instituting some changes in its upcoming issues which we hope will more effectively serve our readership. Namely, our publication will look to provide its readers with a thorough and practical analysis of current criminal law issues, emphasizing case law and proposing solutions for when these issues are confronted in practice. I am excited about the future of the Criminal Law Brief, and look forward to seeing it mature under the guidance of the new Executive Board. It has been an honor for me to serve as the Brief's Editor-in-Chief, and I wish you all the very best in the future.

We hope you enjoy the Spring Issue!

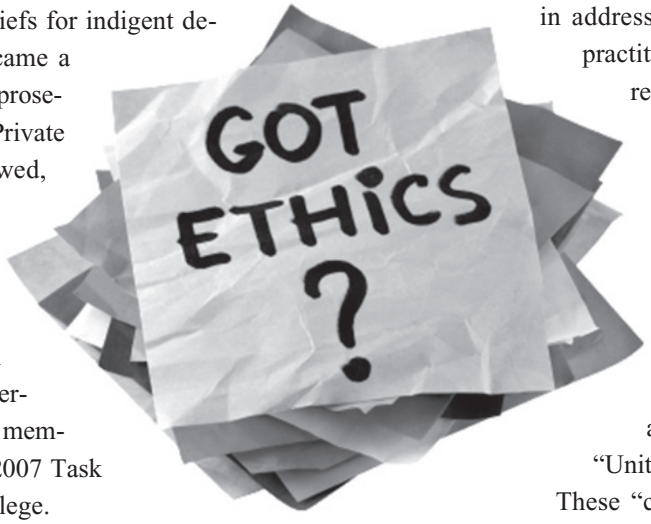
Stephanie Cannuli
Editor-in-Chief

The Special Responsibilities of the Prosecutor with respect to Crime Labs, Plea Agreements, Trial Evidence, Impaired Defense Counsel and *Brady*

Samuel C. Damren*

Preface

This article is the product of years of experience brought to focus by an invitation from Professor Robert Hirshon, professor at the University of Michigan Law School and former President of the American Bar Association (ABA), to address his students on the subject of prosecutorial ethics. During law school at Wayne State University, I worked at the State Appellate Defenders Office in Michigan writing briefs for indigent defendants. After law school, I became a county and then a federal assistant prosecutor in Detroit from 1975-1981. Private practice as a civil litigator followed, but I maintained ties to criminal jurisprudence. That experience was expanded through my time as a panel member in attorney disciplinary proceedings in the early 1990s, as a corporate governance advisor for clients, and as a member on the Michigan Bar's 2006-2007 Task Force on the Attorney/Client Privilege.



Until Professor Hirshon's invitation in the Fall of 2012, I had not closely reviewed the ABA Standards for prosecutorial ethics since my prosecutorial days. The extent of prosecutorial power that existed during my time as a state and federal prosecutor was vastly different from the immense powers available to, and exercised by, today's prosecutor. The ABA Standards governing the "Special Responsibilities of a Prosecutor," however, have not kept pace with these changes. The American Bar must amend and update these ethical standards to provide a necessary check to prosecutorial abuses that are the result of this shift in power. This article provides suggested amendments.

Introduction

In *Connick v. Thompson*,[1] the United States Supreme Court once again asserted the position that professional discipline for prosecutors is an appropriate method to deter violations.[2] The Court has consistently expressed this opinion for over thirty-five years, beginning with *Imbler v. Pachtman*, which granted absolute civil immunity to prosecutors.[3] Nevertheless, in the view of practitioners and commentators over that same time span, professional discipline for prosecutors has been, and remains, a "paper tiger."[4] If changes are applied to the ethical rules governing the so-called "Special Responsibilities of the Prosecutor,"[5] however, this need not be the case.

The success of attorney grievance systems in addressing attorney misconduct by civil practitioners or criminal defense counsel rests on the fact that clients are the predominant source of complaints against attorneys.[6] In contrast to private practitioners, however, the prosecutor has no individual "client."[7] Instead, the prosecutor's client is the amorphous "People" of a particular county or state for local prosecutors, and the equally amorphous "Government" or "United States" for federal prosecutors. These "clients" might refuse to re-elect a prosecutor, but they rarely assert bar grievances against them, nor are other actors in the criminal justice system likely to do so. Unlike the clients of private practitioners, prosecutors do not owe criminal defendants any fiduciary duty, and the few grievance complaints criminal defendants file against prosecutors are given short shrift.[8] Defense counsel are reluctant to file grievance complaints against prosecutors due to the fact that they will likely have to face the offending prosecutor in future encounters with their subsequent clients and, legitimately or not, they often fear retaliation.[9] Lastly, judges, whether elected or appointed, must likewise maintain a working relationship with the prosecutor's office, and consequently, they rarely initiate bar complaints against prosecutors.[10]

There are, however, established methodologies that could be implemented to make professional discipline a more effective remedial device for prosecutorial misconduct. These methodologies are familiar to prosecutors, especially federal prosecutors. They include self-reporting, compliance programs, legal audits, and root cause analysis.[11]

Prosecutors and other executive agencies routinely impose similar requirements on a wide variety of businesses and organizations where the maintenance of high standards of quality control are necessary for public safety and the protection of vulnerable populations.[12] Prosecutors cannot justly complain if this same mirror is turned to examine their conduct in the discharge of their public trust responsibility "to convict the guilty and to make sure they do not convict the innocent."[13]

An observer of the criminal justice system would not dispute the notion that the prosecutor is by far the most powerful person in today's criminal courtroom. This was not the case only a few decades ago. In the mid-1970s, when *Imbler v. Pachtman*[14] was decided, parole guidelines were a significant check on the power of the prosecutor and the court in criminal sentencing because the guidelines could not be overridden by negotiated plea agreements or judicial sentences.[15] For example, thirty-five years ago, if the guidelines required a defendant to be paroled after serving ten years in prison of a 200-year sentence, there was nothing the prosecutor or judge could do to prevent those guidelines from paroling the defendant after he or she served ten years.[16] However, since the enactment of the *Comprehensive Crime Control Act of 1984*[17] and similar state laws,[18] the power of the guidelines as an independent limitation on sentences has been eliminated.[19]

Enhanced penalties have also helped grow the power of the American prosecutor.[20] Penalties for criminal misconduct have increased over the past several decades to such an extent that when a defendant is charged with any serious offense, or multiple counts of lesser charges where possible sentences can run consecutively, today's prosecutor can realistically advise defense counsel that the defendant risks spending the best years of his or her life in prison if an offered plea agreement is refused.[21] The prosecutor did not have that kind of negotiating leverage thirty-five years ago when prison populations were much lower.

Not surprisingly, given the upward trend in sentencing, the United States has become the world leader among all nations in incarceration rates, with over 2.2 million of its citizens in prisons.[22] No other nation is even close to this percentage.[23] The cost on taxpayers is staggering.[24] But the American electorate does not flinch at this state of affairs or the cost it imposes. Being labeled as "soft on crime" has been and remains a sure ticket to electoral defeat in America.[25]

These changed dynamics in the American criminal justice system have so increased the power of the American prosecutor that an updating of the ethical rules is required to counterbalance that power and to curb abuses. This article is divided into two parts, each addressing this need. Part I proposes that, as a result of the failure of prosecutors to address crime lab scandals across the country, a new ethical rule should be included in the ABA Model Rules governing the "Special Responsibilities of a Prosecutor." Part II recommends an update of several existing rules to effectively address real tensions existing in the landscape of today's criminal justice system.

I. A Proposed Ethical Rule Governing the Prosecutor's Proffer of Expert Testimony From Crime Labs

The widespread failures of crime lab experts to correctly and honestly test evidence scandalize the American criminal justice system.[26] These failures, repeatedly uncovered during the past decade and exposed across the country in innumerable jurisdictions,[27] are "red flags" suggesting that this brand of so-called expert evidence is no longer entitled to the blanket reliability it once received. The defense's cross-examination at trial could not expose any of these failings. As every quality control manager knows, a vigorous examination of laboratory protocols and processes cannot be effectively conducted through the mere off-site questioning of laboratory technicians. Preemptive prosecutorial action is needed, and should be enshrined in a new ethical rule governing the prosecutor's proffer of expert testimony from crime labs.

While prosecutors initially characterized this neglect, and often, outright fraud, as the misdeeds of "a few bad apples," the prevalence and long-standing persistence of these incidents no longer supports that assessment.[28] After an exhaustive review of the then-abysmal performance of crime labs in West Virginia, Oklahoma City, Montana, Chicago, Houston, Virginia, and even the national FBI Crime Lab, in 2007 Professor Paul C. Giannelli concluded that "the problems [were] systemic."[29] He proposed comprehensive regulatory reform and legislative action.[30] In 2009, the National Academy of Sciences published an equally harsh condemnation.[31] To date, little progress has been made on any of these fronts. The scandals continue unabated in North Carolina, Minnesota, Michigan, New York, Virginia, Washington, Massachusetts, and California.[32]

From the perspective of ethicists, the absence of preemptive prosecutorial attention to this crisis is extremely disappointing.[33] The irony accompanying this inattention, however, is far more disturbing. In order to be eligible for sentence reductions, the United States Federal Sentencing Guidelines require organizations to implement compliance programs and to periodically evaluate the effectiveness of quality control protocols to ensure that the organization is abiding by applicable laws and regulations.[34] Organizations that fail to do so risk enhanced penalties at sentencing should they ever find themselves within the prosecutor's domain.[35] So-called "paper" compliance programs, which simply document applicable rules, adopt a Code of Ethics, designate a compliance officer and provide an organizational chart of reporting hierarchies, do not satisfy this requirement.[36]

The fact that the government routinely requires outside agencies providing expert services to submit to government inspections and reviews as a form of quality control compounds the hypocrisy of the government's lack of oversight over crime labs.

Instead, the rigors of the Federal Sentencing Guidelines require an organization to take preemptive action to implement the system, train employees, investigate company conduct to ensure that it is meeting compliance objectives and, where it is not, take remedial actions to correct identified deficiencies.[37]

Far too many crime labs fail to satisfy these standards.[38] In response to attempts to lay some accountability for these failings at their doorsteps, prosecutors disclaim responsibility because the employees of the crime labs are not employees of the prosecutor. This feint diminishes the prosecutor's role. The labs that test physical evidence are trained, selected or operated by the government.[39] The prosecutor does not, of course, vouch for the accuracy of an expert's testimony; but the prosecutor does proffer the admission of expert testimony based on testing by those organizations as reliable evidence.[40] Thus, especially given the abundant "red flags" now associated with the failings of crime labs, prosecutors should be required to demand and ensure that crime labs meet the compliance standards established by the Federal Sentencing Guidelines. Suggesting that it is not their responsibility to ensure the reliability of proffered evidence abjures prosecutors' obligation to ensure that innocent citizens are not wrongfully convicted. Prosecutors who object to shouldering this added responsibility bear a heavy burden of explaining the hypocrisy of demanding through the Federal Sentencing Guidelines that other organizations meet these compliance standards when they do not equally apply those same standards to expert evidence from crime labs that they proffer to the court.

The fact that the government routinely requires outside agencies providing expert services to submit to government inspections and reviews as a form of quality control[41] compounds the hypocrisy of the government's lack of oversight over crime labs. Similar inspections could be conducted to ensure the integrity of the testing processes at crime labs.[42] Prosecutors, who are charged with presenting reliable evidence against accused citizens, should not only be at the forefront of such efforts, but should be professionally obligated to ensure that such safeguards are in place. The repeated incidence of crime lab scandals and the inattention of prosecutors to crime lab failings are at crisis levels and require intervention from the bar.

Therefore, the ABA Model Rules 3.8(a)-(h) for prosecutors should be amended to add 3.8(i):

> (i) A prosecutor shall not proffer expert testimony in a criminal case based upon the testing or analysis of physical evidence by crime labs or similar organizations, unless the prosecutor establishes that the crime lab or similar organization:
>
> (1) has adequately trained the staff and experts in the testing and analysis of such evidence;
>
> (2) has adopted and follows appropriate protocols establishing, maintaining, and preserving the chain of evidence for the physical evidence and the accuracy of testing and the analysis of that evidence;
>
> (3) periodically audits compliance with (1) and (2) including samplings of the physical evidence and test results by independent experts and on-site inspections; and
>
> (4) has addressed and taken remedial actions to correct any deficiencies in the testing and analysis procedures that are identified by periodic audits.

II. Proposed Modifications of Existing Ethical Rules for Prosecutors Governing Plea Agreements, Trial Evidence, Impaired Defense Counsel, and *Brady*.

A. Rule 3.8(a) Regarding Charging Standards.

ABA Model Rule 3.8(a) states "[t]he prosecutor in a criminal case shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause."[43] Routinely charging citizens with crimes that lack probable cause is uncommon in today's criminal justice system. Most state jurisdictions have procedural safeguards, such as preliminary exams,[44] that protect citizens from this type of abuse. In the federal system, the grand jury serves the same function, albeit

as a far less effective screen. While improper initial charging is minimized by these safeguards, other prosecutorial abuses nevertheless occur as criminal charges advance through the subsequent stages of the criminal process.

One all too common abuse by contemporary prosecutors is the practice of overcharging. It is a well-worn objection from the defense bar[45] covering a wide spectrum of purported misconduct. However, some of these abuses should be the subject of professional discipline even though Rule 3.8(a), as presently formulated, provides prosecutors with ethical "cover" to engage in improper overcharging.[46] At trial, when the prosecutor presents criminal charges to a jury, the standard for ethically presenting evidence should not be "probable cause," but rather whether the prosecutor has a good faith belief, well grounded in fact and law, that the evidence supports those charges beyond a reasonable doubt. While there is a judicial safeguard in the form of ruling upon a defense motion for directed verdict that seemingly addresses this issue, this safeguard cannot prevent subtle, yet highly prejudicial, prosecutorial abuses that occur before a motion for directed verdict can be made.

When a prosecutor presents evidence in a multi-count complaint in which some of the counts are not supported by evidence sufficient to survive a directed verdict, the lower standard of probable cause set by ABA Model Rule 3.8(a) permits the prosecutor to ethically introduce highly prejudicial evidence on those counts.[47] This highly prejudicial evidence that is not supported by evidence sufficient to survive a directed verdict should not be part of a trial on counts that can survive a directed verdict. Subsequent prophylactic instructions to the jury to disregard this testimony do not remedy the prejudice. Experienced practitioners know that jurors hear the bell and cannot ignore it. By presenting counts against a defendant in a multi-count criminal charge that do not satisfy the directed verdict standard, the prosecutor is both prejudicing and negotiating with the jury. Through this tactic, the prosecutor implies that the defendant has committed multiple wrongs—even if he or she cannot prove all of them—which the jury should take into account when assessing the defendant's guilt or innocence on those counts where there is evidence sufficient to satisfy a directed verdict standard.

Presenting evidence at trial on counts that cannot withstand a motion for directed verdict can also be used to undercut defense theories. This subtle, but cynical, type of "tactical" overcharging is best explained by example. In a case against a public official charged with embezzling public funds, the prosecutor also charges the defendant with misapplication of public funds as gifts to the official's mistress. Evidence as to the embezzlement charge is sufficient to withstand a motion for directed verdict. Evidence of the misapplication of public funds to the mistress is not, although it does meet the probable cause standard. As part of the trial, the prosecutor knows that the defense will present evidence from the official's wife that he is honest and other evidence that disputes facts pertinent to the embezzlement charge. The tactical benefit that the prosecution gains is obvious: the wife's assertion that her husband is honest is called into question. The husband cheated on his wife. Moreover, his talents at deceit are substantial—he deceived his closest confidant—and his betrayal of marital fidelity might equally apply to the public trust. This evidence is devastating to the defense. Variations on this version of "tactical" overcharging are endless. Prosecutorial abuses at trial involving vertical, horizontal and tactical overcharging can be addressed by amending Rule 3.8(a) to prohibit a prosecutor from presenting evidence at trial on those counts unless the prosecutor has a good faith belief that those counts will survive a defense motion for directed verdict.

Prosecutorial abuse through overcharging during plea negotiations must also be addressed, albeit in a different fashion. Indeed, it is in the plea negotiation arena, rather than at trial, that overcharging abuses are most prevalent.[48] The Supreme Court recently observed, in *Lafler v. Cooper*[49] and *Missouri v. Frye*,[50] that over ninety-seven percent of all federal criminal cases and ninety-four percent of all state cases are resolved through guilty pleas.[51] Just as the Supreme Court found that criminal defendants are entitled to effective assistance of counsel at this stage of criminal proceedings,[52] the rules of ethics should be similarly updated to prohibit prosecutorial abuse in plea negotiations where overcharging is often coupled by prosecutors with less than full disclosure of the available evidence.

Negotiated pleas are perceived as a necessary efficiency measure for a criminal justice system that is required to process millions of cases a year, and which maintains annually a prison population of over 2.2 million incarcerated individuals.[53] If every defendant exercised his constitutional right to a trial by jury, the system would grind to a halt.[54] As a result, defense counsel, prosecutors, and the courts engage in plea-bargaining as an efficiency measure to meet the input of criminal complaints to the system. Each of these participants in the criminal justice system has various forms of leverage, but the prosecutor has by far the most, as previously discussed. No practitioner in the criminal justice system could seriously dispute that the prosecutor's hand is stacked, and that the current ethical rules permit prosecutors to unfairly add to that advantage through overcharging.

For example, where the prosecutor charges a defendant with twenty separate counts of mail fraud based on probable cause, but reasonably knows that only two of those counts are supported by evidence that will survive a directed verdict, the prosecutor gains eighteen counts of five-year offenses as negotiating "chips" to leverage a plea to a lesser number of counts. This form of overcharging is known as "horizontal" overcharging.[55] This same type of leverage also exists in the form of "vertical" overcharging,[56] where the prosecutor charges

a defendant with armed robbery based on probable cause but reasonably knows that the evidence that will survive a motion for directed verdict only supports a claim of unarmed robbery. The armed robbery charge, as long as it remains pending, is a "chip" in plea negotiations.[57]

Prosecutors might hotly dispute the notion that they conduct plea negotiations like a poker game, but the current rules of ethics permit them to do exactly that. Through overcharging, and by pursuing counts after the preliminary exam stage that are only supported by probable cause, the prosecutor is permitted to stack the government's hand with cards that ultimately cannot be played to a jury, but will still pressure the defendant to accept the prosecutor's plea offer. The injustice of this situation is compounded where the prosecutor is not required, as a part of plea negotiations, to reveal the evidence[58] underlying those counts to the defendant. To suggest that such negotiating tactics are not analogous to a game of poker is naïve; the real question is whether the prosecutor should be ethically permitted to "bluff" an accused citizen into prison.

The prosecutor has another chip in the government's negotiating hand, one provided by legislatures fearful of being criticized as "soft" on crime. That chip is the exorbitant penalties authorized by legislatures for a variety of criminal offenses that are no longer counterbalanced, as they were in the past, by parole guidelines or other similar safeguards.[59] Some of these penalties are irrational. For example, the penalty for armed bank robbery is up to twenty-five years in prison[60] and a $250,000 fine.[61] Focusing on the fine alone, one might first ask if there has ever been an armed bank robber in United State history with a net worth of $250,000. Second, in assessing the risk and the utility of a possible $250,000 fine, one might reasonably ask whether a person with a net worth of $250,000 would decide to engage in armed robbery. Assuming this risk is low, the functional purpose of enacting a possible $250,000 fine can only be to provide the prosecutor another "chip" to play or to discard during plea negotiations.

In countering these arguments, prosecutors might assert a judicial firewall exists that prevents them from coercing pleas since the defendant is required to admit guilt before the court as part of all such plea agreements. No experienced practitioner would support this notion, however. Requiring a defendant to admit guilt as part of a negotiated plea is a hollow judicial ritual. What reasonable person charged with twenty counts of mail fraud—with an exposure of five years each and amounting to 100 years in prison if run consecutively—would not feel unbearable pressure to plead guilty to one five-year count and serve a year and a day, if given the opportunity?

Anyone who doubts that defendants falsely plead to crimes they do not believe they committed should ask a complimentary question. Has anyone ever been charged with perjury for pleading guilty to a criminal charge they did not commit? The answer is no, and will likely always be no. Likewise, jurists should not mislead themselves to believe that a defendant pleading guilty to a crime he has not committed is all that rare of an occurrence. Nor should judges think they could put any reasonable faith into this illusory safeguard. If a defendant chooses to swear under oath that she committed the crime, the judge is powerless to prevent the defendant from doing so.

Congress and state legislatures are not going to reduce criminal penalties any time soon,[62] nor are the parole guidelines likely to be re-imposed. As a result, the only available counterbalance to the prosecutor's inordinate leverage in modern plea negotiations is transparency. At the onset of plea negotiations, the prosecutor must provide the defense with full "open file" discovery.[63] Open file discovery is becoming more and more accepted across the country[64] and is even now required by statute in North Carolina.[65] Open file discovery limits the ability of the prosecutor to "bluff" a defendant into prison through a negotiated plea because, based on the information in the "open file," the defense can accurately assess the strength of the prosecutor's hand before agreeing to plead guilty. If a prosecutor does not want to conduct open file discovery as a part of plea negotiations, then the prosecutor should be prohibited from resolving the case through any plea other than a guilty plea to each and every count in the complaint. As a practical matter, this requirement will mandate "open file" disclosure.

Ultimately, ABA Model Rule 3.8(a) should be amended as follows:

> The prosecutor in a criminal case
>
> (1) shall not institute a charge that the prosecutor knows is not supported by probable cause;
>
> (2) shall not enter into plea negotiations until and unless the prosecutor has disclosed to the defense all (i) written statements from witnesses he or she intends at that time to call at trial, (ii) existing documentary and physical evidence supporting the pending criminal charges, and (iii) *Brady* materials; and
>
> (3) shall not present evidence to a jury of any criminal charge unless the prosecutor reasonably believes that the charge will survive a defense motion for directed verdict.

B. Rule 3.8(b) governing access to counsel.

ABA Model Rule 3.8(b) states, "[t]he prosecutor in a criminal case shall make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel."[66]

The problem Rule 3.8(b) was designed to address no longer exists in the modern criminal justice system. *Gideon v. Wainright*, decided almost 50 years ago, made the right to

counsel a constitutional requirement.[67] Most—if not all—rules of state criminal procedure require courts to advise a criminal defendant of his or her right to counsel at the defendant's arraignment and at various subsequent stages of the proceeding, such as guilty pleas.[68] Indeed, *Miranda*[69] and *Dickerson*[70] even require police to advise individuals when taken into custody of the defendant's right to counsel. There is nothing wrong with admonishing prosecutors to promote this advice through Rule 3.8(b), but it is an antiquated ethical rule given these established constitutional and procedural requirements.

Rule 3.8(b), however, could be strengthened to address other recurring problems involving the accused's right to counsel, and particularly, the right to competent counsel. Where the prosecutor is on notice that the competency of defense counsel is questionable due to substance abuse or other infirmity, the prosecutor should be ethically required to bring those concerns to the attention of the court. These infirmities do exist. When they do, they are often apparent and can later lead, as they should, to reversals of convictions based on ineffective assistance of counsel.[71]

It is unfair to suggest that a criminal defendant should be tasked with spotting and correcting these deficiencies. This situation is particularly unjust where counsel is assigned and the defendant does not have the resources to replace counsel. For such a defendant, questioning the competency of infirm counsel requires the defendant to balance the risk of alienating his lawyer and undercutting the chances for a vigorous defense against the chance that the court might replace the impaired counsel.

Consequently, ABA Model Rule 3.8(b) should be amended to alleviate this dilemma. The new Rule 3.8(b) should state:

> The prosecutor in a criminal case
>
> (1) shall make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel; and
>
> (2) timely advise the court of any substance abuse or other deficiency in defense counsel's mental capacity reasonably known to the prosecutor that impairs counsel's ability to provide effective assistance to the defendant.[72]

C. Rule 3.8(d) and *Brady* styled disclosures.

ABA Model Rule 3.8(d) currently provides:

> [The prosecutor in a criminal case shall] make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal[.][73]

The failure of prosecutors in various regions of the country to abide by the requirements of *Brady v. Maryland*[74] is startling. The phrase that a "fish stinks from its head" is appropriately applied here. Ethicists uniformly note that the head of an organization sets the tone and standard for that organization and does so personally.[75] Where *Brady* violations occur and re-occur, they can and should be fairly laid at the desk of the head prosecutor.

In my days as a state prosecutor in Wayne County and as an Assistant United States Attorney in Detroit, Bill Cahalan, the elected prosecutor at Wayne County, and Jim Robinson and Richard Rossman,[76] the United States Attorneys during my tenure from 1975-81, made it clear that the prosecutors under their command were prohibited from hiding evidence.[77] Each of these prosecutors made this admonition a priority. All three mandated that prosecutors in their office: (1) did not convict innocent people; (2) embraced the adversary system and its high standard of proof beyond reasonable doubt; (3) turned over exculpatory evidence to the defense because prosecutors are public servants for the entire community, including those accused of crimes, and consequently must deal with that evidence in open court, not behind closed doors; and (4) adhered to the belief that if the government cannot beat exculpatory evidence in open court, then maybe it was not meant to secure a conviction. My experience in these offices taught me that if a culture of ethical behavior is mandated from the top of an organization, then *Brady* violations rarely occur.

Both offices—Wayne County and the United States Attorney's Office—followed a policy of "open file" discovery. At Wayne County, we provided the defense with a copy of the investigating detective's case file. At the United States Attorney's Office, we arranged for the defense to receive grand jury transcripts and investigative reports. Most importantly, in both venues, we granted the defense access to our evidence early in the judicial proceeding. This culture of openness had remarkable long-term benefits. First, the respective defense bars trusted us; in fact, they would often bring information about their client's innocence to our attention before trial because they trusted that our intentions were honorable. Upon receipt of exculpatory evidence we would investigate the matters and act accordingly to ensure justice was advanced and the innocent were not convicted. Second, judges and the community trusted the prosecutor to do "the right thing."[78] The benefits from this trust cannot be overestimated.

In a recent law review article, Barry Scheck earnestly argued for the voluntary institution of "Conviction Integrity Programs" in prosecutor's offices.[79] By way of example, he lauded the

program recently instituted by Dallas District Attorney, Craig Watkins.[80] However, the problem does not lie with cutting-edge prosecutors who are willing to implement these progressive programs. The problem lies with the prosecutors who are unwilling to institute such programs. Those prosecutors must be required by the bar to meet a minimal standard of adherence through changes in the disciplinary rules.

Brady violations are the product of a wide assortment of motives and pressures, but they can be minimized by requiring the head prosecutor of an office to "self-report" allegations of violations to the attorney grievance administrator. The attorney grievance administrator should compile this information into a comprehensive log that details each allegation. Over time, review of this log can potentially reveal a pattern of misconduct.

Where the judiciary determines that a *Brady* violation occurred, the senior prosecutor should additionally be required to conduct a "root cause" analysis. Furthermore, the prosecutor's findings should be presented to the grievance administrator together with an action plan to prevent the reoccurrence of similar violations in the future. Although head prosecutors may not appreciate this intrusion into their otherwise largely unchecked discretion, public prosecutors should be required to "self-report" alleged *Brady* violations and conduct "root cause" analysis on those that do occur, just as the CEOs of public companies are required to "self-report" fraud.[81]

The problem lies with the prosecutors who are unwilling to institute such programs. Those prosecutors must be required by the bar to meet a minimal standard of* Brady *adherence through changes in the disciplinary rules.

Accordingly, ABA Model Rule 3.8(d) should be modified to mandate "self-reporting" of *Brady* violations and "root cause" analysis. The updated Rule should read as follows:

> (1) The prosecutor in a criminal case shall make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.
>
> (2) The elected or chief non-elected prosecutor in an office shall institute a compliance program adequate to ensure that all prosecutors in the office are aware of and timely make the disclosures required under subsection (1); and
>
> (3) The elected or head prosecutor in a non-elected office shall personally report all violations of subsection (1) to the attorney grievance authority in the applicable jurisdiction.
>
> (4) Where a court finds or the prosecutor admits that a violation of subsection (1) occurred, the head prosecutor shall conduct a root cause analysis of the incident and submit a written report of the analysis and an action plan to the attorney grievance authority in the applicable jurisdiction.[82]

Conclusion

For over thirty-five years, the Supreme Court of the United States has consistently expressed the view that bar discipline can be an effective deterrent to prosecutorial abuses.[83] During that same period, however, the bar disciplinary system has failed to curb these abuses. The fault does not necessarily lie with the grievance system, but with the lack of rigor in the existing formulation of the ethical rules. To effectively deal with prosecutorial abuses through professional discipline, the ethical rules governing "The Special Responsibilities of the Prosecutor" must be updated.

The proposed amendments described in this article are necessary to counterbalance the significantly increased power of today's prosecutor. These amendments will specifically address the power discrepancy between the government and criminal defendants' leverage in plea negotiations, as well as the inadequacies of the current ethical rules to prevent specific recurring and new abuses, including crime lab scandals and ineffective or impaired counsel. The ethical rules should also be enhanced to require prosecutorial "self-reporting" of *Brady* violations in order to offset the lack of a tangible "client" for prosecutors akin to the individual clients of private practitioners. This dynamic is crucial to adequately track prosecutorial misconduct.

There is an urgency to this endeavor. Innocence Projects across the country, private attorneys, citizens and scholars have demonstrated dissatisfaction with American prosecutors. Many believe that by focusing on conviction, sentence and plea rates to measures success, prosecutors have abjured their duty to ensure that they do not convict the innocent.[84] Intervention

from the bar and a change in the rules of professional discipline are necessary steps to begin to effectively address this failing and restore faith in the criminal justice system. Future *Brady* violations, crime lab scandals, coerced pleas and improper trial tactics through overcharging and other abuses could be limited if the bar amends the current ethical rules to discipline these abuses. If the bar chooses instead to maintain the status quo, then the bar should accept significant responsibility for their continuation.

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[1] 131 S. Ct. 1350, 1355-56 (2011) (holding a district attorney's office may not be held liable under 42 U.S.C. § 1983 for failure to train based on a single *Brady* violation, reversing the Court of Appeals for the Fifth Circuit which affirmed an award of $14 million in damages for Thompson who was wrongfully imprisoned for 18 years).

[2] Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that due process requires the prosecution to disclose upon request evidence favorable to an accused when such evidence is material to guilt or punishment); *see also* Strickler v. Greene, 527 U.S. 263, 281-82, (1999) (defining a Brady violation as having three components: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.").

[3] 424 U.S. 409, 429-31 (1976) (holding that in initiating and prosecuting a state's case, prosecutors have absolute immunity to civil liability under 42 U.S.C. § 1983); *see also* Malley v. Briggs, 475 U.S. 335, 343 n.5 (1986) (noting the professional disciplinary process of the bar association lessens the danger that absolute immunity will become a shield for prosecutorial misconduct); McCleskey v. Kemp, 481 U.S. 279, 363 (1987) (holding prosecutors are not required to provide explanations for their actions in seeking the death penalty, finding support in *Imbler*).

[4] Richard A. Rosen, *Disciplinary Sanctions Against Prosecutors for Brady Violations: A Paper Tiger*, 65 N.C. L. Rev. 693 (1987); *see also* Susan A. Bandes, *The Lone Miscreant, The Self-Training Prosecutor, and Other Fictions: A Comment on* Connick v. Thompson, 80 Fordham L. Rev. 715, 715 (2011) (referring to the decision in *Connick* as foreclosing the last available avenue for holding prosecutors accountable, absent frequent or notorious *Brady* non-compliance); Stephanos Bibas, *Prosecutorial Regulation Versus Prosecutorial Accountability*, 157 U. Pa. L. Rev. 959, 975-78 (2009) (positing that by-and-large traditional external regulation of prosecutors has shown itself to be ineffectual; among other reasons, prosecutors are subject to discipline by an association of their peers, and sanctions are rare, and thus the deterrent value is minimal).

[5] *See generally* Model Rules of Prof'l Conduct R. 3.8 (2008).

[6] William H. Fortune, Richard H. Underwood & Edward J. Imwinkelried, Modern Litigation and Professional Responsibility Handbook: The Limits of Zealous Advocacy 694 (Aspen 2d ed. 2000).

[7] *See* Bibas, *supra* note 4, at 977 (stating that because they do not have ordinary clients, prosecutors are rarely disciplined, both in the abstract and relative to private practitioners); *see e.g.,* State *ex rel.* Romley v. Superior Court, 891 P.2d 246, 250 (Ariz. App. 1995) ("the prosecutor does not 'represent' the victim in a criminal trial; therefore, the victim is not a 'client' of the prosecutor.")

[8] *Cf.* Bibas, *supra* note 4, at 994-96 (advocating a system for procuring feedback from defendants on prosecutors' performance, citing defendants as an untapped and valuable source of information on prosecutors' performance).

[9] *See generally* Ellen Yaroshefsky, *New Orleans Prosecutorial Disclosure in Practice After* Connick v. Thompson, 25 Geo. J. Legal Ethics, 913, 923-25 (2012) (noting that limited and competing funding, as well as political battles contribute to the dysfunctional relationship between district attorneys and defense counsel); *see also* Walter W. Steele, Jr., *Unethical Prosecutor and Inadequate Discipline*, 38 Sw. L.J. 965, 980 (1984) ("[I]f defense counsel prejudices himself with the prosecutor by making a complaint to the grievance committee, he faces the prospect of the impact on cases of future clients.").

[10] *See e.g.,* Yaroshefsky, *supra* note 9, at 923 (arguing that a weak and underperforming judiciary is a significant factor in the poor quality of the criminal justice system in New Orleans).

[11] Dan K. Webb, Robert W. Tarun & Steven F. Molo, Corporate Internal Investigations ¶16.05B-D (Law Journal Press 2012).

[12] Sarbanes-Oxley Act of 2002, 15 U.S.C. §7241 (2002) (requiring, among other things, the self-reporting of fraud by public corporations); EPA, Incentives for Self-Policing: Discovery, Disclosure, Correction and Prevention of Violations, 65 Fed. Reg. 19618 (Apr. 11, 2012) (discussing incentives to improve health and the environment, including reducing or eliminating civil penalties, and the a determination not to recommend criminal prosecution for the disclosing entity); HHS, Office of Inspector General, Publication of the OIG Compliance Program Guidance for Hospitals, 60 Fed. Reg. 8979 (Feb. 23, 1998) (developing guidelines to help healthcare providers better protect their operations from fraud and abuse through voluntary compliance programs); HHS, Office of Inspector General, Provider Self-Disclosure Protocol, 63 Fed. Reg. 583999 (Oct. 30, 1998) (concluding that "Self-Disclosure Protocol" offers health care providers specific steps, including a detailed audit methodology, to efficiently quantify a particular problem in order to promote a higher level of ethical and lawful conduct).

[13] United States v. Wade, 388 U.S. 218, 256-57 (1967) (White, J., concurring and dissenting) (noting that law enforcement officers must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime).

[14] *Imbler v. Pachtman*, 424 U.S. 409, 429-31 (1976).

[15] Peter Hoffman, U.S. Parole Comm'n, History of the Federal Parole System 22-30 (2003).

[16] *Id.*; *see also* Stephen Breyer, *The Federal Sentencing Guidelines and the Key Compromises Upon Which They Rest*, 17 Hofstra L. Rev. 1, 4 (1988) (noting that Congress abolished the parole system through the new Guidelines in response to "the previous system whereby a judge might sentence an offender to twelve years, but the Parole Commission could release him in four.").

[17] *See* Comprehensive Crime Control Act, Pub. L. No. 98-473, 98 Stat. 1837 (1984) (mandating the abolition of the Parole Commission five years from the date the sentencing guidelines take effect).

[18] *See e.g.,* Minn. Stat. Ann. § 244.09-11 (West 2013); Wash Rev. Code § 9.94A.010-.910 (2011).

[19] Hoffman, *supra* note 15, at 2.

[20] *See* Richard A. Oppel, Jr., *Sentencing Shift Gives New Leverage to Prosecutors*, N.Y. Times, Sept. 26, 2011, www.nytimes.com/2011/09/26/us/tough-sentences-help-prosecutors-push-for-plea-bargains.html?pagewanted=all&_r=0 (stating that "mandatory minimums and other sentencing enhancements" allow prosecutors to "dictate" sentences).

[21] David F. Greenberg and Valerie West, , 39 Criminology 615, 639 (2001) (demonstrating that despite falling prison admission rates, prison populations continued to grow due to longer sentences; however, around the year 2000, some populations began to notice a decline); Marc Mauer, , Mass Imprisonment: Social Causes and Consequences 4, 5-7 (David Garland ed., 2001) (positing that the impact of sentencing changes has

been more influential on the growth of prison populations than changes in crime rates, specifically the imposition of a new generation of mandatory minimums across the country).

[22] *Entire World, Prison Population Totals*, Int'l Ctr. for Prison Studies, , http://www.prisonstudies.org/info/worldbrief/wpb_stats.php?area=all&category=wb_poptotal (last visited Feb. 25, 2013).

[23] *Id*.

[24] *See e.g.*, Christian Henrichson & Ruth Delaney, VERA Institute of Justice, The Price of Prisons: What Incarceration Costs Taxpayers 6 (2012), *available at* http://www.vera.org/sites/default/files/resources/downloads/Price_of_Prisons_updated_version_072512.pdf (noting that, among 40 states, the cost on taxpayers was $39 billion); *see also* Do Prisons Make Us Safer? The Benefits and Costs of the Prison Boom 220 (Steven Raphael & Michael A. Stoll, eds., 2009) (finding a negative correlation between changes in personal income and changes in correctional spending).

[25] *E.g.,* Gregory Stanford, *Fear of Being Soft on Crime Driving Presidential Politics*, CommonDreams.org (July 23, 2000), http://www.commondreams.org/views/072300-104.htm (originally published in the Milwaukee Journal Sentinel) (arguing that the fear of being soft on crime entered presidential politics beginning with Alabama Governor George Corley Wallace and peaked when the Republicans vowed to make Willie Horton, the media-driven running mate of Democratic presidential nominee Dukakis, "a black convict who raped a white woman after escaping while on furlough."); Melinda Deslatte, *Analysis: Budget Crisis Prompts Look at Jail Time*, LeesvilleDailyLeader.com (Jan. 17, 2011), http://www.leesvilledailyleader.com/article/20110118/NEWS/301189991 ("In Louisiana, it's always paid off for politicians to appear 'tough on crime.'"); *see also* Eli Lehrer, *It's Hard to Be Soft on Crime*, Nat'l Rev. (Dec. 14, 2009, 2:01 PM), http://www.nationalreview.com/content/its-hard-be-soft-crime ("[P]oliticians across the political spectrum just want to be seen as 'tough on crime' and are unwilling to bend at all even when they know that other policies might be better for the public."); Rachel E. Barkow, *Administering Crime*, 52 UCLA L. Rev. 715, 733 (2005) (explaining that sentencing agencies enjoy some freedom from legislative oversight because legislators "may be reluctant to block legislation for fear of looking soft" on such issues as sentencing and crime).

[26] *See e.g.,* Spencer S. Hsu, *Convicted Defendants Left Uninformed of Forensic Flaws Found by Justice Dept.*, Wash. Post, (Apr. 16, 2012), http://www.washingtonpost.com/local/crime/convicted-defendants-left-uninformed-of-forensic-flaws-found-by-justice-dept/2012/04/16/gIQAWTcgMT_print.html (highlighting that flawed forensic work that might have led to the convictions of potentially innocent people had been known by the Justice Department for years, but the Justice Department only shared the information with the prosecutors in the affected cases).

[27] Matt Clarke, *Crime Labs in Crisis: Shoddy Forensics Used to Secure Convictions*, Prison Legal News, October 2010, 1, 1-2, https://www.prisonlegalnews.org/includes/_public/_issues/pln_2010/10pln10.pdf (noting scandals resulting in full or partial closures, reorganizations, investigations or firings at city or county labs in Baltimore, Boston, Chicago, Colorado Springs, Dallas, Detroit, Erie County (New York), Houston, Los Angeles, Monroe County (New York), Oklahoma City, San Antonio, San Diego, San Francisco, San Joaquin County (California), New York City, Nashville, and Tucson, as well as at state-run crime labs in Illinois, Montana, Maryland, New Jersey, New York, Oregon, Pennsylvania, Virginia, Washington, North Carolina, West Virginia and Wisconsin, plus the federally-run FBI and U.S. Army crime labs.)

[28] Paul C. Giannelli, , 86 N.C. L. Rev. 163, 168-70 (2007).

[29] *Id*.

[30] *Id.* (recommending regulatory reforms including accreditation of crime laboratories, legislatively obliged quality assurance, standardization of technical procedures, certification of examiners, and forensic science commissions).

[31] Press Release, Nat'l Acad. of Sci., 'Badly Fragmented' Forensic Science System Needs Overhaul; Evidence to Support Reliability of Many Techniques Is Lacking (February 18, 2009) (http://www8.nationalacademies.org/onpinews/newsitem.aspx?RecordID=12589) (summarizing a congressionally mandated report from the National Research Council that found serious deficiencies in the nation's forensic science system).

[32] Marie Cusick, , NPR, Nov.20, 2012, http://www.npr.org/2012/11/20/165579898/forensic-crime-lab-scandals-may-be-due-to-oversight (looking at a mishandled North Carolina case, and the accreditation process for New York labs, which requires inspections but fails to truly scrutinize);, NPRnews, Dec. 30, 2012, http://minnesota.publicradio.org/display/web/2012/08/02/daily-circuit-forensic-evidence (St. Paul Crime Lab); Tresa Baldas & Steve Neavling, , Detroit Free Press, May 29, 2011, http://www.freep.com/article/20110529/NEWS01/105290502/Detroit-s-abandoned-crime-lab-adds-disturbing-U-S-trend (citing crime lab failures in Detroit, Houston, New York, Virginia and Washington); Denise Lavoie, , Huffington Post, Oct. 4, 2012, http://www.huffingtonpost.com/2012/10/04/marcus-pixley-lab-scandal-massachusetts-fugitive_n_1940888.html (Massachusetts); Paul Elias and Terry Collins, , Huffington Post, Apr. 18, 2010, http://www.huffingtonpost.com/2010/04/18/san-francisco-crime-lab-s_n_542102.html (California); Hsu, note 26 (FBI laboratory).

[33] *Are Crime Labs Reliable For Court Cases?*, *supra* note 32.

[34] US Sentencing Comm'n, , § 8B2.1 (Nov. 2012) (addressing effective compliance and ethics programs).

[35] *See* David Collins & Samuel Damren, *Persuading Business Clients to Implement Gold Plated Compliance Programs Sell it as Quality Control*, *in* Best Practices For Corporate Governance and Compliance: Leading Lawyers on Implementing Compliance Programs, Working with In-house Counsel, and Responding to Ongoing Concerns, 10-13 (Aspatore Books, 2008).

[36] *Id.* at 13-17.

[37] *Id.*

[38] Giannelli, *supra* note 28, at 172-207 (examining crime lab failures across the country).

[39] Paul C. Giannelli, *Independent Crime Laboratories: The Problem of Motivational and Cognitive Bias*, 2010 Utah L. Rev. 247, 250 (2010) (A survey of approximately three hundred crime laboratories revealed that "[s]eventy-nine percent of all laboratories responding . . . are located within law enforcement/ public safety agencies.").

[40] *See* Fed. R. Evid. 702(c).

[41] *See, e.g.*, N.Y. State Office of Mental Health, Incident Causes and Root Cause Analyses 2002-2008: What They Reveal About Suicides (June 2009), *available at* http://www.omh.ny.gov/omhweb/statistics/suicide_incident_rpt/ (noting that N.Y. State Office of Mental Health requires investigations of all suicides that occur in a facility that provides around-the-clock treatment, or within seventy-two hours of an individual's discharge from such a facility).

[42] *See* Edward J. Dunn & Paul J. Moga, *Patient Misidentification in Laboratory Medicine: A Qualitative Analysis of 227 Root Cause Analysis Reports in the Veterans Health Administration*, 134 Archives of Pathology & Lab. Med. 244, 248 (2010) (using a Q-PROBES program to address misidentification factors in laboratory medicine and subsequently recommending steps to adjust those factors).

[43] *See* Model Rules of Prof'l Conduct R. 3.8(a) (2008).

[44] *See* Yale Kamisar with W. LaFave & J. Israel, Modern Criminal Procedure: Cases, Comments & Questions 868 (4th ed. 1974) (most informational jurisdictions require a preliminary hearing.)

[45] *See generally* Paul Bennett, Prosecutorial Overcharging (1979) (unpublished research memo, Legal Resources Project) (on file with the National Criminal Justice Reference Service) (for a detailed discussion of the impropriety of prosecutorial overcharging and the reasons behind its

pervasiveness). *See also* Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. Chi. L. Rev. 50, 85-105 (1968).

[46] *See* Model Rules of Prof'l Conduct R. 3.8(a) (2008) (preventing prosecutors from knowingly prosecuting a charge that is not supported by probable cause).

[47] *See id.* (permitting prosecutors to prosecute a charge so long as the charge is supported by probable cause).

[48] Michelle Anderson, The New Jim Crow: Mass Incarceration In The Age of Colorblindness 87 (2012) (arguing that prosecutors commonly encourage defendants to plead guilty, thus compelling them to forego a trial regardless of their innocence).

[49] Lafler v. Cooper, 132 S. Ct. 1376 (2012).

[50] Missouri v. Frye, 132 S. Ct. 1399 (2012).

[51] *Id*. at 1402 (explaining the extent of the reliance the criminal justice system places on plea bargains).

[52] *See id.* at 1404 (citing Strickland v. Washington, 466 U.S. 668, 686 (1984)).

[53] *See* Paul T. Rosynsky, *Plea Bargains a Painful But Necessary Tool for the Criminal Justice System*, Mercury News, Aug. 17, 2011, www.mercurynews.com/breaking-news/ci_18695516 (arguing that the current criminal justice system is too overloaded to exist without high rates of plea bargaining); *see also* Int'l Ctr. for Prison Studies, *supra*, note 22.

[54] See Michelle Alexander, *Go to Trial; Crash the Justice System*, N.Y. Times, March 3, 2011, www.nytimes.com/2012/03/11/opinion/sunday/go-to-trial-crash-the-justice-system.html?emc=eta1.

[55] Susane Kabor, Bargaining in the Criminal Justice Systems of the United States 84 (2008); *See* Russell D. Covey, *Fixed Justice: Reforming Plea Bargaining with Plea-Based Ceilings*, 82 Tul. L. Rev. 1237, 1254 (2008).

[56] *See* Covey, *supra* note 55, at 1254-55 (explaining the leverage gained through vertical overcharging).

[57] There are also forms of "horizontal" overcharging that a prosecutor can employ to coerce a plea irrespective of whether the additional counts satisfy the standard of proof beyond a reasonable doubt. One example would be where a prosecutor converts a single criminal act into multiple offenses, such as multiplying a mail fraud count into false statements to a federal agent and obstruction after the defendant denies committing mail fraud in a statement to an interrogator. Another example would be where the prosecutor charges multiple counts of mail fraud only to increase the prosecutor's negotiating leverage and coerce a plea to a single count. These varieties of "overcharging" are permitted by the courts.

[58] *See, e.g.*, Matthew v. Johnson, 201 F.3d 353, 362 (5th Cir. 2000) (rejecting the claim that the prosecutor's failure to supply certain evidence prior to the defendant before the defendant's entry of a guilty plea constituted a *Brady* violation); Smith v. United States, 876 F.2d 655, 657 (8th Cir. 1989) (holding that through a guilty plea, a defendant waives claims that the prosecution failed to disclose favorable evidence). *See* Carrie Leonetti, *When the Emperor Has No Clothes III: Personnel Policies and Conflicts of Interests in Prosecutors' Offices,* 22 Cornell J.L. & Pub. Pol'y 53, 77 (2012).

[59] Hoffman, *supra* note 15, at 22-30 (describing the decline of parole hearings as sentencing guidelines began to take full effect).

[60] *See* 18 U.S.C. § 2113(d) (2002) (limiting prison time for assault using a deadly weapon during a bank robbery to a fine under the title and twenty-five years).

[61] *See* 18 U.S.C. § 3571(b)(3) (1995) (setting a $250,000.00 fine for felony convictions).

[62] *See* Barkow, *supra*, note 25 at 743-44.

[63] *See* Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 33 Am. J. Crim. L. 223, 276 (2006) (explaining how prosecutors are both required to make discovery disclosures without delay and follow an "open-file policy").

[64] *See* Alafair S. Burke, *Talking About Prosecutors*, 31 Cardozo L. Rev. 2119, 2126 (2010) (explaining how many prosecutor's offices are adopting open-file policies on their own initiative).

[65] Yaroshefsky, *supra* note 9, at 939-40 (suggesting other states should follow the lead of North Carolina).

[66] Model Rules of Prof'l Conduct R. 3.8(b) (2008).

[67] *See* Gideon v. Wainwright, 372 U.S. 335, 338 (1963) (overruling a state law that only provided counsel for criminals charged with capital offenses).

[68] *See, e.g.*, Cal. Penal Code § 987 (West 2000); Ill. Comp. Stat. Ann. 5/113-1 (West 2013); N.Y. Crim. Proc. Law § 210.15 (McKinney 2010); Ariz. Rev. Stat. Ann. § 14-2 (2010).

[69] *See* Miranda v. Arizona, 384 U.S. 436, 469-70 (1966) (creating procedural safeguards against self-incrimination during police interrogation).

[70] *See generally* Dickerson v. United States, 530 U.S. 428 (2000) (prohibiting state legislatures from overruling *Miranda* requirements).

[71] For these reasons, reversals did not occur in the past as often as they should have. *See* Carrisa Byrne Hessick, *Ineffective Assistance of Counsel at Sentencing*, 50 B.C. L. Rev. 1069, 1074-75 (2009) (mentioning that courts often assume that counsel is adequate, thus leading to a high threshold for defendants to overcome). *But see* Justin F. Marceau, *Embracing a New Era of Ineffective Assistance of Counsel*, 14 U. Pa. J. Const. L. 1161 (2012) (describing how the recent decisions in *Frye* and *Lafler* may require a more effective assistance of counsel).

[72] *See* Model Rules of Prof'l Conduct R 3.8(b) (1983) (as amended by author).

[73] Model Rules of Prof'l Conduct R 3.8(d) (1983).

[74] *See generally* Brady v. Maryland, 373 U.S. 83 (1963) (requiring prosecutors to disclose material exculpatory evidence to the defense).

[75] *See* Symposium, *New Perspectives on Brady and Other Disclosure Obligations: What Really Works*, 31 Cardozo L. Rev. 1961, 1997 (2010) (explaining that one of the chief sources of leadership is usually whomever is at the top of the organization).

[76] James K. Robinson later became the Chief of the Criminal Division in the Department of Justice for President Clinton. Richard A. Rossman is currently the President of the Association of Past United States Attorneys.

[77] It was part of the culture at both offices, but driven from the top.

[78] This expectation is woven deep into the fabric of the legal community in southeastern Michigan. It is exemplified by the Gilman Award given annually by the Detroit Federal Bar Association "to an outstanding practitioner of criminal law who exemplifies the excellence, professionalism, and commitment to public service of Len Gilman, who was U.S. Attorney at the time of his death in 1985." In Honor of Leonard Gilman, his friend and colleague Alan Gershel wrote: "As the United States Attorney he instilled a level of excellence, professionalism, and commitment to public service that exists to this day. While most of the prosecutors now in the office never met Lenny, his presence is felt every day in numerous, often subtle ways. Whether it be in the recognition that depriving a person of his liberty is an awesome responsibility that requires the utmost care or in the treating of others with respect, his influence is never far. However, it is his strength of character, personality and integrity that we most remember and honor him for. Lenny was the paradigm of what a prosecutor should be. He balanced aggressive advocacy with compassion. Trumanesque in his language and passion, his guiding principle to many a young prosecutor was to do the right thing. In a time when respect is becoming harder to find, he demanded it from those who worked for him. While he always took his work seriously, he never took himself too seriously. A smile and self-deprecating sense of humor could disarm the most strong-willed adversary. Lenny was a determined and passionate competitor, whether on the ball field or in the courtroom. His ire would be raised not in the losing, but in the failure to try. His character should serve as a beacon, not just for us as lawyers, but as a way of life. We should look forward each spring to the presentation of this prestigious award as an opportunity to celebrate his life as well as

a renewed introspection of our own by asking ourselves whether we have lived up to the ideals of decency, fairness and respect for others that were exemplified so remarkably in the life and character of Len Gilman." www.fbamich.org.awards.

[79] *See* Barry Scheck, *Professional and Conviction Integrity Programs: Why We Need Them, Why They Will Work, and Models for Creating Them*, 31 Cardozo L. Rev. 2215, 2216 (2009-2010) (suggesting a "Conviction Integrity Program" that investigates "plausible post-conviction claims of innocence").

[80] *See id*. at 2250 (lauding District Attorney Watkin's program as the most successful and prominent model for a Conviction Integrity Unit).

[81] *See* 15 U.S.C. § 7241(a)(5)(B) (2002) (including within the Sarbanes-Oxley Act provisions requiring head officers of public companies to certify any fraud that occurred in a particular quarter or year).

[82] *See* Model Rules of Prof'l Conduct R. 3.8(d) (2008) (as amended by author).

[83] *See* Imbler v. Pachtman, 424 U.S. 409, 429 (1976) ("[Checks from the bar association] undermine the argument that the imposition of civil liberty is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime.").

[84] *See* Leonetti, *supra* note 58, at 60-65.

About the Author

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The Waiting Game: How States Deny Probationers Their Constitutional Right to a Preliminary Hearing

Cody Warner

Introduction

In *Gagnon v. Scarpelli,*[1] the U.S. Supreme Court established that probationers arrested for allegedly violating probation have a due process right to a preliminary hearing.[2] A preliminary hearing aims to ensure that when a probationer is arrested for allegedly violating probation, there is in fact probable cause to believe he may have violated the terms of his probation.[3] If a court finds probable cause, it may justifiably incarcerate the probationer until his final probation revocation hearing.[4] If the court does not find probable cause, then it must release the probationer.[5] This safeguard is critical because imprisonment often destroys a probationer's chance of successful rehabilitation.[6] Yet, many states do not provide probationers with a separate preliminary hearing;[7] they instead consolidate the preliminary hearing with the final revocation hearing.[8] This article argues that these states are denying probationers an important constitutional right designed to protect their liberty.

This article develops through five parts. Part I provides a framework to understand probation and probation revocation. Part II discusses the due process right to a preliminary hearing for probationers facing probation revocation. Part II begins by discussing *Morrissey v. Brewer*,[9] the predecessor to *Gagnon* that gave parolees the right to a preliminary hearing and a final revocation hearing prior to parole revocation.[10] Second, it discusses *Gagnon*, which extended *Morrissey* to probation revocation.[11] Third, it presents subsequent U.S. Supreme Court cases that reiterate and refine the requirement for a *Gagnon* preliminary hearing.[12] Fourth, it presents decisions by federal appellate courts, which overwhelmingly acknowledge the requirement for a *Gagnon* preliminary hearing. Finally, Part II demonstrates that the Federal Rules of Criminal Procedure have been modified to provide preliminary hearings for federal probationers. This modification was done in order for the federal government to comply with the dictates of *Gagnon*.

Part III describes the variety of ways that states approach the requirement for a *Gagnon* preliminary hearing and explains why many of these state approaches do not satisfy the due process demands of *Gagnon*. It first notes that many states correctly understand that *Gagnon* requires preliminary hearings for probationers arrested for allegedly violating probation. These states have consequently mandated—through statute or common law—that probationers be afforded a preliminary hearing. Second, it identifies those states that require preliminary hearings but find that failure to hold a hearing is harmless error if the defendant cannot demonstrate prejudice. Third, it examines state views suggesting that preliminary hearings are not necessary if a final revocation hearing is promptly held. Fourth, it identifies states that believe the *Gagnon* rule is inapplicable to them because the case involved an administrative probation system and not a judicial probation system. Finally, it presents states that claim preliminary hearings are unnecessary because due process only requires one final revocation hearing.

Part IV suggests a realistic framework that would satisfy the due process demands of *Gagnon*. This framework addresses both the concerns and rationales employed by various states, while still providing the due process protection sought by *Gagnon*. Part IV goes on to argue that probationers should be given a preliminary hearing within fourteen days of arrest. States may forgo a preliminary hearing if the final revocation hearing occurs within fourteen days of arrest because a prompt final revocation hearing would satisfy the due process concerns of *Gagnon*. This framework, or a similar framework, should be adopted by all states to guarantee that states do not continue to operate constitutionally defective probation revocation systems.

I. Background On Probation And Revocation

In the United States, probation is used frequently to punish criminal offenders.[13] In fact, 4,055,514 individuals were on probation at the end of 2010.[14] The American Correctional Association defines probation as "[a] court-ordered dispositional alternative through which an adjudicated offender is placed under the control, supervision and care of a probation staff member in lieu of imprisonment, so long as the probationer meets certain standards of contact."[15] When a judge sentences a defendant to probation, he sets the terms of probation based on what he deems appropriate for each particular defendant and crime.[16] If a probationer is accused of not following the requirements of his probation, he can be charged with violating probation.[17] Such a probationer may be arrested and held until he is brought to the court.[18] Once a court determines that a probationer has violated the terms of his probation, it has the ability to revoke probation and incarcerate the probationer.[19] Although revocation rules vary from state to state, courts frequently can incarcerate a probationer for the rest of his sentence once it determines the probationer has violated probation.[20]

Due process requires that states provide probationers with a formal hearing before revoking their probation.[21] At the formal hearing, the state must prove that the probationer violated his terms of probation.[22] Although probationers are entitled to a formal revocation hearing, such hearings are not criminal proceedings, and therefore, not all constitutional procedural protections apply.[23] Consequently, most states do not require that the probation violation be established beyond a reasonable doubt.[24] Most states only require proof by a preponderance of the evidence.[25] Probationers also do not have other rights during their probation revocation hearing that they would be afforded during a normal criminal proceeding. For instance, probationers do not have the right to a jury trial during their probation revocation hearings.[26] "[C]ourts have held that double jeopardy does not apply to revocation hearings because a sentence of probation is always subject to revocation and thus is not constitutionally final. In addition, Fourth Amendment, self-incrimination, and *Miranda* protections do not fully apply in these proceedings."[27] Although many states do not provide preliminary hearings for probationers facing revocation, the U.S. Supreme Court held in *Gagnon v. Scarpelli* that probationers must be afforded a preliminary hearing prior to revocation.[28] The purpose of the preliminary hearing is to guarantee that a probationer is not incarcerated unless probable cause exists to believe he has committed a violation of his probation.[29]

II. The Due Process Right To A Preliminary Hearing

Part II discusses the due process right to a preliminary hearing for probationers facing probation revocation. It begins by discussing *Morrissey v. Brewer*, the predecessor case to *Gagnon* that gave parolees the right to a preliminary hearing and final revocation hearing prior to parole revocation.[30] Part II then presents *Gagnon* and its canon, which extends *Morrissey* to probation revocation.[31]

A. *Morrissey v. Brewer*: The Predecessor to *Gagnon*

In *Morrissey v. Brewer*, the U.S. Supreme Court held that the Due Process Clause of the Fourteenth Amendment requires states to afford parolees a preliminary hearing to determine whether there is probable cause to believe that an arrested parolee has committed acts that would constitute a violation of parole conditions.[32] The Court held that a preliminary hearing is necessary because a parolee's loss of liberty is a grievous loss.[33] Further, the Court noted that states have no interest in revocation without at least some form of procedural safeguards because states have the goal of successfully rehabilitating parolees.[34]

Morrissey involved two petitioners. The first petitioner, Morrissey, pled guilty to false drawing or uttering of checks and was sentenced to prison.[35] He paroled from the Iowa State Penitentiary the following year.[36] Seven months later, he was arrested for violating the terms of his parole.[37] The parole officer's report indicated the reasons why he believed that Morrissey violated parole.[38] After reviewing the parole officer's report, the Iowa Board of Parole revoked Morrissey's parole.[39] Morrissey returned to prison and was not afforded any type of hearing prior to the revocation of his parole.[40]

The second petitioner, Booher, pled guilty to forgery and was sentenced to prison.[41] He paroled two years later.[42] The next year, his parole officer recommended that Booher's parole be revoked for failing to abide by the terms of his parole.[43] On the basis of the parole officer's report, the Iowa Board of Parole revoked Booher's parole and sent him to the state penitentiary, located 250 miles from his home, to serve the remainder of his sentence.[44] He was not provided any sort of hearing.[45]

Both Morrissey and Booher filed habeas corpus petitions in the U.S. District Court for the Southern District of Iowa, claiming the revocation of their respective paroles without a hearing constituted due process violations.[46] The District Court disagreed with this interpretation of due process, stating that the failure to hold a revocation hearing did not violate due process.[47] The two cases were consolidated on appeal, and the Court of Appeals affirmed.[48] The U.S. Supreme Court granted certiorari.[49]

The *Morrissey* Court began its discussion by noting the function of parole in the correctional process.[50] The purpose of parole is to "help individuals reintegrate into society as constructive individuals."[51] The Court later added, "[t]he liberty of a parolee, although indeterminate, includes many of the core

values of unqualified liberty and its termination inflicts a 'grievous loss' on the parolee and often on others."[52] As such, "[i]mplicit in the system's concern with parole violations is the notion that the parolee is entitled to retain his liberty as long as he substantially abides by the conditions of his parole."[53] Furthermore, the Court noted that the state has a stake in successfully rehabilitating a parolee to society.[54] Thus, states have no interest in revocation without informal procedural protections.[55] With these values in mind, the Court went on to describe the procedures required by the Due Process Clause of the Fourteenth Amendment for a parolee facing revocation.[56]

The Court articulated two important stages in the process of parole revocation.[57] The Court labeled the first stage the "arrest of parolee and preliminary hearing."[58] The Court explained that there is usually a substantial time lag between the parolee's arrest and the parole board's determination to revoke parole.[59] Sometimes, the parolee is arrested far away from the state prison.[60] Accordingly, "due process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available."[61] This inquiry should be "in the nature of a 'preliminary hearing' to determine whether there is probable cause or reasonable ground to believe that the arrested parolee has committed acts that would constitute a violation of parole conditions."[62]

The Court articulated minimum due process requirements for the preliminary hearing.[63] To be sure, the Court provided only minimum requirements and thus gave state legislatures substantial discretion to create their own preliminary hearing procedures.[64] Additionally, the Court noted, "the revocation of parole is not part of a criminal prosecution and thus the full panoply of rights due a defendant in such a proceeding does not apply to parole revocations."[65] However, *Morrissey* did provide some due process requirements.[66] The parolee "should be given notice that the hearing will take place and that its purpose is to determine whether there is probable cause to believe he has committed a parole violation."[67] Such notice should include what parole violations are alleged.[68] At this hearing, the parolee "may appear and speak on his own behalf; he may bring letters, documents, or individuals who can give relevant information to the hearing officer."[69] Additionally, the parolee is allowed to cross-examine adverse witnesses, unless the witness is an informant who would be subjected to a risk of harm if his identity were disclosed.[70] Noting that the parole officer directly involved in a parole case could harbor bias, the Court found, "due process requires that after the arrest, the determination that reasonable grounds exists for revocation of parole should be made by someone not directly involved in the case."[71] The independent decision maker does not need to be a judicial officer; a neutral administrative officer will suffice.[72]

The *Morrissey* Court found that the hearing officer should use the information discovered during the preliminary hearing to determine whether there is probable cause to detain the parolee until the final revocation hearing.[73] A finding of probable cause would be sufficient to warrant continued incarceration until the final revocation hearing.[74] Notably, the Court used commands words, such as "should" and "requires," in listing proper features of the preliminary hearing.[75] In so doing, the Court indicated that the Due Process Clause in fact mandates these features.[76]

The second stage in the revocation process is the final revocation hearing.[77] This hearing is a final evaluation that determines whether the facts warrant probation revocation.[78] The final hearing must occur within a reasonable time; a lapse of two months, for example, is not unreasonable.[79] The Court acknowledged that it could not write a code of procedure because that is the responsibility of each state.[80] However, the Court gave a list of minimal requirements necessary to satisfy the due process demands of the final hearing:

> (a) [W]ritten notice of the claimed violations of parole; (b) disclosure to the parolee of evidence against him; (c) opportunity to be heard in person and to present witnesses and documentary evidence; (d) the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); (e) a 'neutral and detached' hearing body such as a traditional parole board, members of which need not be judicial officers or lawyers; and (f) a written statement by the factfinders as to the evidence relied on and reasons for revoking parole.[81]

The Court reaffirmed the notion that, despite having these procedural protections, the second stage of parole revocation should not be equated with a criminal prosecution.[82] The Court concluded by stating that it does not want to create an inflexible structure for parole revocation that would be hard for states to administer with their respective parole systems.[83] It simply sought to establish basic due process requirements to ensure that parolees facing revocation are given a fair process.[84] Although the procedural due process protections established in *Morrissey* were articulated for parole revocation, they soon were extended to probation revocation.[85]

B. *Gagnon v. Scarpelli*: Preliminary Hearings For Probation Revocation

A year after *Morrissey*, the U.S. Supreme Court extended procedural due process protection to probationers facing probation revocation.[86] Gerald Scarpelli pled guilty to armed robbery in Wisconsin.[87] Scarpelli was sentenced to fifteen years in prison, but the trial judge eventually suspended the sentence and imposed a probation sentence of seven years.[88] Scarpelli

A year after* Morrissey, *the U.S. Supreme Court extended procedural due process protection to probationers facing probation revocation.

was later apprehended in the course of a burglary.[89] His probation was revoked without a hearing, and he was sent to prison to serve his initial fifteen-year sentence.[90] Three years later, Scarpelli filed a writ of habeas corpus.[91] The District Court held that "revocation without a hearing . . . was a denial of due process."[92] The Court of Appeals affirmed, and the U.S. Supreme Court granted certiorari.[93]

The Supreme Court began its analysis by recognizing the parallel between the *Gagnon* and *Morrissey* cases.[94] The Court recapped that in *Morrissey*, it:

> [H]eld that a parolee is entitled to two hearings, one a preliminary hearing at the time of his arrest and detention to determine whether there is probable cause to believe that he has committed a violation of his parole, and the other a somewhat more comprehensive hearing prior to the making of the final revocation decision.[95]

Acknowledging that there is no relevant difference between parole and probation that should affect the application of due process,[96] the Court stated that probation revocation, like parole revocation, also results in a loss of liberty.[97] Accordingly, "a probationer, like a parolee, is entitled to a preliminary hearing and a final revocation hearing, under the conditions specified in *Morrissey v. Brewer*."[98] Therefore, *Gagnon* explicitly held that a probationer facing revocation has the right to a preliminary hearing.[99]

C. Subsequent Supreme Court Decisions

Other U.S. Supreme Court decisions demonstrate that due process requires the *Gagnon* preliminary hearing. In *Moody v. Daggett*,[100] the Court held that a parolee does not need a preliminary hearing prior to parole revocation when the parolee is already incarcerated as the result of a subsequent conviction.[101] The Court reasoned, "the subsequent conviction obviously gives the parole authority 'probable cause or reasonable ground[s] to believe that the . . . parolee has committed acts that would constitute a violation of parole conditions,'[102] . . . [and] issuance of the warrant does not immediately deprive the parolee of liberty."[103] In *Moody v. Daggett*, the Court carved out a reasonable exception to *Morrissey*. A subsequent conviction is alone grounds to revoke parole,[104] and such a conviction occurs only after a defendant is afforded the vast due process protections of an ordinary criminal proceeding.[105] A conviction demonstrates much more than probable cause that the parolee committed the subsequent offense.[106] Therefore, a preliminary hearing would be superfluous.[107] Furthermore, since a parolee convicted of a subsequent offense is already justifiably incarcerated on that conviction, conducting a preliminary hearing to determine if he violated probation would not protect him from unjustified incarceration, which was the concern in *Morrissey*.[108] Since this holding has the same relevance to probation as it does parole, it is surely applicable to probation.[109] Implicit in *Moody* is that preliminary hearings are ordinarily required.[110] Otherwise, the Court would not have explained why preliminary hearings were not required in this specific scenario.

In *Gerstein* v. *Pugh*,[111] the Court provided further insight into the purpose of the *Gagnon* preliminary hearing requirement. *Gerstein* held that the Fourth Amendment precludes the government from detaining an individual awaiting trial, unless a judge finds probable cause to justify the detention.[112] If the *Gerstein* hearing[113] occurs within forty-eight hours of arrest, it is presumptively timely.[114] However, if a defendant has been incarcerated for forty-eight hours without a hearing, the burden shifts to the state to "demonstrate the existence of a bona fide emergency or other extraordinary circumstance."[115] A *Gerstein* hearing is not required when an individual is arrested on an arrest warrant, because an arrest warrant is only issued after a judge finds probable cause to justify the arrest.[116] A *Gerstein* hearing is used to justify detention for a defendant awaiting trial on new charges, whereas a *Gagnon* preliminary hearing is used to justify detention for a probationer awaiting a final probation revocation hearing.[117] In form, the *Gerstein* hearing differs from a *Gagnon* preliminary hearing primarily because it is not an adversarial hearing that provides the defendant the opportunity to cross-examine witnesses and present evidence.[118]

In *Gerstein*, the Court explained why probationers are guaranteed the right to an adversarial preliminary hearing.[119] After noting that in *Morrissey* and *Gagnon*, it "held that a parolee or probationer arrested prior to revocation is entitled to an informal preliminary hearing at the place of arrest, with some provision for live testimony,"[120] the Court explained, "revocation proceedings may offer less protection from initial error than the more formal criminal process, where violations are defined by statute and the prosecutor has a professional duty not to charge a suspect with [a] crime unless he is satisfied of probable cause."[121] The import of this statement is clear: unlike defendants facing new criminal charges, probationers facing probation revocation are entitled to adversarial preliminary hearings because

probationers are otherwise not protected to the degree that defendants facing new charges are protected.

D. Federal Courts of Appeals

Various federal appellate court decisions overwhelmingly demonstrate that *Gagnon* requires preliminary hearings for probationers facing revocation. For instance, the United States Court of Appeals for the Second Circuit noted in *United States v. Basso*[122] that the defendant "demanded and received a hearing on the issue of probable cause, which the Supreme Court prescribed in *Gagnon*."[123] Likewise, the Court of Appeals for the Ninth Circuit held:

> [I]n order to revoke probation, there must be first a 'preliminary hearing at the time of [the probationer's] arrest and detention to determine whether there is probable cause to believe that he has committed a violation of his [probation], and [then] a somewhat more comprehensive hearing prior to the making of the final revocation decision.[124]

At least four other federal appellate courts similarly find that *Gagnon* requires that probationers receive a preliminary hearing.[125]

Some federal appellate courts have crafted exceptions to the *Gagnon* preliminary hearing requirement.[126] However, these exceptions largely reinforce and complement the U.S. Supreme Court's *Gagnon* jurisprudence.[127] Several federal appellate courts hold that a preliminary hearing is not required if the defendant is incarcerated on another charge. For instance, in *United States* v. *Sutton,*[128] the Court of Appeals for the Eighth Circuit noted, "[t]he preliminary hearing requirement [established by *Morrissey* and *Gagnon*] is founded upon the concern that a person not be wrongfully imprisoned pending final probation revocation proceedings if probable cause to believe that a violation has occurred cannot be established."[129] The Court noted that in the instant case, the probationer had already been convicted of a subsequent offense.[130] Since the defendant was already incarcerated due to the subsequent conviction, the Court held that a preliminary hearing was unnecessary.[131] The U.S. Supreme Court provided this exception in *Moody*.[132] As discussed earlier, the *Moody* exception still embraces the purposes of the *Gagnon* preliminary hearing requirement, and thus does not abridge probationers' due process rights.[133]

A few federal appellate courts do not require preliminary hearings if the defendant is out of custody. In *United States v. Strada*,[134] the Court of Appeals for the Eighth Circuit explained:

> One rationale for the *Morrissey* preliminary hearing requirement was to provide procedural safeguards with regard to the loss of liberty that accompanied an *arrest* for parole violations. Thus, *Gagnon* extends the right to such a hearing only to those probationers who are taken into custody and deprived of their conditional freedom.[135]

Since the probationer in that case was not held in custody prior to the final revocation hearing, the *Strada* Court held that a preliminary hearing was unnecessary.[136] This exception does not frustrate the purposes of the *Gagnon* preliminary hearing requirement. Although in *Moody* the U.S. Supreme Court directly dealt with a parolee who was incarcerated for a subsequent conviction, the parolee was technically not yet in custody for the parole violation.[137] Appropriately, then, the Court framed the issue as, "whether a hearing must be held . . . before the parolee is taken into custody as a parole violator."[138] Since a probationer at liberty before his final revocation hearing is also not "taken into custody as a [probation] violator,"[139] the *Gagnon* requirement for a preliminary hearing would seem unnecessary. This holding is consistent with the purpose of the *Gagnon* preliminary hearing—to ensure that a free probationer is not unjustifiably incarcerated.

Several courts claim that although preliminary hearings are required, they will not provide a remedy for failure to hold a preliminary hearing unless prejudice ensues.[140] For instance, in *United States v. Companion*, the Court of Appeals for the Second Circuit considered the appropriate remedy for when a probationer is not given a preliminary hearing.[141] Looking for guidance, the court examined *Gerstein*.[142] The court noted that in *Gerstein*, the Supreme Court found that an illegal arrest or detention does not void a subsequent conviction.[143] Finding the *Gerstein* reasoning dispositive, the Second Circuit noted, "[t]his rationale is directly applicable here. Appellant's present incarceration stems from a decision by Judge Holden made after a [final revocation] hearing that was adequate in all respects; the denial of appellant's preliminary hearing right no longer has any relation to his incarceration."[144] Accordingly, to release the defendant from custody would be an extreme remedy for a defendant who is no longer suffering from the failure to have a preliminary hearing.[145] The court then added, "we are aware that our decision has the unfortunate ring to it of affording a 'right without a remedy.'"[146] Thus the court cautioned, "our decision does not give the Government license to ignore the preliminary hearing mandate of *Morrissey* and *Gagnon*. If a probationer's rights are flagrantly abused…we reserve, of course, the authority . . . to order release from custody regardless of when the request is made."[147] Therefore, unless the failure to have a preliminary hearing prejudiced a probationer's final revocation hearing, the court will not provide a remedy for a probationer whose probation was revoked after a final revocation hearing, but without a preliminary hearing. Since only a few federal appellate courts provide this "no prejudice" exception, it is

certainly not a ubiquitous exception that changes the tenor of *Gagnon* jurisprudence. Still, in Part III, which describes the various approaches used by states to interpret *Gagnon*, this article argues that this position abridges probationers' rights because the *Gerstein* analogy is inapplicable. Unlike *Gagnon*, *Gerstein* affords a right *with* a remedy.

E. Federal Code

The Federal Rules of Criminal Procedure require that federal probationers be provided with a preliminary hearing prior to a final revocation hearing.[148] Rule 32.1 (b)(1)(A) provides, "if a person is in custody for violating a condition of probation or supervised release, a magistrate judge must promptly conduct a hearing to determine whether there is probable cause to believe that a violation occurred."[149] The person may waive the hearing."[150] The Code then provides requirements for the preliminary hearing.[151] These include:

> (i) [N]otice of the hearing and its purpose, the alleged violation, and the person's right to retain counsel or to request that counsel be appointed if the person cannot obtain counsel; (ii) an opportunity to appear at the hearing and present evidence; and (iii) upon request, an opportunity to question any adverse witness, unless the judge determines that the interest of justice does not require the witness to appear.[152]

Thus, the requirements of Rule 32.1 guarantee probationers many of the due process requirements articulated by *Gagnon*.[153] This is no coincidence; the codification was modified to comport with the due process requirements of *Gagnon*.[154] In fact, the Notes of the Advisory Committee provide, "[s]ubdivision [(b) (1)] requires, consistent with the holding in [*Gagnon*] that a prompt preliminary hearing must be held whenever 'a probationer is held in custody on the ground that he has violated a condition of his probation.'"[155] Therefore, the federal government has recognized that *Gagnon* mandates a preliminary hearing and has accordingly taken steps to modify its code to guarantee that it does not abridge probationers' due process rights.

III. The Myriad State Approaches To *Gagnon*

The aforementioned federal cases and the Federal Rules of Criminal Procedure demonstrate that *Gagnon* intended for probationers to have a preliminary hearing prior to a final revocation hearing. The overarching value cherished in *Gagnon* and its progeny is that a probationer has a remarkable liberty interest, and an adversarial preliminary hearing is essential to help guarantee that a probationer is justifiably incarcerated prior to final revocation. Using that lens to view this issue, Part III examines how states approach the *Gagnon* requirement for a preliminary hearing. After noting that many states do in fact follow the requirements of *Gagnon*, Part III explores the rationales provided by the states that do not provide preliminary hearings. It aims to explain the erroneous and meritorious aspects of these views. Following this section, Part IV provides a preliminary hearing framework that aims to follow the mandate of *Gagnon* while allowing for reasonable accommodations.

A. Strict Compliance

Approximately half of the states require preliminary hearings prior to the final probation revocation hearing.[156] Most of these states provide preliminary hearings in an effort to comport with the dictates of *Gagnon*.[157] For instance, when discussing the procedure for probation revocation, the Supreme Court of Nevada noted:

> [T]he United States Supreme Court, in *Morrissey* and *Gagnon,* outlined the minimal procedures necessary to revoke probation or parole. A preliminary inquiry, to determine whether there is probable cause to believe that the probationer violated the conditions of his or her probation, is required, at which the probationer must be given notice of the alleged probation violations, an opportunity to appear and speak on his own behalf and to bring in relevant information, an opportunity to question persons giving adverse information, and written findings by the hearing officer, who must be "someone not directly involved in the case."[158]

The overarching value cherished in* Gagnon *and its progeny is that a probationer has a remarkable liberty interest, and an adversarial preliminary hearing is essential to help guarantee that a probationer is justifiably incarcerated prior to final revocation.

In order to ensure probationers their right to a preliminary hearing, some states have even codified the *Gagnon* preliminary hearing requirement.[159] For example, Vermont Code provides:

> [W]henever a probationer is held in custody on the ground that he or she has violated a condition of probation, the probationer shall be afforded a prompt hearing before a judicial officer in order to determine whether there is probable cause to hold the probationer for a revocation hearing. The probationer shall be given: (A) notice of the preliminary hearing and its purpose and of the alleged violation of probation; (B) an opportunity to appear at the hearing and present evidence in his or her own behalf; (C) upon request, the opportunity to question opposing witnesses unless, for good cause, the judicial officer decides that justice does not require the appearance of the witness; and (D) notice of the right to be represented by counsel and the right to assigned counsel if he or she is unable to obtain counsel. The proceeding shall be taken down by a court reporter or recording equipment. If probable cause is found to exist, the probationers shall be held for a revocation hearing. If probable cause is not found to exist, the proceeding shall be dismissed.[160]

To be sure, these states do not guarantee preliminary hearings for probationers in all situations.[161] However, these exceptions are situations that the Supreme Court has indicated do not require preliminary hearings, or situations where the denial of a preliminary hearing does not frustrate the purposes of *Gagnon*.[162] For instance, several jurisdictions do not require preliminary hearings when the probationer is already incarcerated due to other charges.[163] As previously noted, this exception was recognized in *Moody v. Daggett*, where the Supreme Court held that a parolee does not need a preliminary hearing prior to parole revocation when the parolee is already incarcerated as the result of a subsequent conviction.[164] Some jurisdictions do not provide preliminary hearings for probationers out of custody awaiting their final revocation hearing.[165] For example, the Massachusetts Supreme Judicial Court noted that "the purpose of the preliminary hearing is to protect the rights of the parolee or probationer who, being at liberty, is taken into custody for alleged violation of his parole or probation conditions, and detained pending a final revocation hearing."[166] Thus, when a probationer is not incarcerated pending his probation revocation hearing, the need for a preliminary hearing is absent.[167] *Moody* also supports this exception.[168] Accordingly, although these states do not provide probationers with a preliminary hearing, the spirit and purpose of *Gagnon* is not thwarted.

B. The "No Prejudice" Exception

Several states require preliminary hearings prior to probation revocation, but hold that failure to afford a preliminary hearing does not warrant a remedy unless the defendant can demonstrate that his case was prejudiced.[169] These states contend that due process is ultimately about fairness.[170] The Appellate Court of Illinois opined:

> In our judgment, the rule announced in *Morrissey* is one of reasonableness, which requires a balancing of all relevant circumstances… Due process does not require that a probationer benefit from the denial of a timely prerevocation hearing, but only that no unfairness result therefrom. Accordingly, a probationer whose probation has been revoked after a properly conducted revocation hearing is not entitled to have the revocation set aside unless it appears that the failure to accord him a prerevocation hearing resulted in prejudice to him at the revocation hearing.[171]

Since a probationer will still receive a final hearing to determine whether he violated probation, failure to conduct a preliminary hearing will generally not affect the ultimate outcome of revocation. Only in the instances where failure to have a preliminary hearing changes the ultimate revocation outcome, will the defendant have a remedy.[172] For example, prejudice could occur when "information was no longer 'fresh' or sources were no longer 'available' at the time of the final revocation hearing."[173] When no prejudice occurs, however, and the court determines through a final revocation hearing that the probationer in fact violated probation, "a subsequent preliminary hearing is purely supererogatory."[174]

These states justify their position by analogizing those positions with *Gerstein*.[175] In *Gerstein*, the Court held that "illegal arrest or detention does not void a subsequent conviction."[176] Applying this reasoning to probation revocation, these states hold that once a probationer's probation is revoked pursuant to a final revocation hearing, the probationer was not harmed by the absence of a preliminary hearing to justify detention because he in fact violated probation.[177] If states were to release probationers solely because they were not afforded their right to a preliminary hearing, then probationers who are later found to be in violation of probation would be released simply because the state failed to follow procedure.[178]

The analogy to *Gerstein* is inapplicable because, unlike *Gagnon*, *Gerstein* provides arrestees with a "use it or lose it" remedy.[179] In *Riverside v. McLaughlin*,[180] the U.S. Supreme Court fine-tuned the *Gerstein* requirement by holding that if probable cause is not established within 48 hours of arrest, the burden shifts to the state to "demonstrate the existence of a bona fide emergency or other extraordinary circumstance."[181] Thus, if an arrestee is in custody for over 48 hours without a *Gerstein* hearing, he can demand the court to order his release.[182] He would lose the remedy of release if his demand were made after he was found to be guilty, because an "illegal arrest . . .

does not void a subsequent conviction."[183] However, he should be released if he had not yet been found guilty.[184] Therefore, *Riverside* provides arrestees with a "use it or lose it" remedy.

Probationers do not have a "use it or lose it" remedy that allows them to be released after a certain period of time if they are not given a *Gagnon* preliminary hearing. The Supreme Court has not specified any bright-line time period within which probationers must be given a preliminary hearing. Therefore, probationers cannot cite a time period after which they should be released if they have not had a preliminary hearing. Consequently, they must wait in jail until they have their final revocation hearing. To be sure, probable cause is typically established via a warrant before a probationer is arrested for violating probation.[185] However, unlike *Gerstein*, the *Gagnon* preliminary hearing requires more than simply a judicial determination of probable cause.[186] It provides the defendant with an assortment of rights, such as the right to present evidence and cross-examine witnesses.[187] Since probationers who are arrested do not have a time period after which their detention is illegal if they have not had a *Gagnon* preliminary hearing, they truly have a right without any form of remedy. Since probationers have no remedy, failing to provide a probationer with a *Gagnon* preliminary hearing is qualitatively different than failing to give a new arrestee a *Gerstein* hearing. Accordingly, the analogy used between *Gerstein* and *Gagnon* to justify not providing probationers a remedy unless prejudice ensues is misguided. If states were to provide probationers with a definite time within which they are entitled to a preliminary hearing, as suggested in Part IV, then the *Gerstein* analogy would become appropriate.

> [T]here is typically a substantial time lag between the arrest and the eventual determination by the pardon and parole board whether parole should be revoked. Additionally, it may be that the parolee is arrested at a place distant from the state institution to which he may be returned before the final decision is made concerning revocation. Given these factors, due process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available.[190]

The parallel purposes of* Gerstein *and* Morrissey/Gagnon *suggest that the Court intended for the* Gagnon *preliminary hearing to occur within a timeframe comparable to the* Gerstein *hearing.

C. The "Promptness" Exception

A few states hold that a preliminary hearing is unnecessary because their respective revocation procedures provide probationers with a prompt final revocation hearing.[188] The Court of Criminal Appeals of Oklahoma held that a preliminary hearing was unnecessary because Oklahoma provides prompt final revocation hearings by statute, which arguably affords probationers a "greater protection of liberty than *Morrissey* and *Gagnon* provide."[189] The Court noted that *Morrissey* mandated a preliminary hearing because:

Since Oklahoma provided a final revocation hearing within twenty days of arrest, the court held that Oklahoma revocation procedure satisfied the demands of *Gagnon*.[191] Similarly, in *Washington v. Myers*,[192] the Supreme Court of Washington addressed whether a preliminary hearing was necessary if the final revocation is provided promptly.[193] In that case, the probationer received his final revocation hearing within thirty days of arrest.[194] The court held that a period of thirty days in between arrest and final revocation was not so long that the probationer was denied due process by not having a preliminary hearing.[195]

The demands of *Gagnon* are possibly met when a state provides a prompt final revocation hearing. Undoubtedly, whether the demands of *Gagnon* are met depends on what a state means by "prompt." *Morrissey* and *Gagnon* unfortunately do not provide much guidance to determine how soon after arrest the preliminary hearing should occur. In *Morrissey*, the Court held that the preliminary hearing should take place "as promptly as convenient after arrest."[196] The only other indicator of promptness is that in *Morrissey*, the Court held that for the *final* revocation hearing, a time lapse of two months is not unreasonable.[197] Since the Court held that a two-month delay for the final hearing is not unreasonable,[198] it stands to reason that the Court intended the preliminary hearing to occur in a period of time sooner than two months after arrest.

The parallel purposes of *Gerstein* and *Morrissey/Gagnon* suggest that the Court intended for the *Gagnon* preliminary hearing to occur within a timeframe comparable to the *Gerstein* hearing. In *Morrissey*, the Court noted that a parolee's liberty is an interest of utmost importance and that revocation of such

freedom results in a grievous loss.[199] This fundamental liberty interest guided the Court in *Morrissey* to create the preliminary hearing requirement. In *Gerstein*, the Court expressed similar concerns. It noted, "the consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships."[200] It was this interest that prompted the Court to require the *Gerstein* hearing. Since both the *Gerstein* hearing and *Morrissey/Gagnon* preliminary hearing serve similar purposes, it stands to reason that the Court intended for both hearings to occur within a comparable timeframe. Although neither *Morrissey* nor *Gagnon* provided a timetable for a prompt preliminary hearing, a prompt *Gerstein* hearing must take place within forty-eight hours.[201] A *Morrissey/Gagnon* preliminary hearing demands more preparation than a *Gerstein* hearing because the defendant may wish to present evidence and cross-examine witnesses.[202] Therefore, it would be unreasonable to require courts to hold, as with *Gerstein*, the hearing within forty-eight hours. However, since the Court had similar interests in *Gagnon* and *Gerstein*, the preliminary hearing should still occur as promptly after arrest as feasible. In Part IV, which provides a suggested framework, this article argues that a reasonably "prompt" preliminary hearing must occur within two weeks after the probationer is arrested.

D. The "Administrative" Distinction

Several states contend that *Morrissey* and *Gagnon* holdings apply only to jurisdictions that have administrative probation systems.[203] In other words, "the [*Gagnon*] requirement of a preliminary hearing was intended for those jurisdictions where probation responsibility, and its revocation as well, is directly controlled by an administrative agency as an arm of the executive."[204] For instance, in *Gagnon*, the Wisconsin Department of Public Welfare, not the sentencing judge, revoked the defendant's probation.[205] Similarly, in *Morrissey,* the Iowa Parole Board, not the sentencing judge, revoked the defendants' parole.[206] Thus several states claim that *Morrissey* and *Gagnon* were limited to administrative probation systems and should not apply to states that have probation systems controlled by the judiciary.[207] For example, in Maryland, "the continuing responsibility for the probationer remains with the sentencing judge, and the supervising agency merely reports violations to the court but is without revocation authority."[208] Since the probation systems in these states are qualitatively different from the systems discussed in *Morrissey* and *Gagnon*, these states contend that the preliminary hearing requirement of *Gagnon* is inapplicable.[209]

Courts in these states explain that holding preliminary hearings in judicially operated probation systems would be superfluous.[210] The First District Court of Appeals in California noted two mechanical differences between revocation in an administrative probation system and judicial probation system.[211] First, it explained that preliminary hearings occur much sooner in states with judicially controlled probation systems, which consequently comport with the temporal requirements of *Morrissey/Gagnon*.[212] The court noted:

> A major reason for the prerevocation hearing requirement in *Morrissey* is the time lag between arrest of the parolee and final determination on the merits of the parole agent's allegations. It is unfair to disrupt the parolee's life during such time without any determination as to the existence of probable cause for revocation. By contrast, the time consumed by the procedures through which appellant's probation was revoked amounted to a total of 21 days from the day the petitions to revoke were filed until he was sentenced to prison.[213]

In other words, the court explained that while revocation procedures in an administrative probation system often take a long time, California was able to give the probationer a final revocation hearing within twenty-one days after incarceration.[214] Since the purpose of the *Gagnon* preliminary hearing requirement is to ensure that a probationer is not incarcerated for an inordinate period of time unless the state can justify the detention, this aim of *Gagnon* should be satisfied by the expedient process of California's judicial probation system.[215]

Second, the court explained that *Morrissey/Gagnon* concerns defendants that were arrested far away from where revocation would occur and would consequently be unable to present witnesses during a revocation determination at a distant prison.[216] The court noted:

> The other major factor compelling a prerevocation parole hearing is that the parolee often is arrested some distance from the penal institution where the final hearing will be held. The prerevocation hearing near the place of arrest affords him a better opportunity to present witnesses. (*Morrissey* v. *Brewer, supra*, 408 U.S. at p. 485 [33 L.Ed.2d at pp. 496-497].) While it is true that the probation revocation hearing before the superior court which granted probation might conceivably be held some distance from the place of arrest, that is not the usual situation. As in the case before us, most probationers are supervised within the county in which probation is granted, and they are not taken to remote locations for revocation hearings. Furthermore, the probation revocation hearing in California, unlike a parole revocation hearing, is a judicial proceeding providing the probationer with the use of court processes, thus assuring him the presence of necessary witnesses.[217]

Since the revocation hearing in a judicial probation system likely will occur at a court in close proximity to where the defendant was arrested, and not at the penal institution that would hold the probationer if his sentence were revoked, the court argued that a probationer has a much better opportunity to present his witnesses who live near him.[218]

The Supreme Court, however, has never limited the *Gagnon* preliminary hearing requirement to states with administrative judicial systems. Both *Morrissey* and *Gagnon* did involve parole and probation systems that were controlled by administrative boards, not members of the judiciary.[219] Also, both cases were concerned that revocation decisions often happen far away from where the defendant was arrested.[220] This distance and delay often results in the two problems articulated by the First District Court of Appeal in California: namely, that the final hearing does not occur until long after arrest, and the defendant has a much harder time producing witnesses who may reside on the other side of the state.[221] Although the Supreme Court was concerned by this aspect of administrative parole and probation systems, it gave no indication in either *Morrissey* or *Gagnon* to suggest it intended to limit those holdings to states with administrative probation and parole systems. Rather, the Court focused on which due process rights parolees and probationers must be afforded before revocation, regardless of whether the state's parole or probation system is administratively or judicially controlled.[222] Furthermore, in *Moody*, where the Court fine-tuned the *Morrissey* preliminary hearing requirement, the Court said nothing to indicate that *Morrissey* is limited to cases in administrative parole or probation systems.[223] Lastly, federal appellate courts do not interpret *Morrissey* or *Gagnon* as so restricted. Therefore, it is unreasonable for any jurisdiction to conclude that the preliminary hearing requirement of *Morrissey* and *Gagnon* is limited to administratively controlled parole and probation systems.

Morrissey's discussion of the necessary qualifications for the preliminary hearing decision maker further demonstrates that the Court was considering due process rights generally and not within the limited scope of administrative parole systems.[224] In *Morrissey*, the Court considered whether the preliminary hearing decision maker should be a member of the judiciary.[225] The Court concluded that the decision maker does not need to be a member of the judiciary, and that a neutral administrative officer would suffice.[226] If the Court was creating a holding limited to administratively controlled parole systems, it would consider only whether an administrative decision maker satisfies the demands of due process. To consider whether a judicial decision maker is needed would be outside the limited scope of an administrative system. Therefore, the Court was looking at what due process requires, regardless of whether the system is controlled administratively or judicially.

Lastly, federal appellate courts do not interpret* Morrissey *or* Gagnon *as so restricted. Therefore, it is unreasonable for any jurisdiction to conclude that the preliminary hearing requirement of* Morrissey *and* Gagnon *is limited to administratively controlled parole and probation systems.

The Court of Special Appeals of Maryland held that the liberty interest sought to be protected through the *Gagon* preliminary hearing is satisfied by the structure of a judicially operated probation system.[227] It noted:

> [T]he procedural due process safeguard provided by the preliminary hearing for those jurisdictions utilizing administrative revocation, is primarily to determine whether probable cause, or reasonable grounds, exists for revocation of probation. In Maryland that determination is made by a judge trained by education and experience to make such decisions. At the District Court level, only judges may issue warrants in probation revocation proceedings, not commissioners whom we otherwise authorize to issue arrest warrants for 'probable cause' . . . we think it is clear that a judicial determination of probable cause is an adequate substitute for the same determination by laymen in an administrative preliminary hearing.[228]

Since a judge, not an administrative body, makes the decision to arrest a probationer with a warrant after finding probable cause of a probation violation, the court here argued that the safeguard sought in *Gagnon* is protected.[229] This court also added that since due process is not offended when a defendant is denied a preliminary hearing in a murder case,[230] due process is surely not offended when a preliminary hearing is not afforded for a probationer whose probation revocation proceedings are judicially conducted.[231]

A non-adversarial judicial determination of probable cause is not enough to satisfy the demands of *Gagnon*. To satisfy *Gagnon*, a probationer must be given other safeguards, such as the rights to speak on his own behalf and to cross-examine adverse witnesses.[232] As noted in *Gerstein*, these additional safeguards are required because a probationer does not otherwise get the full panoply of rights afforded to a criminal defendant facing new charges.[233] Thus, although a defendant facing murder charges may not get a preliminary hearing, he is allotted an assortment of other protections that are not provided to a probationer facing probation revocation. If a probationer does not have the opportunity for an adversarial preliminary hearing, a biased probation officer could unreasonably incarcerate the probationer for many months.[234] A probation officer could be negatively biased towards the probationer because of tarnished relations. This bias could prevent the probation officer from giving the judge a neutral recitation of facts when explaining why an arrest warrant should be issued. If a probationer did not have a right to present evidence or cross examine witnesses, then he potentially could be incarcerated for an inordinate amount of time based solely on the words of the biased probation officer. The requirements of *Gagnon* thus serve the important purpose of helping guarantee that the probationer is not incarcerated solely on the views of a biased probation officer. Therefore, the demands of *Gagnon* are not satisfied when a judge issues an arrest warrant for a probationer without providing the probationer the additional safeguards required by *Gagnon*.

E. The "Consolidated Hearing" Approach

Several states claim that *Gagnon* does not mandate a preliminary hearing, and due process is satisfied when the probationer receives a final revocation hearing.[235] These states provide an assortment of reasons to justify their position. For instance, in *Connecticut v. Baxter*, the Appellate Court of Connecticut provided several reasons why the U.S. Supreme Court did not intend for preliminary hearings to be an essential requirement of probation revocation.[236] First, it discussed *Black v. Romano*,[237] a case where the Supreme Court found that due process did not require a trial court to indicate that it considered alternatives to incarceration before revoking probation.[238] In *Black*, the Court noted that there should be no "imposition of rigid requirements that would threaten the informal nature of probation revocation proceedings or interfere with exercise of discretion by the sentencing authority."[239] Furthermore, the probationer in *Black* was not given a preliminary hearing.[240] Despite not having a preliminary hearing, the Court in *Black* did not find that the probationer's procedural due process rights were violated.[241] However, the probationer in *Black* was arrested on new charges.[242] Under *Moody*, the probationer in *Black* would not be required to have a preliminary hearing. Since *Black* presented facts that fall under the *Moody* exception and does not stand for the proposition that preliminary hearings are not required in ordinary circumstances, it does not conflict with the requirements of *Gagnon*.

The Appellate Court of Connecticut also discussed *Griffin v. Wisconsin*,[243] a case where the U.S. Supreme Court considered whether a search warrant must be obtained before entering a probationer's home.[244] Although the holding of *Griffin* was unrelated to revocation procedures, it noted, "a [s]tate's operation of a probation system . . . may justify departures from the usual warrant and probable cause requirements."[245] The Appellate Court of Connecticut thus interpreted *Griffin* as casting "doubt on the necessity for a mandatory preliminary hearing in probation revocation hearings."[246] The court's conclusion is unwarranted; *Griffin* does not weaken the *Gagnon* requirement for a preliminary hearing. *Griffin* addresses a probationer's limited protection against searches under the Fourth Amendment,[247] whereas *Gagnon* addresses due process under the Fourteenth Amendment.[248] The Fourth Amendment privacy interests affected by a search and seizure are very different from the Fourteenth Amendment due process interests affected by incarceration. Therefore, a weakened Fourth Amendment requirement should not affect the strength of Fourteenth Amendment requirements. Furthermore, since *Gagnon* clearly articulated that due process requires a preliminary hearing,[249] a state's autonomy in controlling its probation system cannot justify departing from this specific due process requirement.

Some states contend that the due process requirements of *Gagnon* can be satisfied in one hearing, and therefore a preliminary hearing is not required.[250] For instance, the Supreme Court of Georgia explained that although *Morrissey* established basic due process requirements for revocation, it declined to write a code of procedure, explicitly leaving that task up to the state legislatures.[251] According to the Georgia Supreme Court, the essential requirement of *Morrissey* is that due process requires the opportunity to be heard.[252] Accordingly, *Morrissey* only suggested a two-step procedure—a preliminary hearing followed by a final revocation hearing—as a means to satisfy due process, but such a procedure was not required.[253] This two-step procedure was suggested because "in the situation of a parolee there is 'typically a substantial time lag' between arrest and revocation."[254] Further, "[t]he parolee is likely to be arrested in his community of residence while the revocation decision is likely to be made a great distance away at the state institution to which he is returned."[255] The court then compared the requirements of the two hearings suggested by the U.S. Supreme Court:

> For the first hearing minimum due process requirements set forth are: (1) notice of hearing; (2) notice of alleged violations; (3) opportunity to appear and speak and offer evidence; (4) right of confrontation, unless there is risk of harm to an informant; and (5) a summary or digest of the hearing together with a determi-

> nation of probable cause to hold the petitioner made by a hearing officer other than the one initially dealing with the case. The requirements for the second suggested hearing are: (1) written notice of the claimed violations; (2) disclosure of the evidence against parolee; (3) opportunity to be heard in person and to present evidence; (4) right of confrontation (unless there is good cause for not allowing confrontation); (5) a neutral and detached hearing body, not necessarily composed of judges or lawyers; and (6) a written statement by the fact finder as to evidence relied upon and reasons for revocation.[256]

The court explained that all of the requirements of both hearings could be satisfied in one hearing.[257] As a result, and because *Morrissey* gave states the flexibility to create their own procedure as long as it met the minimum requirements of due process, the court concluded that due process can be satisfied in one final revocation hearing, and a preliminary hearing is consequently not required.[258]

States that provide probationers with only one hearing are violating the requirements of *Gagnon*.[259] The demands of *Gagnon* cannot necessarily be satisfied in a final revocation hearing because *Gagnon* was not just concerned about the form of the final revocation hearing. Rather, *Gagnon* was concerned that probationers, who are trying to readjust to society, may be unjustifiably incarcerated for long periods of time awaiting their final revocation hearing.[260] In *Morrissey*, the Court noted, "implicit in the system's concern with parole violations is the notion that the parolee is entitled to retain his liberty as long as he substantially abides by the conditions of his parole."[261] The Court further explained that there is usually a substantial time lag between the arrest of the parolee and the eventual determination to revoke parole.[262] Because of this time lag, the Court held "due process would seem to require that some minimal inquiry be conducted at or reasonably near the place of the alleged parole violation or arrest and as promptly as convenient after arrest while information is fresh and sources are available."[263] Therefore, the Court specifically held that a final revocation hearing is not enough to satisfy due process.[264] Rather, due process is also concerned with the temporal aspect of probation revocation.[265] Accordingly, the Court requires that a preliminary hearing promptly occur to determine whether the state can justifiably incarcerate the probationer until his final revocation hearing.[266] Hence, states that contend due process can be satisfied in one final hearing are ignoring the text and spirit of *Gagnon*.

States that provide probationers with only one hearing are violating the requirements of* Gagnon. *The demands of* Gagnon *cannot necessarily be satisfied in a final revocation hearing because* Gagnon *was not just concerned about the form of the final revocation hearing.

IV. A Suggested Framework

Probationers have a due process right to a preliminary hearing promptly after they are arrested for allegedly violating probation.[267] This right is clearly mandated by *Gagnon*, and federal appellate court decisions that followed have overwhelmingly acknowledged this requirement.[268] Indeed, the U.S. Supreme Court intended for states to have a wide degree of autonomy to create probation systems tailored to each state's respective needs.[269] Nevertheless, the Court did not intend for the preliminary hearing requirement to be left to state discretion. Even though states may write their own codes of procedure, the Court articulated the preliminary hearing as a necessary requirement to satisfy due process.[270] However, in *Moody* the Court suggested that when the purpose of *Gagnon* is not thwarted, preliminary hearings may not be required.[271] Thus, to determine what a sufficient probation revocation system entails, we must consider the essential purpose of the *Gagnon* preliminary hearing.

The essence of the *Gagnon* preliminary hearing requirement is that a probationer should not have his liberty abridged without good reason to think that he may in fact have violated probation. A probationer has a very strong liberty interest, and unreasonable incarceration will potentially destroy the probationer's rehabilitative momentum. Thus, any acceptable probation revocation system must include a prompt preliminary inquiry to determine whether probable cause exists to believe the probationer may have in fact violated probation. This inquiry

must be more than a non-adversarial probable cause determination. *Morrissey* and *Gagnon* provided additional safeguards, like cross-examination, because the probationer does not have the full assortment of rights provided to a regular defendant.[272] Additionally, a probation officer may be much more biased when approaching the judge for a warrant because of a soured relationship with the probationer. Therefore, the state must provide an adversarial preliminary hearing promptly after arrest.

A "prompt" preliminary hearing should occur within fourteen days of arrest. As noted, the *Gagnon* preliminary hearing serves a similar purpose to the *Gerstein* hearing—they are both methods to prevent unjust incarceration.[273] Although *Gagnon* did not clearly define "prompt," the *Gerstein* hearing must occur within forty-eight hours of arrest.[274] Since *Gagnon* and *Gerstein* serve similar ends, the forty-eight hours requirement of *Gerstein* would seem to indicate how promptly the Court intended for the *Gagnon* preliminary hearing to take place. However, since the *Gagnon* hearing is not simply a probable cause determination, but rather a robust preliminary hearing with additional safeguards, parties could probably not sufficiently prepare for the hearing within forty-eight hours. A fair timeline can be inferred by considering the preliminary hearing timeline for defendants arrested on new charges in federal court. Federal law requires that defendants incarcerated for new charges must receive a preliminary hearing within fourteen days of the first appearance.[275] Given *Gagnon*'s concern for a prompt hearing, the time needed to prepare for a preliminary hearing and the current fourteen-day statutory timeline for ordinary preliminary hearings in federal court, a fourteen-day timeline for probationers seems appropriate. Since probationers do not necessarily have a first appearance where they are advised of the charges against them, the fourteen-day time period should begin once the defendant is processed in jail. If probationers were guaranteed a hearing within fourteen days, then, like arrestees under *Gerstein*, they would have a definite time after which they could demand to be released if they are not provided with a hearing.

States may forgo providing probationers with a preliminary hearing if the final revocation hearing occurs within fourteen days of arrest. *Gagnon* created the preliminary hearing requirement because probationers have a significant liberty interest that should not be obstructed without good reason.[276] Accordingly, if a state does not provide a preliminary hearing but promptly provides the final revocation hearing within fourteen days of arrest, then the purposes of the *Gagnon* preliminary hearing are satisfied. To be sure, preliminary hearings serve the additional function of informing the probationer of the state's evidence in support of the allegations against him, which may help him prepare a defense for the final revocation hearing. However, *Gagnon* did not suggest that a preliminary hearing should be required for this reason; it was concerned about unjustified incarceration. Therefore, the purposes of *Gagnon* should be satisfied if the state provides a prompt final revocation hearing within fourteen days of arrest.

Conclusion

Many states do not provide preliminary hearings for probationers arrested for allegedly violating probation. However, the U.S. Supreme Court held in *Gagnon* that probationers have a constitutional right to a preliminary hearing prior to probation revocation, and thus these states are abridging probationers' constitutional rights on a daily basis. This article's proposal, if used, would help ensure that these states do not continue to violate the Constitution. Until then, many probationers who have successfully rehabilitated themselves as productive members of society will sit in jail for months, only to be released at their final revocation hearing. We can only hope these downtrodden probationers have not relinquished the desire for rehabilitation.

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1 411 U.S. 778 (1973).

2 *See id.* at 791 (holding that because the respondent was "not afforded either a preliminary hearing or a final hearing, the revocation of his probation did not meet the standards of due process").

3 *Id.* at 781-82.

4 Morrissey v. Brewer, 408 U.S. 471, 487 (1972) (explaining that after making a quick and informal inquiry into a probationer's alleged violation and reviewing the necessary materials, a neutral hearing officer must determine whether there is probable cause to justify incarcerating the probationer from the time of his initial arrest until the revocation decision).

5 *See id.* at 487 (noting that the continued detention of a parolee (or probationer) after his arrest should only occur if a hearing officer determines that there is probable cause for a probation violation).

6 *See Gagnon*, 411 U.S. at 785 (contending that because the purpose of parole and probation is to rehabilitate offenders by keeping them involved in the community, revocation should be a measure of last resort).

7 *See, e.g.*, *Morrissey*, 408 U.S. at 487 n.15 (asserting that few states do not provide hearings for parole revocations and highlighting various state statutes and court decisions which require such hearings).

8 *See id.* at 487 (explaining that writing a code of procedure is the responsibility of each individual state).

9 408 U.S. 471 (1972).

10 *See id.* at 484-85 (arguing a the parolee's stake in his conditional liberty and the State's stake in the parolee's rehabilitation will be furthered by a preliminary hearing that occurs after the parolee is arrested and detained, but before the final probation revocation hearing).

11 *See Gagnon*, 411 U.S. at 782 (likening a probationer to a parolee in that there are no major differences in due process protections afforded to either facing revocation, entitling both to a preliminary and final revocation hearing).

12 Reference made to the preliminary hearing mandated by the Supreme Court in *Gagnon* v. *Scarpelli* will be notated as the "*Gagnon* preliminary hearing."

13 Lynn S. Branham & Michael S. Hamden, Cases and Materials on the Law and Policy of Sentencing and Corrections 226 (8th ed. 2009) (providing that "probation is one of the most common penalties imposed on criminal offenders" in the United States).

[14] Laura Glaze, Correctional Population in the United States, 2010, 3 (Dep't of Justice ed., 2011) (providing that .4,055,514 individuals were on probation as of 2010).

[15] Joan Petersilia, , 22 Crime & Just. 149, 149 (1997). Parole, alternatively, is not a sentence imposed by a judge. Parole is the conditional release from a prison sentence, which is granted by a parole board. Fiona Doherty, , 88 NYULR 958, 985 (2013).

[16] *See* Brian G. Bieluch, *Probation*, 90 Geo. L.J. 1813, 1817 (2002) (noting that a sentencing judge will likely weigh factors such as the defendant's record, characteristics, and overall sentencing goals in determining conditions of probation).

[17] *See* Daniel F. Piar, *A Uniform Code of Procedure for Revoking Probation*, 31 Am. J. Crim. L. 117, 118 (2003) (explaining that once charged with violation of probation, a probationer will be brought before the court and may face incarceration if the court finds he failed to comply with the conditions of his probation).

[18] *See* Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973).

[19] *See* Piar, *supra* note 16, at 118 (discussing that terms of probation are up to the discretion of the sentencing judge and may include reporting to a probation officer regularly, paying fines or restitution, staying out of trouble, and attending counseling).

[20] *See id.* (elaborating that in some states, judges can impose a new sentence altogether).

[21] *See Gagnon*, 411 U.S. at 782 (arguing that because probation and parole revocation involves the loss of liberty, due process dictates that the probationer be afforded two hearings prior to the final revocation decision).

[22] *See* Piar, *supra* note 16, at 127 (stating that most jurisdictions require the state to prove probation violations by a preponderance of the evidence during probation revocation hearings).

[23] *See Gagnon*, 411 U.S. at 782, 789 (noting, for example, that unlike a defendant in a criminal proceeding, a probationer does not necessarily have the due process right to counsel during a revocation hearing).

[24] *See* Piar, *supra* note 16, at 128 (reiterating that no standard of proof for proving a violation of probation is constitutionally required).

[25] *But see id.* at 127 (explaining that some states require lower standards of proof, while others, such as Minnesota and Nebraska require a higher standard of "clear and convincing evidence").

[26] *See* Morgan v. Wainwright, 676 F.2d 476, 478-79, 481 (11th Cir. 1982) (discussing the Court's reluctance to model revocation hearings after criminal trials and denying the defendant the right to a jury for determination of an identity issue during his probation revocation hearing).

[27] Bieluch, *supra* note 15, at 1825-26.

[28] *See Gagnon*, 411 U.S. at 782 (referencing the Court's new procedural standards for probation revocation under *Morrissey*).

[29] *Id.* at 781-82.

[30] *See Morrissey* 408 U.S. 471, 485, 487-88 (1972) (exploring the rationale behind the Court's extension of parolees' due process rights to include two informal hearings prior to any final ruling on the revocation of parole).

[31] *See Gagnon*, 411 U.S. at 782, 790 (holding that like a parolee, a probationer has the right to both a preliminary hearing and a final revocation hearing before the final revocation decision is made).

[32] *See Morrissey*, 408 U.S. at 485 (holding that a prompt but minimal investigation must be conducted near the location of the alleged parole violation or arrest in a timely manner).

[33] *See id.* at 482 (emphasizing the value of an individual's right to liberty and the necessity of an "orderly process" in situations that call for the termination of this right).

[34] *See id.* at 484 (asserting society's further interest in "not having parole revoked because of erroneous information or because of an erroneous evaluation of the need to revoke parole, given the breach of parole conditions").

[35] *Id.* at 472.

[36] *Id.*

[37] *Id.*

[38] *See Morrissey*, 408 U.S. at 473 (referring to Morrissey's unauthorized purchase and use of a car and his failure to follow proper reporting procedures after he was involved in a minor accident with the vehicle).

[39] *Id.* at 473-74.

[40] *Id.* at 473.

[41] *Id.*

[42] *See id.* (indicating the second petitioner's parole date as November 14, 1968).

[43] *Id.* at 474 (explaining that petitioner failed to remain within specified territorial boundaries, fraudulently obtained a vehicle, and failed to maintain gainful employment).

[44] *See Morrissey*, 408 U.S. at 473.

[45] *Id.*

[46] *Id.* at 474.

[47] *Id.*

[48] *Id.*

[49] *Id.* at 472.

[50] *See Morrissey*, 408 U.S. at at 477 (asserting that parole also helps alleviate the costs of keeping an individual in prison).

[51] *Id.*

[52] at 482.

[53] *Id.* at 479.

[54] *See id.* at 484 (noting that fairness in granting parole revocations enhances the likelihood of parolee rehabilitation by reinforcing the idea that revocations are based on verified facts and not arbitrary determinations).

[55] *Id.* at 483.

[56] *See Morrissey*, 408 U.S. at 489 (deciding that at minimum under due process the parolee is entitled to: (1) written notice of the alleged parole violation; (2) notification of incriminating evidence against him; (3) the chance to speak and present witnesses and evidence for his case; (4) if appropriate, the opportunity to question adverse witnesses; (5) a hearing before "a 'neutral and detached' hearing body;" and (6) a written statement by the fact finders outlining the rationale behind their decision to revoke parole).

[57] *See id.* at 484-85 (reiterating that both the parolee and the government benefit from these stages)

[58] *Id.* at 485.

[59] *Id.*

[60] *See id* (recognizing that the parolee may be arrested in one state prison and returned to a different state prison before the final parole revocation decision is made).

[61] *Id.*

[62] *See Morrissey*, 408 U.S. at 485.

[63] *See id.* at 486-87 (clarifying that following an arrest, under due process, a parolee is entitled to a determination of whether reasonable grounds exist for parole revocation. A neutral and detached officer or independent decision maker must decide whether or not there is probable cause to believe a parole violation has occurred. He or she must indicate the evidence used to reach his or her final decision. At the preliminary hearing the parolee may speak on his own behalf, present his own evidence and witnesses, and if appropriate even cross-examine adverse witnesses).

[64] *Id.* at 488-89 (stating that while the Court has laid out a set of basic mandatory requirements for the informal hearings, it is the responsibility of each State to formulate its own full parole revocation procedural code).

[65] *Id.* at 480.

[66] *Id*. 486-87.

[67] *Id.* at 487.

[68] *Morrissey*, 408 U.S. at 487.

[69] *Id.*

[70] *See id.* (noting a parolee's due process right to request an audience with those presenting information adverse to his case).

[71] *Id.* at 485.
[72] *Id.* at 486.
[73] *Id.* at 487.
[74] *Morrissey*, 408 U.S. at 487.
[75] *See id*. at 485-87 (referring to the Court's efforts to create procedural guidelines for parole revocation proceedings).
[76] *Id.*
[77] *Id.* at 487-88.
[78] *See id.* at 488 (elaborating that the final revocation hearing gives the parolee the opportunity to prove that he did not violate the conditions of his probation, or if he did, that there were circumstances that might mitigate sentencing).
[79] *See id.* If a lapse of two months before the *final* revocation hearing is reasonable, arguably a preliminary hearing should occur much sooner than two months after the probationer's arrest in order to similarly be reasonable.
[80] *See Morrissey*, 408 U.S. at 488 (explaining that most states have established a procedural code for revocation hearings, through legislation or by judicial decision).
[81] *Id.* at 489.
[82] *See id.* (noting that unlike a traditional criminal trial, a parole revocation hearing should be flexible enough to allow evidence such as letters, affidavits and other materials typically inadmissible in criminal trials).
[83] *See id.* at 490 (suggesting that it should be relatively easy for states to implement new parole revocation procedures).
[84] *See id.* at 488 (reemphasizing the Court's intent to provide a basic framework to the States for protecting parolee's due process rights in revocation hearings).
[85] *See* Gagnon v. Scarpelli, 411 U.S. 778, 782, 791 (1973) (asserting that because there is no relevant difference between the revocation of parole and the revocation of probation as far as due process protections are concerned, the probationer, like the parolee, has a right to both a preliminary hearing and a final revocation hearing).
[86] *Id.* at 782.
[87] *Id.* at 779.
[88] *Id.*
[89] *See id.* at 779, 780 (describing an August 6, 1975 burglary where Scarpelli and another man broke into an Illinois home. At the time Scarpelli admitted that he had broken into the home intending to steal money and valuables. He later retracted his statement claiming that it had been given under duress).
[90] *See id.* at 780
[91] *See Gagnon*, 411 U.S. at 780.
[92] *Id.*
[93] *Id.* at 780-81.
[94] *See id.* at 781-82 (describing the similarities between parole and probation and the Court's expansion of due process protections in *Gagnon*).
[95] *Id.* at 781-82.
[96] *See id.* at 781, 791 n.3 (citing Jon Van Dyke, *Parole Revocation Hearings in California: The Right to Counsel*, 59 Calif. L. Rev. 1215, 1241-43 (1971)); Ronald B. Sklar, *Law and Practice in Probation and Parole Revocation Hearings*, 55 J. Crim. L. Criminology, & Police Sci. 175, 198 n.182 (1964) (arguing that with respect to hearing procedures, parole and probation should be treated the same because both seek to rehabilitate the offender and both "involve the same factual questions and determinations").
[97] *See Gagnon*, 411 U.S. at 781, 782 (explaining that revocation deprives both parolees and probationers of the "conditional liberty" granted to them, a liberty which is dependent upon their adherence to the restrictions of their respective statuses).
[98] *Id.* at 782.
[99] *Id.*
[100] 429 U.S. 78 (1976).
[101] *See id.* at 86, 86 n.7 (describing an exception to the *Morrissey* requirement of a preliminary hearing following a conviction of a crime).
[102] *Id.* at 86 n.7 (citing Morrissey v. Brewer, 408 U.S. 471, 485 (1972)).
[103] *Id.*
[104] *See id.* at 80 (discussing a petitioner who was convicted for rape, paroled after serving part of his sentence, and then incarcerated again after committing double homicide).
[105] *See* Gagnon v. Scarpelli, 411 U.S. 778, 781 (1973) (noting that by the time a parolee faces a revocation hearing, he would have already had the opportunity to experience the wider due process protections afforded in a formal criminal proceeding).
[106] *Moody*, 429 U.S. at 86 n.7
[107] *See id.* (arguing that because a subsequent conviction satisfies the needed burden of proof, a preliminary hearing, which is used to determine whether there is probable cause, would be redundant and therefore unnecessary).
[108] *Id.*
[109] *See id.* at 86 n.7; *Gagnon*, 411 U.S. at 782 (reasoning that because the same procedural due process rights are applicable to both parole and probation revocation, a subsequent conviction in either case would be grounds for revocation).
[110] *See Moody*, 429 U.S. 86 at n.7 (alluding to the precedent established in *Morrissey*).
[111] 420 U.S. 103 (1975).
[112] *Id.* at 124-26 (noting that while each State has its own criminal procedure system and differences certainly exist, at a minimum, each State must have a reliable system in place for determining whether there is probable cause to deny an individual's freedom).
[113] A *Gerstein* hearing is the probable cause hearing mandated by *Gerstein* v. *Pugh*, which is an informal hearing that requires a court to find probable cause that the defendant committed a crime. By finding probable cause, the court is able to justifiably incarcerate the defendant.
[114] Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991).
[115] *Id.* at 57.
[116] *See Gerstein*, 420 U.S. at 116 n.18; *Riverside*, 500 U.S. at 53 (explaining that while it would be ideal to have an arrest warrant to justify arrest in every situation, such a requirement is not feasible for legitimate law enforcement).
[117] *See Gerstein*, 420 U.S. at 121 n.22, 124-25.
[118] *See id.* at 122-23 (referencing an Alabama case where, at his preliminary hearing, the defendant was allowed to confront and cross-examine prosecution witnesses).
[119] *See id.* at 121-22 n.22.
[120] *Id.* at 121 n.22.
[121] *See id.* at 121-22 n.22 (citing Model Code of Prof'l Responsibility DR 7-103(A) (Final Draft 1969) (noting that a prosecutor "Shall not institute or cause to be instituted criminal charges when he knows or it is obvious that the charges are not supported by probable cause"); *see, e.g.*, ABA Project on Standards for Criminal Justice, The Prosecution Function §§ 1.1, 3.4, 3.9 (1974); Code of Trial Conduct R. 4(c) (Am. Coll. Trial Lawyers 1963)).
[122] 632 F.2d 1007 (2d Cir. 1980).
[123] *Id.* at 1012 n.4.
[124] United States v. Segal, 549 F.2d 1293, 1297 (9th Cir. 1977) (citing Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973)).
[125] *See, e.g.*, United States v. Kindred, 918 F.2d 485, 487 n.1 (5th Cir. 1990); United States v. Davila, 573 F.2d 986, 987 (7th Cir. 1978); United States v. Shead, 568 F.2d 678, 682 (10th Cir. 1978); Clark v. Wyrick, 538 F.2d 1327, 1329 (8th Cir. 1976).
[126] *See, e.g.*, McDonald v. N.M. Parole Bd., 955 F.2d 631, 633 (10th Cir. 1991); United States v. Sutton, 607 F.2d 220, 222 (8th Cir. 1979).

[127] *See McDonald*, 955 F.2d at 633; United States v. Sutton, 607 F.2d 220, 222 (8th Cir. 1979).

[128] *Sutton*, 607 F.2d at 220.

[129] *Id.* at 222.

[130] *Id.* at 221 (explaining that the probationer was convicted for mail theft in 1978, given three year's probation and then convicted again in 1979 for theft).

[131] *Id.* at 222 (following the rationale in United States v. Tucker, 524 F.2d 77, 78 (5th Cir. 1975)).

[132] Moody v. Daggett, 429 U.S. 78, 86 n.7 (1976).

[133] *See id.* (contending that denying a preliminary hearing to those with a subsequent conviction is not a denial of their due process rights since the conviction itself serves as acceptable grounds for a parole violation).

[134] 503 F.2d 1081 (8th Cir. 1974).

[135] *Id.* at 1084.

[136] *See id.* (applying the Court's reasoning in McDonald v. N.M. Parole Bd., 955 F.2d 631 (10th Cir. 1991)).

[137] *Moody*, 429 U.S. at 86.

[138] *Id.*

[139] *Id.*

[140] *See* United States v. Santana, 526 F.3d 1257, 1260 (9th Cir. 2008); United States v. Companion, 545 F.2d 308, 313 (2nd Cir. 1976) (explaining that because the defendant's present incarceration was based on a determination made by a judge in a fair hearing, a preliminary hearing was not needed since the decision that he should be incarcerated had already been made).

[141] *Companion*, 545 F.2d at 312 (arguing that a probationer or parolee who is wrongfully denied his right to a preliminary hearing may be entitled to a dismissal of the petition for revocation of probation or parole respectively, thereby leading to the prisoner's release from custody).

[142] *See id.* at 312-13 (discussing the *Gerstein* Court's contention that although due process requires a prompt probable cause determination within a reasonable time following an arrest, failure to ascertain probable cause for detainment is not enough to vacate a subsequent conviction). *See Gerstein*, 420 U.S. at 126.

[143] *Companion*, 545 F.2d at 313.

[144] *Id.*

[145] *Id.*

[146] *Id.* (citing United States *ex rel.* Hahn v. Revis, 520 F.2d 632, 639 (7th Cir. 1975)).

[147] *Id.* at 313.

[148] Fed. R. Crim. P. 32.1(b)(1)(A).

[149] *Id.*

[150] *Id.*

[151] *Id.* at (b)(1)(B).

[152] *Id.* at (b)(1)(B)(i-iii).

[153] *See* Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973) (referencing Gagnon's extension of a preliminary hearing to probationers).

[154] *See* United States v. LeBlanc, 175 F.3d 511, 515 (7th Cir. 1999) (describing rule 31.1 as a product of both *Morrissey* and *Gagnon*).

[155] Fed. R. Crim. P. 32.1 (Advisory Comm. Note).

[156] *See, e.g.*, Wortham v. State, 519 P.2d 797, 799 (Alaska 1974); Rockwood v. Super. Ct., 554 P.2d 1281, 1282 (Ariz. Ct. App. 1974); Bryan v. Conn, 530 P.2d 1274, 1275-76 (Colo. 1975); Ringor v. State, 965 P.2d 162, 169-71 (Haw. Ct. App. 1998); State v. Chapman, 721 P.2d 1248, 1252 (Idaho 1986); Pfister v. Iowa Dist. Ct., 688 N.W.2d 790, 796 (Iowa 2004); Brown v. Kan. Parole Bd., 943 P.2d 1240, 1242 (Kan. 1997); Baggert v. State, 350 So. 2d 652, 654 (La. 1977); State v. Sommer, 388 A.2d 110, 111 (Me. 1978); State v. Puleio, 739 N.E.2d 1132, 1134 n.2 (Mass. 2000); Pearson v. State, 241 N.W.2d 490, 492 (Minn. 1976); State v. Kartman, 224 N.W.2d 753, 755 (Neb. 1975); Anaya v. State, 606 P.2d 156, 158 (Nev. 1980); California v. Crump, 433 A.2d 791, 793-94 (N.J. Super. Ct. App. Div. 1981); People *ex rel.* Calloway v. Skinner, 300 N.E.2d 716, 720 (N.Y. 1973); State v. O'Connor, 229 S.E.2d 705, 707 (N.C. Ct. App. 1976); Bekins v. Cupp, 545 P.2d 861, 864 (Or. 1976); State v. Holmes, 375 A.2d 379. 380 (Pa. Super. Ct. 1977); State v. Hill, 630 S.E.2d 274, 276 (S.C. 2006); State v. Ellefson, 334 N.W.2d 56, 57, 58 (S.D. 1983); State v. Bonza, 150 P.2d 970, 971 (Utah 1944); State v. Benjamin, 929 A.2d 1276, 1280 (Vt. 2007); Howie v. State, 283 S.E.2d 197, 200 (Va. 1981); State *ex rel.* Flowers v. Dep't of Health & Soc. Serv., 260 N.W.2d 727, 735 (Wis. 1978).

[157] *See, e.g.*, *Anaya*, 606 P.2d at 158 (noting that the constitutional requirements of *Gagnon* have been codified in Nevada); *Pearson*, 241 N.W.2d at 491 (noting that *Morrissey* and *Gagnon* mandate preliminary hearings).

[158] *Anaya*, 606 P.2d at 157-58.

[159] *See id.* at 158 (noting that the constitutional requirements of *Gagnon* that been codified in Nevada); *e.g.*, *Benjamin*, 929 A.2d at 1280 (noting that Vermont codified a preliminary hearing for probationers in effort to follow the mandate of *Morrissey* and *Gagnon*).

[160] Vt. R. Crim. P. 32.1.

[161] *See, e.g.*, *Ellefson*, 334 N.W.2d at 58 (declaring that a preliminary hearing is not required if a probationer is confined due to other charge); *Pearson*, 241 N.W.2d at 493 (finding a preliminary hearing is unnecessary if the probationer is not incarcerated).

[162] *See, e.g.*, Moody v. Daggett, 429 U.S. 78, 86, n.7 (1976) (holding that a preliminary hearing is not required when the parolee is already incarcerated on a subsequent conviction); North Carolina v. O'Conner, 229 S.E.2d 705, 707 (N.C. Ct. App. 1976) (holding that a preliminary hearing is not required if a probationer is not incarcerated pending his final revocation hearing).

[163] *See, e.g.*, Lay v. La. Parole Bd., 741 So. 2d 80, 87 (La. Ct. App. 1999); State v. Odoardi, 489 N.E.2d 647, 677 (Mass. 1986); *Ellefson*, 334 N.W.2d at 58; Ringor v. State, 965 P.2d 162, 170 (Haw. Ct. App. 1998).

[164] *Moody*, 429 U.S. at 86, n.7 (1976).

[165] *See, e.g.*, Fay v. Commonwealth, 399 N.E.2d 11, 15 (Mass. 1980); *Pearson,* 241 N.W.2d at 493; State v. Malbrough, 615 P.2d 165, 166 (Kan. Ct. App. 1980); *O'Conner*, 229 S.E.2d at 707.

[166] *Fay*, 399 N.E.2d at 15 (citing United States v. Sciuto*,* 531 F.2d 842, 846 (7th Cir. 1976)). *See also* Stefanik v. State Bd. of Parole*,* 363 N.E.2d 1099, 1102, 730-731 (Mass. 1977) (explaining the probable cause hearing satisfies the preliminary hearing requirements); United States v. Strada, 503 F.2d 1081, 1084 (8th Cir. 1974) (contending that the preliminary hearing is needed to protect against the serious deprivation of liberty that occurs when a parolee is arrested for a violation).

[167] *See e.g.*, *Malbrough*, 615 P.2d at 167 (holding that a preliminary hearing is not required when the probationer is not in custody because the denial of the hearing does not violate due process); *Pearson*, 241 N.W.2d at 493 (holding that a preliminary hearing was not needed because the probationer was not in custody).

[168] *Moody*, 429 U.S. at 86, n.7 (reiterating that when a parolee in custody because of a subsequent offense due process is not violated by the lack of a preliminary hearing for parole revocation).

[169] *See, e.g.*, State v. Hunt, 330 N.E.2d 883, 888 (Ill. App. Ct. 1975); Wilson v. State, 403 N.E.2d 1104, 1105 (Ind. Ct. App. 1980); Presley v. State, 48 So. 3d 526, 530 (Miss. 2010); State v. Delaney 465 N.E.2d 72, 75 (Ohio 1984); State v. Holcomb, 360 S.E.2d 232, 235 (W. Va. 1987).

[170] *See Wilson*, 403 N.E.2d at 1105 (holding that due process only requires that no unfairness result from denial of preliminary hearing); *Hunt*, 330 N.E.2d at 887 (stating that due process does not require that a defendant benefit from the denial of a timely preliminary hearing, but only that no unfairness result from it).

[171] *Hunt*, 330 N.E.2d at 887-88.

[172] *See, e.g.*, *Presley*, 48 So. 3d at 530 (finding that because the probationer was allowed to be fully heard on the issue at the probation revocation

hearing he was not prejudiced by the denial of a preliminary hearing); *Holcomb*, 360 S.E.2d at 235 (stressing that the probationer was not prejudiced because he would have been incarcerated regardless of the outcome of the revocation hearing); *Delaney*, 465 N.E.2d at 75 (providing that if the probationer had shown there were sources who were no longer available for the final revocation hearing he may have been able to show he was prejudiced); *Wilson*, 403 N.E.2d at 1105 (articulating that a probationer's revocation will only be set aside if it can be shown that the denial of a prerevocation hearing resulted in prejudice); *Hunt*, 330 N.E.2d at 888 (contending that because the defendant failed to show that he was prejudiced he was not harmed by the denial of the prerevocation hearing).

[173] *Delaney*, 465 N.E.2d at 75.

[174] *Wilson*, 403 N.E.2d at 1106 (quoting Richardson v. N.Y. State Bd. of Parole, 41 A.D.2d 179, 181 (N.Y. App. Div. 1973)).

[175] *See Presley*, 48 So. 3d at 529 (explaining that the denial of a preliminary hearing must be evaluated because an illegal detention by itself does not require a subsequent conviction to be reversed); *Delaney*, 465 N.E.2d at 75 (determining that the probationer's time served in jail and his incarceration before the final evidentiary hearing did not require his final provocation hearing decision be reversed).

[176] Gerstein v. Pugh, 420 U.S.103, 119 (1975).

[177] *See Presley*, 48 So. 3d at 530 (finding that the defendant violated his suspended sentence and revoked his probation thus was afforded due process and was not harmed by the failure to have a preliminary hearing).

[178] State v. Hunt, 530 N.E.2d 883, 888 (Ill. App. Ct. 1975) (providing that prejudice does not occur simply by not complying with a procedure if the failure is constitutionally harmless).

[179] *Compare* Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991) *with* Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973).

[180] 500 U.S. 44 (1991).

[181] *Riverside*, 500 U.S. at 57.

[182] *See id.* at 56 (holding that generally jurisdictions that make probable cause determinations within forty-eight hours will withstand challenges made by defendants); *See, e.g.*, Haw. Rev. Stat. § 803-9 (West 2012) (requiring arrestees to be released if they are arrested for forty-eight hours without being presented to a magistrate judge for examination); Mo. Ann. Stat. § 544.170 (West 2012) (requiring arrestees to be released if a probable cause determination has not occurred within 20 hours); Ga. Code Ann § 17-4-62 (West 2011) (requiring arrestees to be released if arrested without warrant and not brought in front of judge within 48 hours). These statutes essentially provide a statutory remedy of release for *Riverside/Gerstein* violations. However, the U.S. Supreme Court has explicitly refrained from articulating the constitutional remedy for a *Riverside*/*Gerstein* violation. *See* Powell v. Nevada, 511 U.S. 79, 84-85 (1994) (deciding that though the defendant was held for four days without a probable cause review done by a magistrate, he was not necessarily entitled to be released). Furthermore, the Court held in *Gerstein* that an "illegal . . . detention does not void a subsequent conviction." *Gerstein*, 420 U.S. at 119. Thus, arrestees in states that do not provide statutory remedies for *Riverside*/*Gerstein* violations may not have a definitive remedy. However, they can still make a motion to the court that they should be released once 48 hours has transpired without a *Gerstein* hearing, since the right to a hearing within 48 hours *is* a constitutional right—regardless if the U.S. Supreme Court has ordained a specific remedy. Since a probationer is not similarly guaranteed a time frame after which he can claim a constitutional due process violation, he does not have the same range of protection as an arrestee under *Gerstein*.

[183] *Gerstein*, 420 U.S. at 119.

[184] *See* n.185. Of course, after the arrestee is released he could still face criminal charges if the prosecution files an information or indictment. After a *Riverside*/*Gerstein* violation, he would just essentially be released on a recognizance bond until his later court date.

[185] *See* 67A C.J.S. *Parole and Probation* § 69 (explaining that a warrant for the parole violation should be executed within a reasonable time and diligence).

[186] Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973) (stating that at the preliminary hearing a determination is made to as to whether there is probable cause to find the parolee committed a violation of his parole).

[187] *Id.* at 786.

[188] *See* State v. Myers, 545 P.2d 538, 544 (Wash. 1976) (requiring a prompt determination of the final revocation); Pickens v. State, *779 P.2d 596, 598 (Okla. Crim. App. 1989) (requiring the probation revocation hearing to occur within ten days of probationer's arrest);* Moore v. Stamps, 507 S.W.2d 939, 951 (Mo. Ct. App. 1974) (allowing the "factual determination and the value-judgment determination" for parole revocation to be combined into one hearing).

[189] *See Pickens*, 779 P.2d at 598 (concluding the revocation hearing must occur within twenty days of the probationer's arrest).

[190] *Id. at 597* (quoting Morrissey v. Brewer, 408 U.S. 471, 485 (1972)).

[191] *Id. at 598.*

[192] 545 P.2d 538 (Wash. 1976).

[193] *Myers*, 545 P.2d at 544.

[194] *Id.*

[195] *Id.*

[196] Morrissey v. Brewer, 408 U.S. 471, 485 (1972).

[197] *Id.* at 488.

[198] *Id.*

[199] *See id.* at 477 (establishing that the purpose of parole is to help individuals re-enter society while simultaneously lowering the costs to society of keeping individuals incarcerated).

[200] Gerstein v. Pugh, 420 U.S. 103, 114 (1975).

[201] *See* Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 57 (1991) (reiterating that if a probable cause determination does not occur within forty-eight hours of arrest, the government has the burden of showing exigent circumstances existed which caused the delay).

[202] *Morrissey*, 408 U.S. at 489.

[203] *See, e.g.*, State v. Buford, 117 Cal. Rptr. 333, 336 (Cal. Ct. App. 1974); McRoy v. State, 320 A.2d 693, 695 n.1 (Md. Ct. Spec. App. 1974); State v. Chavez, 607 P.2d 640, 642-43 (N.M. Ct. App. 1979); State v. Hass, 264 N.W.2d 464, 468 (N.D. 1978).

[204] *McRoy*, 320 A.2d at 695 n.1.

[205] Gagnon v. Scarpelli, 411 U.S. 778, 779-80 (1973).

[206] *Morrissey*, 408 U.S. at 472-473.

[207] *See, e.g.*, *Hass*, 264 N.W.2d at 468-469; *Chavez*, 607 P.2d at 642-43; *Buford*, 117 Cal. Rptr. at 336; *McRoy*, 320 A.2d at 695-96 n.1.

[208] *McRoy*, 320 A.2d at 696 n.1.

[209] State v. Hass, 264 N.W.2d 464, 468 (N.D. 1978); State v. Chavez, 607 P.2d 640, 642 (N.M. Ct. App. 1979); McRoy v. State, 320 A.2d 693, 695 n.1 (Md. Ct. Spec. App. 1974).

[210] *See McRoy*, 320 A.2d at 698 (establishing that conducting preliminary hearings would "strain technical due process").

[211] *Buford*, 117 Cal. Rptr. at 336.

[212] *Id.* at 336-37.

[213] *Id.*

[214] *Id.* at 337.

[215] *See* Gagnon v. Scarpelli, 411 U.S. 778, 782 (1973); *Buford*, 117 Cal. Rptr. at 336-37.

[216] *Buford*, 117 Cal. Rptr. at 337.

[217] *Id.* at 337.

[218] *Id.*

[219] *See Gagnon*, 411 U.S. at 789-80 (indicating that the Wisconsin Department of Public Welfare revoked the individual's probation); Morrissey v. Brewer, 408 U.S. 471, 472-73 (1972) (explaining the Iowa Board of Parole revoked the individual's parole).

[220] *See Gagnon*, 411 U.S. at 780 (finding that the probationer was arrested in Deerfield, Illinois while his probation was revoked in Wisconsin); *Morrissey*, 408 U.S. at 472-73 (finding that the parolee's parole was revoked in Iowa but he was placed in custody about 100 miles from his home).

[221] *Buford*, 117 Cal. Rptr. at 336-37.

[222] *See Gagnon*, 411 U.S. at 781 (reiterating the seriousness of the loss of liberty that occurs with the revocation of parole and thus due process must be met); *See also Morrissey*, 408 U.S. at 486 (emphasizing the need for an unbiased person to evaluate if parole has been violated, whether that person be a judicial officer or administrative officer).

[223] *See generally* Moody v. Daggett, 429 U.S. 78 (1976).

[224] *See Morrissey*, 408 U.S. at 489 (listing the minimum requirements due process demands for a preliminary hearing for parole revocation).

[225] *Id.*

[226] *Id.*

[227] McRoy v. State, 320 A.2d 693, 696 n.1 (Md. Ct. Spec. App. 1974).

[228] *Id.*

[229] *Id.* at 698.

[230] *Id.* at 696.

[231] *Id.*

[232] Morrissey v. Brewer, 408 U.S. 471, 487 (1972).

[233] *See* Gerstein v. Pugh, 420 U.S. 103, 121-22 n.22 (1975) (noting that the revocation hearings may offer the parolee or probationer less protection than the criminal process which has violations defined by statute and charges can only be brought if there is evidence of probable cause).

[234] *See* Gagnon v. Scarpelli, 411 U.S. 778, 785 (1973) (articulating that when a probation officer recommends revocation there is a shift in his attitude towards the probationer).

[235] , Armstrong v. State, 312 S.E.2d 620, 623 (Ala. 1975); State v. Baxter, 563 A.2d 721, 725 (Conn. App. Ct. 1989); State v. Griffith, 331 So. 2d 313, 315 (Fla. 1976); McElroy v. State, 276 S.E.2d 38, 40 (Ga. 1981); Ware v. State, 224 S.E.2d 873, 875 (Ga. Ct. App. 1976).

[236] *Baxter*, 563 A.2d at 727.

[237] Black v. Romano, 471 U.S. 606 (1985).

[238] *Baxter*, 563 A.2d at 727 (citing *Black*, 471 U.S. at 611 (1985)).

[239] *Id.* (quoting *Black*, 471 U.S. at 611 (1985)).

[240] *See id.*

[241] *Black*, 471 U.S. at 615.

[242] *See id.* at 609 (finding that two months later the probationer was arrested for leaving the scene of a car accident).

[243] Griffin v. Wisconsin, 483 U.S. 868 (1987).

[244] *See Griffin*, 483 U.S. at 878 (stating that the search of the home was permissible because it satisfied the reasonableness test of the Fourth Amendment).

[245] *Baxter*, 563 A.2d at 728 (quoting *Griffin*, 483 U.S. at 873-874).

[246] *Id.*

[247] *See Griffin*, 483 U.S. at 870 (defining the issue before the court as whether the search of the probationer's home without a warrant violated the Fourth Amendment).

[248] *See* Gagnon v. Scarpelli, 411 U.S. 778, 781 (1973) (emphasizing the importance of affording a parolee due process during the revocation process because of the serious loss of liberty the parolee faces).

[249] *Id.* at 781-82.

[250] McElroy v. State, 276 S.E.2d 38, 40 (Ga. 1981).

[251] *Id.*

[252] *Id.*

[253] *Id.*

[254] *Id.*

[255] *Id.*

[256] *McElroy*, 276 S.E.2d at 40.

[257] *Id.* at 41 (citing Ware v. Georgia, 224 S.E.2d 873, 876 (1976)). .

[258] *Id.*

[259] Gagnon v. Scarpelli, 411 U.S. 778, 781–82 (1973) (finding that because there was no difference between parole and probation hearings, a probationer should also be given two hearings).

[260] *Id.* at 785 (emphasizing it is in the interest of the State to ensure there is an accurate finding of facts before the probationer's liberty is taken away and he is taken from the community unnecessarily).

[261] Morrissey v. Brewer, 408 U.S. 471, 479 (1972).

[262] *Id.* at 485.

[263] *Id.*

[264] *Id.* 484-488 (explaining the requirements for the two parole revocation hearings—preliminary and final).

[265] *See id.* at 485 (reiterating the difference in time between when the parolee is arrested and the case is reviewed by the parole board).

[266] *See id.* (mandating that a "minimal inquiry" into the parole violation occur soon after arrest so that information will be more readily available).

[267] *See* Gagnon v. Scarpelli, 411 U.S. 778, 781-82 (1973) (indicating the parolee is entitled to two hearings when arrested).

[268] *E.g.*, United States v. Scott, 850 F.2d 316, 391 (7th Cir. 1988); United States v. Rifen, 634 F.2d 1142, 1143 (8th Cir. 1980); United States v. Companion, 545 F.2d 308, 312 (2d Cir. 1976); Clark v. Wyrick, 538 F.2d 1327, 1329 (8th Cir. 1976).

[269] *Morrissey*, 408 U.S. at 488.

[270] *See id.* at 485 (stating that a preliminary hearing, which determines probable cause, is necessary for due process).

[271] Moody v. Daggett, 429 U.S. 78, 86 (1976) (noting a preliminary hearing is unnecessary when the parolee is incarcerated for a subsequent conviction).

[272] *Morrissey*, 408 U.S. at 499.

[273] Gerstein v. Pugh, 420 U.S. 103, 121 (1975) (acknowledging that the goal of the United States' criminal justice system is to prevent unjust convictions, which results in deprivation of liberty).

[274] Cnty. of Riverside v. McLaughlin, 500 U.S. 44, 57 (1991).

[275] 18 U.S.C. § 3060 (2012).

[276] *See* Gagnon v. Scarpelli, 411 U.S. 778, 781 (1973) (holding that two hearings ensure the requirements of due process are met).

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The Whole is Greater than the Sum of its Parts: *Maynard*, *Jones*, and the Integration of GPS and the Fourth Amendment

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Introduction

In 2004 and 2005, police investigated nightclub owners Antoine Jones and Lawrence Maynard for suspected narcotics offenses.[1] As part of their investigation, police installed a Global Positioning System (GPS) tracking device on Jones's automobile without a valid warrant.[2] Police left this device in place for twenty-eight days before retrieving it and analyzing the GPS-generated data.[3] At trial, the prosecution used this data to establish a pattern that showed both the existence of a criminal conspiracy and Jones's participation in that conspiracy.[4] On appeal, in *United States v. Maynard*, the D.C. Circuit held that the collection of GPS data over twenty-eight days constituted a search subject to the protections of the Fourth Amendment of the U.S. Constitution.[5] The D.C. Circuit avoided the pitfalls inherent in analogizing modern technology to its predecessors and instead looked at GPS technology and the Fourth Amendment with comparatively fresh eyes.[6]

The Supreme Court upheld the D.C. Circuit's decision in *United States v. Jones* on grounds different than those used by the D.C. Circuit.[7] However, since Justice Sotomayor both joined with the majority opinion and filed a separate concurrence, *Jones* also appears to offer strong support for the analysis in *Maynard*.[8] This article proposes that a capability-based warrant requirement for new technologies, such as GPS, will best allow for the implementation of the *Maynard* analysis in a manner that addresses the concerns raised in *Jones*'s majority opinion.[9] Adoption of a capability-based warrant requirement would preserve constitutionally protected privacy interests against government intrusion without unduly burdening the police in their investigation of criminal activity.

Part I provides an overview of Fourth Amendment jurisprudence in relation to technological development. Part II provides a historical overview of GPS and also analyzes the jurisprudence of both federal and state courts regarding GPS tracking. Part III discusses *Maynard*'s facts, examines the reasoning behind the D.C. Circuit's decision, analyzes the Supreme Court's decision in *Jones*, and examines post-*Maynard* GPS jurisprudence. Finally, Part IV proposes the use of a capability-based warrant requirement in order to implement the key holdings of *Maynard* without unduly burdening law enforcement.

I. The Intersection of the Fourth Amendment and Technological Development

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[10] While seemingly straightforward, courts have often faced difficulties when applying the Fourth Amendment to new or emerging technologies.[11] To understand the current state of jurisprudence regarding tracking technologies and the Fourth Amendment, it is useful to examine the historical development of law in this area.

A. Early Fourth Amendment Jurisprudence: Protecting Property from Intrusion

Among the first technological developments impacting the Fourth Amendment were methods of intercepting electronic communications. In the early twentieth century, the Supreme Court addressed this issue when Roy Olmstead attempted to invoke Fourth Amendment protections against a wiretap installed on his phone line.[12] The Court in *Olmstead v. United States* focused its analysis on whether the government physically

To correctly and effectively apply Katz, courts must compare the new technologies' full suite of capabilities de novo, or else risk the unintentional curtailment of Fourth Amendment protections.

invaded a protected space; the Court held that since the wiretap was installed in a public area—the phone lines outside of the defendant's home—his phone conversations were not protected by the Fourth Amendment.[13] For approximately four decades, courts used this "physical penetration" analysis, which required physical penetration of a protected space, in order to determine whether Fourth Amendment protections applied.[14]

B. The Two-Prong *Katz* Test: From Trespass to Privacy

In *Katz v. United States*, the Supreme Court abandoned *Olmstead*'s "physical penetration" analysis, focusing on protected places, and declared instead that "the Fourth Amendment protects people, not places."[15] In *Katz*, as in *Olmstead*, police listened to phone calls made by the defendant from a public phone booth without physically penetrating the phone booth itself.[16] The Court acknowledged that "the absence of such penetration was at one time thought to foreclose further Fourth Amendment inquiry."[17] However, drawing on its jurisprudence in the years following the *Olmstead* decision, the Supreme Court shifted the focus from places protected by the Fourth Amendment to whether the Government had violated a person's reasonable expectation of privacy.[18] In his concurrence, Justice Harlan formulated a two-prong test that examined whether "a person . . . exhibited an actual (subjective) expectation of privacy, and, second, whether that expectation [was] one that society is prepared to recognize as 'reasonable.'"[19]

Subsequent decisions of the Supreme Court have continued to use Justice Harlan's two-prong test when dealing with Fourth Amendment issues.[20] Professor Renée Hutchins noted that courts that have applied Justice Harlan's two-prong *Katz* analysis have generally focused on the second prong of that test: whether the expectation of privacy is one that society is prepared to recognize as reasonable.[21] In contrast, courts have largely satisfied the first prong by any affirmative steps that would indicate an actual, subjective expectation of privacy.[22]

Some scholars criticize the two-prong *Katz* test by asserting that it allows the Court to subjectively define an "objective expectation of privacy" according to its own preconceptions or because it creates a right to privacy not explicitly stated in the Fourth Amendment.[23] While these criticisms have some validity, they miss the larger point. *Katz* does not establish a general right to privacy, but rather protects individuals from "certain kinds of governmental intrusion."[24] When confronted with technology that allows for intrusions not possible when the Constitution was written, the Court has struggled to fit those technologies into previously existing Fourth Amendment jurisprudence, especially when determining whether those technologies violated a reasonable expectation of privacy.[25]

Partially, this is due to the difficulty in defining exactly what a reasonable expectation of privacy is.[26] However, a greater challenge emerges due to the tendency of some courts to analogize new technologies to older ones.[27] Analysis by analogy creates the danger of ignoring or minimizing additional capabilities that older technologies lacked, as courts focus on the similarities instead of the differences. To correctly and effectively apply *Katz*, courts must compare the new technologies' full suite of capabilities *de novo*, or else risk the unintentional curtailment of Fourth Amendment protections.

C. Applying *Katz* to Other Technological Developments

While *Katz* dealt with applying Fourth Amendment protections to wiretaps of phone conversations, the Supreme Court has applied Justice Harlan's two-prong test to other types of new technology.[28] When applying the Fourth Amendment to a new technology, the Court's analysis of the second prong will vary greatly depending on the nature of that technology. One category involves cases dealing with what could be classified as *extra-sensory* technologies: technology granting perceptions above and beyond those normally possessed by human beings.[29] The other category involves technology that does not replace human senses, but rather *supplements* or *enhances* them.[30]

1. Extra-Sensory Technologies: More than Merely Human

In the 2001 case of *Kyllo v. United States*, federal law enforcement investigated the petitioner, who was suspected of growing marijuana inside his house.[31] Such activities required the use of high-intensity lamps generating significant amounts of heat.[32] From a public road, police officers used a thermal imager to determine that certain areas of the house were significantly hotter than the remainder of the house and other houses in the neighborhood.[33] On review, the Supreme Court addressed

the question of whether using the thermal imager constituted an unwarranted search of the petitioner's home in violation of the Fourth Amendment.[34]

In a 5-4 decision, the Supreme Court held that "where… the Government uses a device that is not in general public use, to explore details of the home that would previously have been unknowable without physical intrusion, the surveillance is a "search" and is presumptively unreasonable without a warrant."[35] While *Kyllo* appears to set a relatively high bar for the use of extra-sensory technologies, its holdings are actually quite limited. First, it limits itself to the use of technology to observe homes.[36] Second, it restricts itself to devices that are "not in general public use."[37]

However, the Court applied the *Kyllo* analysis to a case involving the use of a drug-sniffing dog in *Illinois v. Caballes*.[38] In that case, the Court declined to extend the privacy protection from *Katz* to dog sniffs, but clarified that the central element in *Kyllo* was "the fact that the device was capable of detecting lawful activity."[39] Additionally, the Court, framing its reasoning in terms suited to the second prong of Justice Harlan's *Katz* analysis, noted that it was a "legitimate expectation that information about perfectly lawful activity will remain private."[40] The Court thus expanded its holding from *Kyllo*, shifting the focus from a question of whether the extra-sensory technology was used to observe a home and was in general public use, to the question of whether the extra-sensory technology could detect lawful activity subject to a legitimate expectation of privacy.[41]

2. *Supplementary Technologies: New Ways to Perform Old Tricks*

The Court also applied Justice Harlan's two-prong analysis from *Katz* to technologies that merely supplement human senses instead of replacing them. In those types of cases, the Court focused its attention on how that technology was used.[42] Once it classified a technology as supplementary, the Court then proceeded as if the technology were not present.[43] For example, when dealing with aerial surveillance, the Court viewed flight as being no different than any other mode of transportation, and simply asked the question of whether the police were in a lawfully permissible position when they made their observations.[44]

Technologies used to track suspects have generally been classified as supplementary technology by the Court. In the seminal case of *United States v. Knotts*, the Court placed the use of those tracking technologies in the context of the Fourth Amendment.[45] The Supreme Court ultimately approved the holdings of many circuits that had allowed warrantless installation of tracking "beepers" on suspects' automobiles and other items within the suspect's possession.[46] In *Knotts*, police placed a "beeper" inside a container of chloroform, commonly used to manufacture methamphetamines, which had been sold to the defendant.[47] The beeper was a battery-powered device that emitted a weak radio signal, allowing police equipped with a receiver to detect when the beeper was nearby.[48]

The *Knotts* Court categorized the beeper as a means of following the defendant on public streets and highways and noted the diminished expectation of privacy in those circumstances.[49] The Court concluded that the beeper only supplemented the police officers' senses, making them more efficient without providing them with information they could not have secured without the use of the beeper.[50] The Court thus saw no reason to treat an electronic beeper any differently than a telescope or a searchlight, both of which had been permitted in prior decisions.[51]

A year after the Supreme Court decided *Knotts*, it revisited the issue in *United States v. Karo*.[52] In that case, law enforcement agents placed a beeper in a can of ether, which had been purchased by the suspect.[53] The agents then proceeded to track the movement of the ether through both visual surveillance and monitoring the beeper's transmissions as it moved between three different houses before finally ending up in a commercial storage facility.[54] Agents used the beeper, subpoenaed records from the storage facility, and their own sense of smell to locate the ether within that storage facility.[55] Several days later, after the ether had been removed from the facility without detection, agents traced the beeper signal to another storage facility and located the exact location of the ether by smell.[56]

Agents then monitored the ether via closed-circuit video, and several months later observed the cans being removed from the locker and loaded into a pickup truck.[57] The agents located the truck, using a combination of visual and beeper surveillance, and followed the truck from one residence to another.[58] At the final residence, agents used the beeper's signal to verify that the can of ether was inside the house.[59] Based partially on information "derived through use of the beeper," agents applied for and received a warrant to search that house.[60]

The Supreme Court focused its analysis in *Karo* on whether using the beeper to locate items inside a private residence violated the Fourth Amendment rights of those with a privacy interest in that residence.[61] The key fact in the Court's analysis was that the Government used "an electronic device to obtain information that it could not have obtained by observation from outside the curtilage of the house."[62] The Court distinguished *Karo* from *Knotts* by pointing out that the information provided by the beeper in *Knotts* was available to anyone in the public who had observed the suspect's motions, while in *Karo* the beeper provided information that could not have been visually verified absent a search warrant.[63]

Interestingly, the technologies used in *Knotts* and *Karo* were functionally identical.[64] Despite the functional equivalency of the technologies, the Court came to different results in *Knotts* and *Karo*.[65] It can thus be seen that the Court, when evaluating technology under the Fourth Amendment, has been less

concerned with the type of technology used than with how that technology was used.[66] However, this focus on how technology is used in the context of a particular case means that *other* uses of that technology, if not implicated by the case at hand, have largely been ignored by the Court. With GPS in particular, lower courts have often ignored this distinction and have seemed to assume that prior approval of a particular use confers a blanket approval of GPS technology as a whole.[67]

II. GPS's Development History, Technological Capabilities, and Legal Controversies

The 1991 Persian Gulf War demonstrated the overwhelming superiority of the U.S. military on the modern battlefield.[68] The Iraqi military had set up strong defenses in the south, but, believing the western desert to be unnavigable and a large-scale attack by coalition forces from that direction impossible, had left their western flank largely unprotected.[69] They were therefore unprepared for the arrival of two full army corps, whose unexpected appearance greatly hastened the collapse of the Iraqi military.[70] This coordinated movement of coalition forces through the Iraqi and Saudi Arabian deserts was made possible by a relatively new technology: GPS.[71]

A. The History and Capabilities of GPS

GPS is a space-based radionavigation system, owned by the U.S. Government, that provides "positioning, navigation, and timing services to military and civilian users on a continuous worldwide basis."[72] Three separate elements make up GPS: (1) satellites in Earth orbit; (2) ground-based control and monitoring stations; and (3) GPS receivers.[73] The GPS satellites broadcast a signal that can be picked up and identified by GPS receivers, which can then accurately calculate a three-dimensional position and the time.[74]

GPS was initially conceived and developed as a military project, but in 1983, President Reagan announced that GPS would be opened to civilian use.[75] Since then, successive presidents have elevated the importance of non-military GPS users in the planning and administration of GPS.[76] GPS is currently used in a multitude of civilian and military applications, and new uses of GPS are constantly being invented.[77]

GPS allows for determination of a receiver's exact position and time anywhere on the planet.[78] Basic GPS receivers can accurately determine position to within one or two meters, but enhanced GPS receivers can achieve accuracy to within inches.[79] While GPS is commonly referred to as a tracking system, GPS can be more accurately described as a location system.[80] On its own, a GPS receiver does nothing except determine the time and position of the receiver.[81] Only when the GPS receiver is integrated with some other device can the information be viewed, stored, broadcast, or used for some other purpose.[82]

For example, General Motors' popular OnStar system, installed in many of their vehicles, features an integrated GPS receiver[83] that allows the service to locate the vehicle, give directions, or dispatch emergency services if necessary.[84] Rental car companies have attempted to use a GPS receiver in conjunction with an event data recorder in order to monitor when their vehicles exceeded the speed limit.[85] Law enforcement agencies, in particular, have also embraced the use of integrated GPS receivers to track vehicular movement.[86]

B. Legal Controversies of GPS Tracking Jurisprudence

Courts have not been blind to the controversies surrounding the use of GPS by police to track vehicular movement. Federal courts from multiple circuits have heard cases dealing with the Fourth Amendment implications of GPS tracking.[87] Additionally, state courts have also dealt with GPS-related issues and have sometimes come to different conclusions than have the federal courts.[88]

1. Federal Jurisprudence Regarding GPS Tracking

Until the D.C. Circuit issued its decision in *United States v. Maynard*, federal court jurisprudence dealing with the issue of police using GPS to track vehicular motion had been remarkably uniform. One of the first cases involving GPS to be reviewed by a federal appellate court was the 1999 case of *United States v. McIver*.[89] In that case, police, acting without a warrant, installed both a GPS receiver and an older "beeper" tracking system underneath a suspect's automobile to track the movement of suspected marijuana farmers.[90] The installation of both a GPS receiver and the beeper received only cursory mention in the *McIver* decision, as the defendant's argument consisted solely of the contention that the warrantless placement of the tracking devices on his automobile constituted a seizure.[91] The *McIver* decision made no serious discussion of the privacy implications of GPS surveillance, as the defendant did not even attempt to raise that issue at trial.[92]

The focus on the car owner's property interest, as opposed to privacy interest, is in line with *Knotts*, which conclusively denies the existence of any reasonable expectation of privacy in a person's movement on public highways.[93] However, the *McIver* decision made a critical assumption: that GPS and beeper technology were essentially the same. It is true that the police in *McIver* used, or attempted to use, the GPS receiver in the same way that they did the beeper, and so a deeper examination of GPS was perhaps not warranted. Unfortunately, this shortcoming would be carried on in later decisions that also failed to examine or note the differences between GPS receivers and beepers.[94]

Federal courts largely ignored the privacy implications of GPS technology as it applied to long-term surveillance and instead analogized GPS to older "beeper" technology from Knotts. However, dicta from some decisions indicated that federal courts were not entirely blind to the potential dangers of GPS tracking technology.

In *United States v. Pineda-Moreno*,[95] the Ninth Circuit took a slightly deeper look at GPS tracking technology. The bulk of the Ninth Circuit's decision in that case focused on the installation of the GPS receiver, which had occurred while the vehicle was parked in the defendant's driveway, part of the curtilage of his home.[96] However, the defendant also attempted to argue that the use of the GPS receiver to track his movements failed to meet the standard set in *Kyllo* because the law enforcement agents used an extra-sensory technology not available to the general public to obtain their information.[97] The Ninth Circuit reasoned that *Kyllo* did not prohibit the warrantless use of advanced technology *per se*, but rather prohibited the warrantless use of advanced technology as "a substitute for a search unequivocally within the meaning of the Fourth Amendment."[98] Since the GPS receiver in *Pineda-Moreno* was used only to provide "information the agents could have obtained by following the car," the Ninth Circuit held that the *Kyllo* holding did not apply.[99]

In short, the federal judiciary has historically taken a largely permissive attitude towards the unwarranted use of GPS receivers to track suspects. Federal courts largely ignored the privacy implications of GPS technology as it applied to long-term surveillance and instead analogized GPS to older "beeper" technology from *Knotts*. However, dicta from some decisions indicated that federal courts were not entirely blind to the potential dangers of GPS tracking technology.[100]

3. *State Jurisprudence Regarding GPS Tracking*

Unlike federal courts, state courts have not shied away from considering the privacy implications of GPS tracking technology. Washington, for example, confronted this issue in *Washington v. Jackson*, a homicide case.[101] In that case, police installed a GPS unit with the capability to record data over an extended period of time onto a suspect's car.[102] They later retrieved the GPS unit and used the information to locate the victim's body and other evidence.[103] While the Washington Supreme Court reviewed this case and its privacy implications under the Washington State Constitution,[104] which it noted was "broader than under the Fourth Amendment to the United States Constitution,"[105] the analysis of the Washington Supreme Court is illuminating with respect to its consideration of factors that federal courts have largely ignored.

In particular, the court found that the use of GPS devices was not merely "sense-augmenting" in the same manner as binoculars or flashlights, which help police see clearly what is already exposed to public view.[106] The court noted, "when a GPS device is attached to a vehicle, law enforcement officers do not in fact follow the vehicle."[107] The court also noted that the police left the tracking device in place for two and a half weeks—a length of time that made the possibility of police maintaining uninterrupted, twenty-four hour surveillance unlikely.[108] Most importantly, the court noted that long-term, uninterrupted surveillance allows for the gathering of significant knowledge about an individual's personal life:[109]

> [T]he device can provide a detailed record of travel to doctors' offices, banks, gambling casinos, tanning salons, places of worship, political party meetings, bars, grocery stores, exercise gyms, places where children are dropped off for school, play, or day care, the upper scale restaurant and the fast food restaurant, the strip club, the opera, the baseball game, the "wrong" side of town, the family planning clinic, the labor rally. In this age, vehicles are used to take people to a vast number of places that can reveal preferences, alignments, associations, personal ails and foibles.[110]

These findings led the Washington Supreme Court to hold that a warrant requirement existed before law enforcement officers could legitimately install a GPS tracking system on a suspect's automobile.[111]

While the Washington Supreme Court's decision in *Jackson* was framed in terms of its state constitution, other state courts have come to similar conclusions.[112] The New York Court of Appeals ruled that the placement of a GPS receiver and the collection of data for over two and a half months constituted a search that was presumptively illegal in the absence of a warrant.[113] Although the court's ruling was premised on New York

law,[114] the applicable provisions largely mirror the text of the Fourth Amendment.[115] Thus, while state courts have approached the issue of GPS surveillance in light of state constitutional privacy protections, similar arguments could potentially apply under the U.S. Constitution.

3. *Comparing State and Federal GPS Jurisprudence*

While the differences in the underlying law might explain the divergence between state and federal court decisions, another possible explanation lies in how the courts themselves analyzed the technology of GPS receivers. Federal courts have mostly analogized GPS to older technologies, such as the tracking beepers used in *Kyllo* and *Knotts*.[116] In contrast, some state courts have examined GPS surveillance *de novo*, by considering what the technologies are capable of accomplishing.[117] In other words, while federal courts looked for the similarities between GPS and its predecessors, some state courts have looked instead at the differences between GPS and its predecessors.

Since GPS receivers are inherently a far more flexible system, the potential uses of GPS receivers greatly exceeds that of prior tracking systems, such as beepers.[118] The tracking beepers used in *Knotts* and *Karo* were short-range radio transmitters, incapable of recording data and requiring real-time monitoring by police.[119] In contrast, by coupling a GPS receiver with the proper recording and data storage equipment, a GPS receiver can store data over extended periods of time and requires little to no monitoring on the part of law enforcement.[120] As a result, police can collect far more information than was possible using the older tracking beepers.

The GPS jurisprudence of federal courts, by relying upon the precedent set in *Knotts* and *Karo*, accepted as a base premise that GPS tracking was similar enough to the older tracking beepers that the precedents set in *Knotts* and *Karo* still apply. In contrast, the Washington Supreme Court looked at the potential uses of GPS technologies and concluded that "use of GPS tracking devices is a particularly intrusive method of surveillance, making it possible to acquire an enormous amount of personal information."[121] The highest court of New York found that "GPS is a vastly different and exponentially more sophisticated and powerful technology."[122] This examinations of the differences, rather than the similarities, have given state courts a clearer view of the Fourth Amendment issues implicated by GPS surveillance, which federal courts have largely ignored due to their tendency to equate GPS with older, less capable technologies.

III. *United States v. Maynard* as a Turning Point

When the D.C. Circuit issued its decision in *United States v. Maynard*, it created a circuit split in GPS-related Fourth Amendment jurisprudence.[123] The D.C. Circuit arrived at its decision by examining the issue of GPS technology with reasonably fresh eyes, resulting in consideration of issues that other circuits have either ignored or deferred. In short, the D.C. Circuit's analysis was more akin to that done by state courts; the court looked for differences instead of similarities, but did so entirely within the framework of the U.S. Constitution and federal law. Unfortunately, the Supreme Court's affirmation of *Maynard's* result through *United States v. Jones* failed to conclusively address the issues raised by the D.C. Circuit in *Maynard*.[124] This failure can leave law enforcement officers uncertain as to if, and when, a warrant is required in order to conduct GPS surveillance.

A. *Maynard*'s Background and Procedural History

The arrest of Lawrence Maynard in 2005 followed a relatively straightforward narcotics investigation involving a joint F.B.I.-D.C. Metropolitan Police Task Force.[125] What followed at trial became surprisingly convoluted. Originally, Antoine Jones and several alleged co-conspirators were charged with numerous counts related to narcotics trafficking.[126] Maynard, one of the co-conspirators, pled guilty in June of 2006.[127] The remaining defendants proceeded to trial in October of 2006, and were acquitted on all counts but one, which was later dismissed.[128] The court then granted Maynard permission to withdraw his guilty plea.[129]

Afterwards, Jones and Maynard were charged with a single conspiracy count, proceeding to trial in November of 2007.[130] A jury found them guilty in January of 2008.[131] At this trial, the government relied heavily on the information gathered from a GPS receiver installed on Jones's automobile.[132] Police combined this information with evidence gathered through Jones's cell phone records, in a fashion that "made credible the allegation that he was involved in drug trafficking."[133] Jones and Maynard appealed on several grounds, including the trial court's denial of Jones's motion to suppress evidence gathered through the GPS tracking device.[134]

B. The D.C. Circuit's Analysis in *Maynard*

The D.C. Circuit rejected a simple analogy to the beepers used in *Knotts* when it examined the issue of warrantless GPS tracking. The court looked at the total effect of long-term GPS monitoring and evaluated whether the unwarranted installation of a GPS tracker constituted a search that violated Jones's reasonable expectation of privacy. By doing so, the D.C. Circuit considered issues which federal courts had previously ignored or deferred.[135]

1. *The D.C. Circuit Distinguishes Maynard's Facts from Federal Precedent*

The court began its analysis by answering the question of whether the use of GPS constituted a search. It determined that

Knotts, which had held that "[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another,"[136] was not controlling.[137] Although the *Knotts* decision might have seemed to place vehicular movement completely outside the boundaries of Fourth Amendment protections, the D.C. Circuit noted that the Supreme Court's *Knotts* decision limited itself to the factual situation presented, where a beeper was used to track a vehicle for a single journey from one point to another on a public roadway.[138] The D.C. Circuit also noted that the beeper in *Knotts* provided only "limited information."[139]

In contrast, the police in *Maynard* tracked "Jones's movements 24 hours a day for 28 days as he moved among scores of places."[140] This extended tracking would have been impossible using the tracking beepers from *Knotts*, which required police to remain nearby due to the short range of the beeper's radio transmitter.[141] Only by attaching a GPS receiver to a data storage device could police gather twenty-eight days of location data.[142] The D.C. Circuit further noted that the *Knotts* Court had specifically deferred deciding whether a warrant would be required for continuous, long-term surveillance.[143] It also observed that at least one other circuit, while upholding GPS use, had also identified the limits in the *Knotts* holding.[144]

The D.C. Circuit determined that the issue was not whether the use of GPS technology to track Jones's movement from one place to another constituted a search, but whether the use of GPS to track of all of Jones's movements over the course of twenty-eight days—discovering the "totality and pattern of his movements from place to place"—constituted a search.[145] *Maynard's* fact pattern thus more closely resembled the fact patterns of state cases such as *Jackson* and *Weaver*.[146] This is especially evident in the D.C. Circuit's refusal to analogize long-term GPS surveillance to the antiquated beepers.

2. *The D.C. Circuit Examines the Full Capabilities of GPS*

After determining that *Knotts* did not control, the D.C. Circuit proceeded to investigate whether Jones's movements during the time in which the GPS device was attached to his car were actually exposed to the public.[147] It performed this inquiry because, under *Katz*, "[w]hether an expectation of privacy is reasonable depends in large part upon whether that expectation relates to information that has been 'expose[d] to the public.'"[148] In doing so, the D.C. Circuit began exploring new legal territory—examining whether Jones's movements, over the course of the twenty-eight days that the GPS device was attached to his automobile, were "actually" or "constructively" exposed to the public.[149] The D.C. Circuit noted that Supreme Court decisions have indicated that "actual" exposure depends not on "theoretical possibility, but upon the actual likelihood, of discovery by a stranger."[150] With "actual likelihood of discovery" as the standard, the *Maynard* court then determined that the likelihood that a stranger would observe all of Jones's movements over the course of twenty-eight days was "essentially nil."[151]

The court further examined the possibility that Jones's movements over those twenty-eight days had been constructively exposed, since each individual movement was publicly viewed and thus seeming to fall within the *Knotts* holding that movement from one place to another is exposed to the public. Here the *Maynard* decision is on its most unstable precedential grounds. The D.C. Circuit examined a variety of Supreme Court decisions unrelated to police surveillance, and eventually concluded that the Supreme Court noted a distinction between the whole and the sum of the parts.[152] Although none of those cases dealt with tracking technologies, the D.C. Circuit cited several instances where the Supreme Court had distinguished between individual pieces of information and the aggregation of that information as a cohesive whole.[153]

The D.C. Circuit concluded that Jones's movements had not been constructively exposed because the totality of Jones's movements revealed "far more than the individual movements it comprise[d]."[154] Invoking the "mosaic theory" often used by the Government in national security cases, the D.C. Circuit found that "[p]rolonged surveillance reveals types of information not revealed by short-term surveillance."[155] While relatively novel in federal jurisprudence, the D.C. Circuit essentially followed the reasoning used by the state courts in *Washington v. Jackson* and *People v. Weaver*, except that the D.C. Circuit relied solely on the Federal Constitution.

The D.C. Circuit also found that "[s]ociety recognizes Jones's expectation of privacy in his movements over the course of a month as reasonable."[156] To support this finding, the court referenced a variety of cases where the methods used by police could have revealed not just the information sought, but other personal information beyond the legitimate scope of the police investigation.[157] The court also noted that state laws, while not uniform or conclusive, supported the position that prolonged GPS surveillance violates a reasonable expectation of privacy.[158]

In addition, the D.C. Circuit distinguished GPS from long-term visual surveillance by noting that the Government failed to provide a single example of visual surveillance that would be affected by their holding.[159] The court further noted that equating GPS with visual surveillance "relies implicitly on an assumption" that the means used in an investigation are immaterial when considering whether a reasonable expectation of privacy is violated.[160] The court noted that this assumption was specifically rejected by the Supreme Court in *Kyllo*.[161] However, the D.C. Circuit specifically reserved the question of whether prolonged visual surveillance violated the Fourth Amendment, and limited its holding to the use of GPS to conduct long-term surveillance.[162]

Thus, while the majority opinion ignores the D.C. Circuit's Maynard analysis and resurrects the Olmstead physical trespass analysis, Justice Sotomayor's and Justice Alito's concurrences appear to create a majority in support of the proposition that long-term GPS monitoring violates a reasonable expectation of privacy, thereby implicating Fourth Amendment protections.

C. The Supreme Court "Affirms" *Maynard* in *United States v. Jones*

Maynard was bifurcated in its petitions for certiorari, and the Supreme Court reviewed the portion of the D.C. Circuit's decision that was applicable to Jones in *United States v. Jones*.[163] While all nine Justices voted to affirm *Maynard*, the Supreme Court's opinion was not unanimous; Justices Roberts, Kennedy, Thomas, and Sotomayor joined Justice Scalia's majority opinion, and Justices Kagan, Breyer, and Ginsberg joined Justice Alito's concurrence.[164] Justice Sotomayor filed a separate concurring opinion.[165]

Justice Scalia, writing for the majority, essentially resurrected *Olmstead*'s physical trespass analysis and justified the affirmation of the D.C. Circuit's decision on that basis.[166] In determining that the physical trespass analysis was sufficient, the opinion criticizes the *Katz* reasonable expectation of privacy test as being unnecessarily complicated in situations such as *Jones*, where a physical trespass of a protected space occurred.[167] However, the majority opinion did not invalidate the *Katz* test, but instead resurrected the *Olmstead* physical trespass analysis as an additional means of determining whether the Fourth Amendment was implicated.[168]

Jones appears to leave unanswered the question of whether the D.C. Circuit's analysis in *Maynard* was valid. Instead, *Jones*'s majority opinion criticizes, but does not explicitly overrule, the D.C. Circuit's determination that twenty-eight days of GPS surveillance resulted in a search.[169] The majority opinion thus appears to defer consideration of long-term GPS monitoring for another day.[170]

In contrast, Justice Alito's concurrence criticizes the majority opinion for failing to address the implications of long-term GPS monitoring.[171] Justice Alito's concurrence also utilizes the D.C. Circuit's analysis, concluding that while short-term monitoring is permissible under the Fourth Amendment, longer-term monitoring is not.[172] While Justice Alito does not identify where the boundary between long and short-term monitoring lies, his concurrence also notes that "where uncertainty exists . . . the police may always seek a warrant."[173]

Most curiously, Justice Sotomayor's separate concurrence specifically agrees with Justice Alito in finding that long-term GPS monitoring violates a reasonable expectation of privacy.[174] Thus, while the majority opinion ignores the D.C. Circuit's *Maynard* analysis and resurrects the *Olmstead* physical trespass analysis, Justice Sotomayor's and Justice Alito's concurrences appear to create a majority in support of the proposition that long-term GPS monitoring violates a reasonable expectation of privacy, thereby implicating Fourth Amendment protections.

Such a proposition essentially validates the D.C. Circuit's reasoning in *Maynard* and implies that a warrant requirement exists for long-term GPS surveillance. However, nothing in the *Jones* decision indicates where the boundary between long- and short-term surveillance is located. Thus, courts are left to their own devices in determining when police use of GPS requires a warrant and when it does not.

D. *Maynard's* Fallout in the Federal Courts

The D.C. Circuit's decision in *Maynard* has sparked a variety of responses. Both the Fifth and Seventh Circuits have declined to adopt the D.C. Circuit's reasoning, determining that the factual situation in the cases before them were insufficiently similar to the facts of *Maynard*.[175] However, the Fifth Circuit neither explicitly accepted nor rejected the D.C. Circuit's reasoning in *Maynard*.[176] The Seventh Circuit appeared more accepting, but also failed to explicitly adopt the *Maynard* analysis.[177] At the trial level, *Maynard* has found greater acceptance.[178] However, this acceptance is not universal, as other trial courts have chosen to differentiate their fact patterns to *Maynard's* facts or overtly disagreed with *Maynard's* reasoning.[179]

The district court's decision in *United States v. Sparks*, and the dissent in the D.C. Circuit's *United States v. Jones* denial for a rehearing *en banc*, made similar arguments criticizing the decision in *Maynard.* They both disagreed with *Maynard's* key

holding: that while Jones had no privacy interest in any individual movement, he retained a protected privacy interest in the totality of his movements over the course of an extended period of time.[180] In addition, the *Sparks* decision questioned the practical application of *Maynard*, in particular how a court or police officers could determine when GPS surveillance crosses the line from permissible to impermissible surveillance.[181] Finally, both the *Sparks* decision and the *Jones en banc* dissent questioned the validity of *Maynard's* reservation of whether long-term visual surveillance would also be subject to Fourth Amendment protections.[182]

Sparks' criticism of *Maynard's* practical application is the most compelling.[183] Since the exclusionary rule—the remedy for Fourth Amendment violations—is so severe, courts have attempted to provide simple rules that can be easily understood and followed by law enforcement.[184] While *Maynard's* holding makes it clear that twenty-eight days of GPS surveillance is unacceptable, *Maynard* is unclear as to where the line is drawn.[185] This lack of clarity creates the danger of leaving law enforcement officers in doubt as to when the use of GPS requires a warrant—a factor criticized in several prior Supreme Court decisions.[186]

In addition, *Sparks* and *Jones* also criticized the *Maynard* decision for reserving the question of whether long-term visual surveillance violates the Fourth Amendment.[187] The D.C. Circuit in *Maynard*, however, simply followed the path laid by the Supreme Court in *Knotts*, where the Court specifically reserved the question of whether "twenty-four hour surveillance . . . without judicial knowledge or supervision" would be permissible.[188] Criticizing the reservation in *Maynard* thus implicitly criticizes the *Knotts* decision. Since the argument that warrantless GPS tracking is permissible relies heavily upon *Knotts*, this seems to be a counter-productive argument. The D.C. Circuit was careful not to violate the principles set by *Knotts*, but instead carefully analyzed the *Knotts* decision for the limitations that the Supreme Court itself had set.[189] It also found that these limitations had been recognized by other courts.[190] The court noted that other circuits had failed to address issues with respect to long-term surveillance, due to the failure of the appellants in those cases to raise that argument.[191]

Finally, *Sparks's* and *Jones's* criticism of *Maynard's* finding—that Jones lacked a reasonable expectation of privacy in his individual movements but retained a reasonable expectation of privacy in the totality of his movements—missed the essential point made by the D.C. Circuit. Both *Sparks* and the *Jones en banc* dissent found that the only difference between short-term and long-term GPS surveillance was in the quantity of information gathered, and thus disregarded the "mosaic theory" invoked by the D.C. Circuit.[192] However, the essential point of *Maynard* was that long-term GPS surveillance increases not just the quantity of facts gathered, but also *qualitatively* increases that knowledge by revealing personal information impossible to establish from short-term GPS surveillance.[193] By ignoring this qualitative increase in the efficacy of long-term surveillance, *Sparks* and *Jones* failed to address the D.C. Circuit's identification of Supreme Court precedent establishing that aggregated information can have greater privacy protections than the individual parts.[194]

The "mosaic theory" is an argument normally raised by the Government during cases related to national security, to justify the collection or protection of seemingly trivial data that could create a larger, more complete picture.[195] Challenging the application of the mosaic theory in *Maynard* thus implicitly challenges the use of the mosaic theory by the Government as well. Unless national security interests supersede Constitutional protections, it would seem unlikely that a theory used by the Government would somehow cease to function when used against it.

In short, the criticisms made by the *Sparks* decision and the *Jones* dissent are less about the legal issues involved than they are about social policy. The question, as some scholars have recognized, is essentially whether the Fourth Amendment has relevance when applied to modern technology.[196] While legal scholars may argue about how to best protect privacy in the face of developing technologies, it is the duty of the courts to apply the existing constitutional framework to new technologies such as GPS.[197]

Justice Alito's concurrence in *Jones* notes this exact point, expressing that while a legislative solution would be preferable, courts are forced to deal with new technologies using existing legal doctrine.[198] As such, the most relevant criticism of the D.C. Circuit's *Maynard* decision is in the lack of easily administrable standards regarding when police need a warrant in order to conduct GPS surveillance. Most simply stated, the question becomes where the line should be drawn separating short-term and long-term GPS surveillance.

IV. Refining *Maynard* for General Use

Despite the manner in which *Jones's* majority opinion sidesteps the issue, the concurrences of Justices Alito and Sotomayor strongly indicate that the D.C. Circuit's analysis in *Maynard* was substantially correct.[199] Dismissing *Maynard* due to the lack of easily administrable standards and ignoring its reasoning leaves law enforcement without sufficient guidance regarding long-term GPS surveillance of vehicles within the United States.[200] This result would seem to violate the spirit, if not the letter, of constitutional protections guaranteed by the Fourth Amendment. Therefore, it becomes important to find an objective, easily administrable standard by which law enforcement can know when a warrant is or is not required.

Based on the D.C. Circuit's *Maynard* decision, any such standard should fulfill the following criteria:

> 1) Any standard or rule must not violate the *Knotts* holding that there is "no reasonable expectation of privacy in . . . movements from one place to another."[201]

2) Any standard or rule should protect against government violations of a reasonable expectation of privacy in movements over an extended period of time.[202]

3) The focus of any standard or rule should not be to protect the privacy of any individual movement by a person, but rather to protect against revealing an "intimate picture of his life" as shown by the totality of his movements.[203]

In addition, any standard needs to be easily administrable by law enforcement officers, and would not require them to consult with legal counsel or other similar authorities.[204]

A. Option 1: A Time-Based Warrant Requirement for GPS Surveillance

Since "long-term" and "short-term" are temporal adjectives describing duration, the most obvious standard to use would one based on time, and focused on the length of time that a GPS receiver is installed on a target automobile. Professor Slobogin, in reporting on the standards proposed by the American Bar Association's Task Force on Technology and Law Enforcement, noted that Title III wiretap orders and pen registers have a time-based limitation on their duration.[205] He further noted that this precedent was used by the Task Force to justify their proposed duration for tracking surveillance warrants.[206] In addition, the Ninth Circuit has upheld delayed notification requirements for warrants given sufficient cause.[207] Similarly, a time-based limit could determine when the use of GPS location tracking would require a warrant.[208] The analogy between duration of a search warrant, notification of a search warrant's execution, and the necessity for a warrant itself is inexact, but the principle of setting a time limit to satisfy a Constitutional requirement can apply to any of those situations.

For example, courts could declare that while police officers might be permitted to install a GPS receiver for up to three days on a suspect's vehicle without a warrant, those who wished to maintain surveillance in excess of three days would be required to seek a warrant. A time-based warrant requirement would thus make it simple for police to know when a warrant is required, satisfying the need for a bright-line rule. It would also protect a person from unwarranted, extended GPS surveillance and the inferences that can be drawn from that extended surveillance, while not necessarily protecting any individual movement from discovery by police.

A time-based warrant regime would also be exposed to the criticism that the rule was essentially arbitrary.[209] While the *Jones* concurrences made it clear that twenty-eight days of uninterrupted GPS surveillance was sufficient to invoke the warrant requirement, the D.C. Circuit was unclear as to where the line between long-term and short-term surveillance should be drawn.[210] A court could just as easily declare that the rule was three days, seven days, or fourteen days. Any time-based rule would be open to criticisms such as those made by Professor Albert Alschuler, who stated that "the task of marking the boundary of even a bright line rule usually is not mechanical; and when the rule is artificial, delimiting its boundary becomes a matter of guesswork."[211] Justice Scalia,in *Jones*'s majority opinion, also alluded to the criticism thatany time-based standard is essentially arbitrary.[212] Thus, a temporal, time-based warrant regime for GPS surveillance, while outwardly appearing to satisfy the conditions set forth by the D.C. Circuit and also being easily administrable by law enforcement, would nevertheless be sub-optimal because of its inherent arbitrariness.

B. Option 2: An Intent-Based Warrant Requirement for GPS Surveillance

Some scholars have proposed that police intent should be considered as a factor in the integration of new technologies and Fourth Amendment jurisprudence.[213] Although Fisher's proposal focused on reviewing the use of such technologies at trial,[214] a similar principle could be used to create a warrant regime based on law enforcement intent. When police intend to use GPS surveillance only to track suspects from place to place, no warrant would be required, as the police are only using GPS as they would have used a beeper permitted by *Knotts*.[215] However, if police intend to gather data for the purpose of drawing inferences, as in *Maynard*, a warrant would be needed. Essentially, an intent-based warrant requirement would constitute a standards-based regime that provides guidance for police on when a warrant would be required. This makes it simple for any standard to seemingly satisfy the conditions set by *Maynard*.[216]

However, a standard based on the police officers' intent places an increased emphasis on the professional and legal judgments of the police. This would directly contradict the expressed desire of the Supreme Court for easily administrable rules.[217] In addition, the question emerges as to how the execution of that standard would be reviewed. An action allegedly violating a rule can be reviewed simply, by determining whether or not the rule was violated. In contrast, an action allegedly violating a standard requires an inherently subjective fact-intensive analysis.

A further complication to an intent-based warrant requirement is that the relevance of GPS data may not become evident until trial. In *Maynard*, the D.C. Circuit noted that the Government used the data collected by GPS to establish Jones's participation in a conspiracy.[218] The Government relied on the totality of his movements, and not any one particular movement, to make its case.[219] Under an intent-based standard, had the police intended to use GPS only to establish that Jones's presence at a particular location at a specific point in time, and then only incidentally gathered the evidence needed to establish Jones's participation in a conspiracy, the data collected by GPS would have been admissible. Thus, an intent-based standard provides no motivation for the Government to avoid inadvertent violations of reasonable expectations of privacy. Since this would violate one of the key factors from the D.C. Circuit's decision in *Maynard*,[220] a warrant requirement based on an intent standard would also seem sub-optimal.

C. Option 3: A Capability-Based Warrant Requirement for GPS Surveillance

The *Maynard* analysis of GPS technology essentially re-categorized GPS from a supplementary technology to an extra-sensory technology, based on its ability to collect data in a manner not previously practical.[221] The concurrences of Justices Alito and Sotomayor appear to support this reclassification, as both acknowledge the enhanced capabilities of GPS technology.[222] In *Maynard*, the D.C. Circuit also addressed an issue raised by several scholars, who questioned whether the capability of technology to enable the drawing of inferences from large amounts of data should itself be covered by Fourth Amendment protections.[223] By examining the capabilities of GPS *de novo* instead of by analogy to older technologies,[224] the D.C. Circuit answered this question in the affirmative by identifying differences in capability between GPS and older technologies that allowed it to distinguish *Maynard* from prior cases such as *Knotts*.[225]

While* Maynard *fails to provide the easily administrable rules preferred by the Supreme Court, it provides a solid foundation on which to integrate future technological development with existing Fourth Amendment jurisprudence.

Thus, *Maynard* and the concurrences of Justices Alito and Sotomayor provide the basis for a third and ultimately superior option on which to base a warrant requirement. A capability-based warrant regime would build on the distinction drawn by the Supreme Court between extra-sensory and supplementary technologies.[226] Applying this to GPS, a warrant requirement should be conditioned upon the capability of the GPS system, or more specifically the auxiliary components attached to the GPS receiver that allow police to make use of GPS-derived data.[227]

For example, a GPS receiver might be connected to a transmitter. This transmitter could broadcast an "I am here" signal that would allow police to track a vehicle's movement through virtual checkpoints on a public road.[228] In essence, such a setup would not differ significantly from the beepers used in *Knotts*, as all the GPS system would do is aid in following the subject vehicle on a public roadway.[229] Thus, no warrant would be required for such a configuration. In contrast, police might install a GPS receiver attached to a recording device capable of recording data collected for extended periods of time. Since this configuration is capable of discovering an "intimate picture of life" as shown by the totality of the recorded movements, in violation of *Maynard's* holding,[230] it would require that police seek a warrant before installing it. A capability-based warrant regime thus builds on Supreme Court precedent in a fashion that both creates a bright line rule and satisfies the holdings of the D.C. Circuit in *Maynard*.

In addition, the foundation of the D.C. Circuit's decision in *Maynard* was the application of the mosaic theory to Fourth Amendment jurisprudence and its finding that a reasonable expectation of privacy existed in a *collection* of data. This concern is not limited to GPS technology alone, as scholars have noted that data mining—drawing inferences and conclusions from the computerized analysis of large amounts of data—is another situation where the aggregation of extensive amounts of otherwise public information raises significant concerns about government intrusion into personal privacy.[231] Since the D.C. Circuit limited the scope of its holding to the question of whether long-term GPS surveillance violated the Fourth Amendment's protection against unreasonable search,[232] it is uncertain as to whether *Maynard's* reasoning could apply to other forms of technologically-enabled data aggregation such as data mining. However, a capability-based warrant requirement not only satisfies the concerns of the D.C. Circuit in *Maynard* and the Supreme Court's preference for bright-line rules, but would also create a structure that would ease the future integration of new technology with Constitutional protections.

Conclusion

A majority of Supreme Court justices appear to have supported the D.C. Circuit's analysis in *Maynard*, which examined the issue of whether long-term use of a GPS tracking device on a suspect's automobile constitutes a search subject to the warrant requirements of the Fourth Amendment. By examining GPS and its capabilities in full, the D.C. Circuit identified those areas in which GPS tracking presents issues that other circuits, when analogizing GPS to less capable technologies, either failed to address or deferred for later consideration. While *Maynard* fails to provide the easily administrable rules preferred by the Supreme Court, it provides a solid foundation on which to integrate future technological development with existing Fourth Amendment jurisprudence. The adoption of capability-based

rules for determining when a warrant is required will likely satisfy the Supreme Court's preference for bright-line rules and allow for implementation by law enforcement. *Maynard* thus provides a valuable example for the integration of new technologies into existing Fourth Amendment jurisprudence.

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[1] *See* United States v. Maynard, 615 F.3d 544, 549 (D.C. Cir. 2010).

[2] *See id.* at 567 (explaining that the police obtained a warrant to install the GPS device in D.C., but the warrant expired before the GPS device was placed on the car, and also noting that the GPS device was placed on Jones' automobile while it was in Maryland, rather than while the car was in D.C.).

[3] *See id.*

[4] *See id.* at 567-68 (explaining that the Government was able to portray Jones as guilty of drug trafficking by combining the GPS data records with his cell phone records).

[5] *See id.* at 568.

[6] *See infra* Part III **(**examining the approach taken by the D.C. Circuit in *Maynard* and contrasting it with the decisions of other circuits).

[7] *See* United States v. Jones, 132 S. Ct. 945 (2012) (holding that a violation occurred because of the Government's physical occupation of private property).

[8] *See infra* Section III.C (discussing the majority and concurring opinions in *Jones*).

[9] *See Jones*, 132 S. Ct. at 953-54; *see also infra* Section III. C.

[10] U.S. Const. amend. IV.

[11] *See, e.g.,* Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 Mich. L. Rev. 801, 858-59 (2004) [hereinafter New Technologies] (arguing that legislatures are better suited than the courts to make rules dealing with new or emerging technology. Further noting, however, that legislatively-made rules have a greater susceptibility to special interests groups than do judicially-created rules). *See also* Raymond Shih Ray Ku, *Privacy is the Problem*, 19 Widener L.J. 873, 878 (2010) (noting that the Supreme Court sometimes determines that information-gathering technology is not performing a "search" and so the Fourth Amendment is not implicated); David E. Steinberg, *Sense-Enhanced Searches and the Irrelevance of the Fourth Amendment*, 16 Wm. & Mary Bill Rts. J. 465, 467 (2007) ("Given the inapplicability of the Fourth Amendment, the regulation of powerful new search techniques should come from statutes written by elected legislators.").

[12] *See* Olmstead v. United States, 277 U.S. 438, 464 (1928) (holding that obtaining evidence through the sense of hearing does not constitute a search).

[13] *See id.* at 466 (restricting what constitutes a Fourth Amendment violation to when "there has been an official search and seizure of his person, or such a seizure of his papers or his tangible material effects, or an actual physical invasion of his house 'or curtilage' for the purpose of making a seizure").

[14] *See, e.g.,* Renée McDonald Hutchins, *Tied Up in Knotts*? *GPS Technologies and the Fourth Amendment*, 55 UCLA L. Rev. 409, 424-25 (2007) ("With *Olmstead*, the Court recognized a new constitutional threshold for Fourth Amendment protection—tangible physical intrusion by the government."); *see also* Goldman v. United States, 316 U.S. 129, 134 (1942) (holding that government agents, who used a detectaphone to listen to a conversation held in an adjoining room, without entering the room in which the conversation was held, did not violate the Fourth Amendment).

[15] Katz v. United States, 389 U.S. 347, 351 (1967) (explaining that the question of whether an area is protected under the Fourth Amendment undermines the real issue of the case).

[16] *See id.* at 348 (noting that FBI agents placed an electronic device on the exterior of the phone booth enabling them to listen and record the petitioner's phone conversations).

[17] *Id.* at 352 (explaining that because the FBI's surveillance over the phone booth required no actual physical penetration, this previously would have ended the Fourth Amendment inquiry).

[18] *See id.* at 353 (disregarding the "trespass doctrine" from *Olmstead* and *Goldman* as no longer controlling authority, and holding that the fact that the FBI's electronic device did not physically penetrate the phone booth holds no significance when determining the constitutionality of the Fourth Amendment analysis).

[19] *Id.* at 361 (Harlan, J., concurring).

[20] *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 33 (2001); California v. Ciraolo, 476 U.S. 207, 211-12 (1986).

[21] *See* Hutchins, *supra* note 14, at 429 (discussing that the Court "has never explicitly defined the precise factors that render a subjective expectation objectively reasonable").

[22] *See id.* at 428 (listing examples of affirmative steps, including putting up fences or packaging contraband in secured luggage).

[23] *See, e.g.*, Christian M. Halliburton, *How Privacy Killed Katz: A Tale of Cognitive Freedom and the Property of Personhood as Fourth Amendment Norm*, 42 Akron L. Rev. 803, 826-27 (2009) (suggesting that if the Constitution's drafters intended the Fourth Amendment to protect privacy, the language "persons, houses, papers and effects" may not have been the most effective language to achieve that goal); *see also* Jim Harper, *Reforming Fourth Amendment Privacy Doctrine*, 57 Am. U. L. Rev. 1381, 1387-88 (2008) ("Unworkable as a true legal test, the second part of the formulation Justice Harlan proposed in Katz is simply an invitation for judges to import their personal views and alter the actual rule set down in the case."); David A. Strauss, *Common Law Constitutional Interpretation*, 63 U. Chi. L. Rev. 877, 878 (1996) (discussing the contrasting terms "texualism" and "originalism" and how these terms surround the debate on how best to interpret the Constitution).

[24] *See Katz*, 389 U.S. at 350 (explaining that the Fourth Amendment cannot be defined only to protect the privacy of citizens).

[25] *See, e.g.,* Orin S. Kerr, *Four Models of Fourth Amendment Protection*, 60 Stan. L. Rev. 503, 506 (2007) (noting that while there are two basic ways that a test for determining whether a reasonable expectation of privacy exists could be established, neither method is practicable due to the diversity of police investigations and the decentralization of the lower courts).

[26] *See id.*

[27] *See infra* Subsection II.B.1. , (discussing federal jurisprudence dealing with GPS and the tendency of federal courts to equate GPS with older technology, such as beepers).

[28] *See, e.g.*, Kyllo v. United States, 533 U.S. 27, 35-36 (2001) (applying *Katz* to thermal imaging scanners); *see also* Illinois v. Caballes, 543 U.S. 405, 410 (2005) (applying *Katz* to dog sniffs); Dow Chem. Co. v. United States, 476 U.S. 227, 234 (1986) (applying *Katz* to aerial surveillance).

[29] *See, e.g.,* Hutchins, *supra* note 14, at 432-33 (noting that "The Court has adopted a more privacy-protective view of this form of technologically enhanced police conduct" and suggesting that case law largely prohibits this type of warrantless surveillance).

[30] *See id*. (noting that the Court typically finds that Fourth Amendment concerns are not automatically triggered by technology that merely enhances human senses).

[31] *See Kyllo*, 533 U.S. at 29.

[32] *See id.*

[33] *See id.* at 29-30 (explaining that the thermal imaging scan was performed from the agent's vehicle that was parked across the street in front of the house. The scan only lasted a few minutes).

[34] *See id.* at 29.

[35] *Id.* at 40.

[36] *See id.*

[37] *See Kyllo*, 533 U.S. at 40.

[38] *See* Illinois v. Caballes, 543 U.S. 405, 409-10 (2005).

[39] *Id.* at 409.

[40] *Id.* at 410 (noting that a dog sniff occurring during a lawful traffic stop that does not reveal information other than presence of a substance is not a violation of the Fourth Amendment).

[41] *See id*. at 408-09 (noting that because the Court does not recognize the possession of contraband as a legitimate privacy interest, any government action that reveals only possession of contraband "compromises no legitimate privacy interest").

[42] *See, e.g.,* United States v. Caceres, 440 U.S. 741, 750 (1979) (holding that the Fourth Amendment did not protect against the clandestine use of a tape recorder by an IRS agent during a conversation with the defendant because the tape recorder was merely a substitute for the agent's memory); California v. Ciraolo, 476 U.S. 207, 213-14 (1986) (holding that observations from an aircraft were no different than observations from ground level)..

[43] *See Caceres* at 750-51.

[44] *See, e.g.*, Dow Chem. Co. v. United States, 476 U.S. 227, 234 (1986) (holding that observations from an aircraft travelling at an altitude permitted by law did not constitute a search subject to Fourth Amendment protections).

[45] *See* United States v. Knotts, 460 U.S. 276, 277 (1983).

[46] *See, e.g.*, United States v. Michael, 645 F.2d 252, 259 (5th Cir. 1981) (upholding the use of tracking beepers by police without a warrant); United States v. Bernard, 625 F.2d 854, 860-61 (9th Cir. 1980) (allowing in evidence obtained from Drug Enforcement Administration's installation of beeper on can containing methylamine); United States v. Shovea, 580 F.2d 1382, 1388 (10th Cir. 1978) (finding sufficient probable cause to attach electronic tracking device to defendant's car without first acquiring court order); United States v. Moore, 562 F.2d 106, 112 (1st Cir. 1977) (holding that the police officers had probable cause to believe that an illegal substance was about to be created and, therefore, the use of the beepers without a warrant was not a violation of the Fourth Amendment).

[47] *See Knotts*, 460 U.S. at 277-78.

[48] *See* Hutchins, *supra* note 14, at 435 ("[E]ffective use of a beeper requires law enforcement's presence in the vicinity, for the signal emitted by the beeper is neither sufficiently strong nor sufficiently precise to permit truly remote tracking.").

[49] *See Knotts*, 460 U.S. at 281 ("One has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence or as the repository of personal effects.").

[50] *See id.* at 282.

[51] *See id.* at 283 (citing United States v. Lee, 274 U.S. 559, 563 (1927)) (holding that the use of a searchlight, which allowed authorities to view cases of liquor sitting on deck without needing to board the boat, did not violate the constitution).

[52] *See* United States v. Karo, 468 U.S. 705, 707 (1984).

[53] *See id.* at 708.

[54] *See id.*

[55] *See id.*

[56] *See id.* at 709.

[57] *See id.*

[58] *See Karo*, 468 U.S. at 709.

[59] *See id.* at 709-10.

[60] *See id.* at 710.

[61] *See id.* at 714.

[62] *Id.* at 715.

[63] *See id* at 721 (referring to the use of the beeper to confirm the presence of the ether canister in the house. Although the Supreme Court distinguished the use of the beeper in the two cases, it ultimately upheld the convictions in *Karo* on different grounds. The Court explained that although the use of the beeper to locate the ether within private residences without a warrant violated the Fourth Amendment, the search warrant for the final residence did not rely on the earlier violations of the Fourth Amendment, which had occurred prior to the storage of the ether in the commercial storage facilities where the use of the tracking beeper was permissible).

[64] *See Karo*, 468 U.S. at 707 (equating the beeper in *Karo* with the beeper used in *Knotts*).

[65] *See id.* at 715 (contrasting use of the beeper in *Knotts* to track the subject on a public highway with the use of the beeper in *Karo* to locate evidence inside a private home).

[66] *See id*. at 735 (Stevens, J., dissenting) (agreeing with the majority in their conclusion that the use of the tracking beeper to locate the ether inside private residences was a violation of the Fourth Amendment. Justices Brennan and Marshall joined Justice Stevens in his dissent).

[67] *See, e.g.*, *infra* Subsection II.B.1. (discussing federal jurisprudence regarding GPS technology and the reliance on "beeper" cases such as *Knotts* and *Karo*).

[68] *See, e.g.,* Max Boot, War Made New: Technology, Warfare, and the Course of History, 1500 to Today 347 (2006) (explaining that the 1991 Persian Gulf War involved an international military coalition led by the United States military, which liberated the nation of Kuwait from Iraqi occupation forces).

[69] *See id.* at 349 (explaining that the Iraqis were not adequately prepared because they did not realize that coalition sensors had the capabilities to locate targets through sand walls or moving forces).

[70] *See id.* at 338-46 (noting that VII Corps, the primary striking force of the allied coalition in the 1991 Persian Gulf War, consisted of more than 142,000 soldiers and more than 48,500 vehicles); *see also VII Corps*, GlobalSecurity.org, http://www.globalsecurity.org/military/agency/army/vii-corps.htm (last modified May 7, 2011, 1:37:50) (noting that Franks' army was compiled of more than 142,000 soldiers, while Luck's army only had 116,000).

[71] *See* Boot, *supra* note 68, at 331 (explaining that at the time, GPS was a relatively new technology and most US forces were not equipped with the necessary equipment. Further, explaining that last minute procurement gave the coalition a total of 840 military GPS receivers and 6,500 commercial models, allowing for "much more accurate maneuvering and striking than had ever been feasible before"),.

[72] *See* Global Positioning System Standard Positioning Service Performance Standard 1 (DOD 2008), *available at* http://www.gps.gov/technical/ps/2008-SPS-performance-standard.pdf (noting that since 1978 GPS has provided navigation, positioning, and timing services to both military and civilian users. Further, noting that an unlimited number of military or civilian users with a GPS receiver can determine accurate time and location at any moment worldwide).

[73] *See The Global Positioning System*, GPS.Gov, http://www.gps.gov/systems/gps/ (last visited Jan. 17, 2013).

[74] *See id.*

[75] *See, e.g.,* Michael Russel Rip & James M. Hasik, The Precision Revolution: GPS and the Future of Aerial Warfare 10 (2002) (noting that President Reagan's actions occurred in the wake of the Soviet interception of the civilian airliner KAL 007, which strayed into prohibited airspace due to navigational errors),

[76] *See, e.g.*, *National Space Policy of 2010 Excerpt*, GPS.gov, http://www.gps.gov/policy/docs/2010/ (last modified Aug. 13, 2012); *see also U.S. Space-Based Positioning, Navigation, and Timing Policy Fact Sheet*, GPS.Gov, http://www.gps.gov/policy/docs/2004/ (last modified Oct. 24, 2012); Press Release, Office of Science and Technology Policy, National Security Council, Fact Sheet U.S. Global Positioning System Policy (Mar. 29, 1996), *available at* http://clinton4.nara.gov/textonly/WH/EOP/OSTP/html/gps-factsheet.html.

[77] *See GPS Applications*, GPS.GOV, http://www.gps.gov/applications (last modified Apr. 10, 2012) (explaining that GPS is used in a variety of ways, from increasing efficiency in farming and construction to providing precise time synchronization to major communication networks. Further, noting that GPS prevents transportation accidents and helps in emergencies and disaster relief situations and is critical to many facets of U.S. military operations).

[78] .*See* The Global Positioning System, *supra* note 73.

[79] *See, e.g.,* Hutchins, *supra* note 14, at 417-18.

[80] *See id*.

[81] *See id*.

[82] *See id*.

[83] *See OnStar Technology*, ONSTAR.COM (Feb. 25, 2010, 12:16 PM), http://web.archive.org/web/20100213025857/http://www.onstar.com/us_english/jsp/explore/onstar_basics/technology.jsp (accessed by searching for OnStar in the Internet Archive Index) ("Global positioning system (GPS) satellite technology measures how long it takes a radio signal from a satellite to reach a vehicle, and then calculates distance using that time.").

[84] *See OnStar Services*, ONSTAR.COM (Feb 11, 2010, 1:55 PM), http://web.archive.org/web/20100211135549/http://www.onstar.com/us_english/jsp/explore/onstar_basics/services.jsp (accessed by searching for OnStar in the Internet Archive Index) ("If you report your vehicle stolen, OnStar can work with authorities to attempt to locate your vehicle.").

[85] *See, e.g.,* Andrew Askland, *The Double Edged Sword That Is the Event Data Recorder*, 25 TEMP. J. SCI. TECH. & ENVTL. L. 1, 3 (2006).

[86] *See, e.g.,* Hutchins, *supra* note 14, at 418-19; *see also* Ben Hubbard, *Police Turn to Secret Weapon: GPS Device*, WASH. POST (Aug. 13, 2008), http://www.washingtonpost.com/wp-dyn/content/article/2008/08/12/AR2008081203275.html (citing numerous instances where police tracked suspects by using GPS receivers attached to various components, installed on target vehicles through a variety of means, including darts fired at passing vehicles).

[87] *See infra* Subsection II.B.1. (discussing federal jurisprudence regarding GPS tracking).

[88] *See infra* Subsection II.B.2. (discussing state jurisprudence regarding GPS tracking).

[89] *See* United States v. McIver, 186 F.3d 1119, 1122 (9th Cir. 1999) (noting that this was the first time the Court had to decide whether placing an electronic tracking device on the undercarriage of a vehicle was an unreasonable search and seizure).

[90] *See id.* at 1122-23 ("When the tracking devices were placed on the Toyota 4Runner, it was parked in the driveway in front of McIver's garage, outside the curtilage of the residence.").

[91] *See id.* at 1127 (explaining that the Ninth Circuit made no attempt to distinguish between the beeper and the GPS receiver in its decision. Further, in addressing the issue of the warrantless placement of tracking devices on the defendant's automobile, both the majority and the concurrence focused their attention on the property interest the defendant had in his automobile); *see also id.* at 1133-34 (Kleinfeld, J., concurring) (differing from the majority opinion only in that Kleinfeld found that the defendant had a property interest that was violated).

[92] *See id.* at 1126 (explaining that since police had installed both a GPS receiver and a tracking beeper, it is questionable as to whether the defendant could have even attempted to do so); *see also id.* at 1123 (noting that in addition the use of GPS was a relatively new technique and the GPS unit failed three days after installation, forcing police to rely on the beeper when tracking the movement of target vehicle); *id.* at 1123-24 (explaining that police also maintained visual surveillance of the target vehicle at all pertinent times).

[93] *See* United States v. Knotts, 460 U.S. 276, 281 (1983).

[94] *See, e.g.*, United States v. Smith, 387 Fed. App'x 918, 920-21 (11th Cir. 2010); United States v. Garcia, 474 F.3d 994, 996 (7th Cir. 2007) (holding that, similar to *McIver*, the court rejected the defendant's assertion that a warrantless seizure had occurred by police placement of a GPS receiver on their vehicles. Further, noting that both cases analyzed the GPS systems according to precedent set by beeper cases).

[95] 591 F.3d 1212, 1213 (9th Cir. 2010).

[96] *See id.* at 1214-15.

[97] *See id.* at 1216.

[98] *See id.* (rejecting the contention that an unpermissible search will be found whenever law enforcement officers "use sense-enhancing technology not available to the general public to obtain information.").

[99] *See id.* at 1216-17 (further concluding that the police did not conduct an impermissible search).

[100] *See, e.g.*, *Garcia*, 474 F.3d at 997-98 (explaining that after dismissing Garcia's attempt to distinguish GPS from satellite imaging and lamppost-camera case as futile, the *Garcia* court digressed and stated that "[t]he new technologies enable, as the old (because of expense) do not, wholesale surveillance . . . [o]ne can even imagine a law requiring all new cars to come equipped with the device so that the government can keep track of all vehicular movement"); *see also* United States v. Marquez, 605 F.3d 604, 610 (8th Cir. 2010) ("It is imaginable that a police unit could undertake 'wholesale surveillance' by attaching such devices to thousands of random cars and then analyzing the volumes of data produced for suspicious patterns of activity. Such an effort, if it ever occurred, would raise different concerns than the ones present here.").

[101] *See* State v. Jackson, 76 P.3d 217, 217 (Wash. 2003).

[102] *See id.* at 220-21.

[103] *See id.* at 221.

[104] *See* WASH. CONST. art. I, §7 ("No person shall be disturbed in his private affairs, or his home invaded, without authority of law.").

[105] *See Jackson*, 76 P.3d at 222.

[106] *See id.* at 223.

[107] *See id.*

[108] *See id.* ("We perceive a difference between the kind of uninterrupted, 24-hour a day surveillance possible through use of a GPS device . . . and an officer's use of binoculars or a flashlight to augment his or her senses."),.

[109] *See id*.

[110] *See id.*

[111] *See Jackson*, 76 P.3d at 224.

[112] *See, e.g.*, People v. Weaver, 909 N.E.2d 1195, 1202 (N.Y. 2009) (finding that the use of a GPS receiver to track movement on public roads over an extended period of time constituted a search and required a warrant under the state constitution); Commonwealth v. Connolly, 913 N.E.2d 356, 369-70 (Mass. 2009) (reaching the same conclusion as the court in *Weaver*, 909 N.E.2d 1195).

[113] *See Weaver*, 909 N.E.2d at 1202.

[114] *See id.* (citing the "unsettled state of federal law" on the issue of long-term GPS surveillance as a reason for relying on the New York state constitution).

[115] *Compare* N.Y. CONST. art. I, §12 ("The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.") *with* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."). Note, however, that the New York state constitution also includes specific protection against unreasonable electronic interception of communications. *See* N.Y. CONST. art. I, §12 (note also that a GPS receiver is not a communications system, the electronic intercept provision of the New York state constitution is irrelevant to an analysis of GPS technology).

[116] *See supra* Subsection II.B.1. (discussing federal jurisprudence regarding GPS surveillance).

[117] *See, e.g.*, *Connolly*, 913 N.E.2d at 367-68 ("[A] GPS device permits far more sophisticated surveillance than a beeper."); *Weaver*, 909 N.E.2d at 1203 (noting the enhanced capability of a GPS system); *Jackson*, 76 P.3d 217, 222 (Wash. 2003) (listing information that an analysis of GPS-collected data could reveal).

[118] *See supra* Section II.A. (discussing the capability of GPS receivers in general).

[119] *See* Hutchins, *supra* note 14, at 434 (indicating that the beepers emit weak radio signals and therefore alert officers when the tracked item is nearby, but cannot indicate the item's specific location).

[120] *See id.* at 418 (explaining that the location information is sent to third parties, who can then monitor the GPS receiver's specific location).

[121] *Jackson*, 76 P.3d at 224 (noting that the citizens would be unaware that all of their movements are being tracked).

[122] *Weaver*, 909 N.E.2d at 1199.

[123] *Compare* United States v. Maynard, 615 F.3d 544 (D.C. Cir. 2010) (holding that the warrantless use of a GPS device on defendant's vehicle was a search under the Fourth Amendment) *with* United States v. Pineda-Moreno, 591 F.3d 1212 (9th Cir. 2010) (holding that the use of a tracking device was not a search), *and* United States v. Garcia, 474 F.3d 994 (7th Cir. 2007) (holding that placing a GPS tracking device under the defendant's car was not a search or seizure).

[124] *See generally* United States v. Jones, 132 S. Ct. 945 (2012).

[125] *See Maynard*, 615 F.3d at 549 (stating that the investigation "culminated in searches and arrests").

[126] *See id.* (naming only some of the charges—including conspiracy to distribute and possess with intent to distribute cocaine and cocaine base).

[127] *Id.*

[128] *See id.* (noting that the remaining charge was dismissed after the jury could not decide on a verdict).

[129] *Id.*

[130] *See id.* at 549 (naming the specific charge of conspiracy to distribute five or more kilograms of cocaine and fifty or more grams of cocaine base).

[131] *Maynard*, 615 F.3d at 549 (noting that the two defendants, Jones and Maynard, were tried together).

[132] *See id.* at 567 (listing five different types of evidence that the government relied on at trial, none of which included any evidence of an actual drug transaction taking place or of Jones ever having drugs in his possession).

[133] *Id.* The D.C. Circuit's decision quoted the Government's closing statement at trial, when the prosecutor continually linked the movement information provided by the GPS receiver and cell phone records. The prosecution's opening statement also emphasized "that the GPS data would demonstrate Jones's involvement in the conspiracy." *See id.* at 568.

[134] *See id*. at 549 (acknowledging the five other errors that Jones and Maynard jointly alleged).

[135] *See id.* at 556-58 (citing United States v. Knotts, 460 U.S. 276, 284-85 (1983)); United States v. Marquez, 605 F.3d 604, 610 (8th Cir. 2010); United States v. Pineda-Moreno, 591 F.3d 1212, 1216-17 n.2 (9th Cir. 2010); United States v. Garcia, 474 F.3d 994, 996 (7th Cir. 2007)) (noting that in those cases, the question of long-term GPS surveillance had been reserved by the deciding courts).

[136] *Knotts*, 460 U.S. at 281.

[137] *See Maynard*, 615 F.3d at 557 (distinguishing the holding in *Knotts* from the circumstances surrounding Maynard's case).

[138] *See id.* at 558 (reiterating that the issue of "prolonged surveillance" was not resolved by the *Knotts* Court).

[139] *See id.* at 556 (comparing the surveillance of movements made "during a discrete journey" with "more comprehensive" monitoring).

[140] *Id.* at 558.

[141] *See* Hutchins, *supra* note 14, at 417-18 (noting that the weak radio signals of beepers required that police remain within range of the signal).

[142] *See supra* Section II.A. (discussing the ability of GPS receivers to connect to a data storage device).

[143] *See Maynard*, 615 F.3d at 556-57 ("[I]f such dragnet-type law enforcement practices as respondent envisions should eventually occur, there will be time enough then to determine whether different constitutional principles may be applicable.") (quoting United States v. Knotts, 460 U.S. 276, 283-84 (1983)).

[144] *See id.* at 557 ("As did the Supreme Court in *Knotts*, we pretermit any ruling on worst-case situations that may involve persistent, extended, or unlimited violations of a warrant's terms.") (quoting United States v. Butts, 729 F.2d 1514, 1518 n.4 (5th Cir. 1984)).

[145] *Id.* at 558 (identifying the Fifth Circuit).

[146] *See, e.g.*, People v. Weaver, 909 N.E.2d 1195 (N.Y. 2009); State v. Jackson, 76 P.3d 217 (Wash. 2003). In both cases, police installed GPS receivers on automobiles and left them in place for significant periods of time: one week in *Jackson* and two and a half months in *Weaver*.

[147] *See Maynard*, 615 F.3d at 558.

[148] *Id.* (quoting Katz v. United States, 389 U.S. 347, 351 (1967)).

[149] *See id.*

[150] *Id.* at 560 (citing United States v. Gbemisola, 225 F.3d 753, 759 (D.C. Cir. 2000) (giving the example where a circuit court held that it was not unlikely for someone to be observed by the public while he is opening a package in the back of a taxi).

[151] *See id.*

[152] *Id.*

[153] *Maynard*, 615 F.3d at 561. The *Maynard* court referred, in particular, to two cases. In the first, the Supreme Court noted that a valid privacy interest existed in the whole of an individual's criminal records, but not in individual parts of that record. *See* DOJ v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 764 (1989). In the second, the *Maynard* court noted that the Supreme Court had analyzed whether a privacy interest existed that covered a defendant's full phone records, including all of the numbers that the defendant had called, instead of simply analyzing whether the privacy interest existed in the individual numbers dialed. *See also* Smith v. Maryland, 442 U.S. 735, 744-46 (1979).

[154] *See Maynard*, 615 F.3d at 561-62.

[155] *Id.* at 562. *See generally* David E. Pozen, *The Mosaic Theory, National Security, and the Freedom of Information Act*, 115 Yale L.J. 628, 630 (2005) (discussing the mosaic theory in the context of national security issues). The mosaic theory is a "basic precept of intelligence gathering" in which separate pieces of information, though individually of little value, are combined to create a larger picture of the overall situation. *Id.* It has often been invoked by the government to justify the government's refusal to release documents requested under the Freedom of Information Act, such as the D.C. Circuit's denial of FOIA requests concerning seven hundred people detained after the 9/11 attacks. *Id.* at 631 (citing Ctr. for Nat'l Sec. Studies v. DOJ, 331 F.3d 918 (D.C. Cir. 2003)).

[156] *Maynard*, 615 F.3d at 563.

[157] *See id.* at 563-64 (referencing urine tests, electronic listening devices, luggage inspections, and thermal imaging technology).

[158] *See id.* at 564.

[159] *See id.* at 565 (citing practical considerations about the difficulty in maintaining clandestine, uninterrupted, long-term visual surveillance including cost, personnel requirements, and possibility of detection).

[160] *See id.* at 565-66. Although this conclusion has been implied by several prior Supreme Court cases dealing with supplementary technology, it has never been explicitly stated. *See supra* Subsection I.C.2.

[161] *See Maynard*, 615 F.3d at 566 (citing Kyllo v. United States, 533 U.S. 27, 35 n.2 (2001)). Note that *Kyllo* involved technology usually classified as extra-sensory. *See supra* Subsection I.C.1. (discussing extra-sensory technology).

[162] *Maynard*, 615 F.3d at 566 (noting that Fourth Amendment issues should be decided on a case-by-case basis rather than on "extravagant generalizations").

[163] *See* United States v. Jones, 132 S. Ct. 945, 949 (2012).

[164] *Id.* at 947.

[165] *Id.*

[166] *See id.* at 947, 952 ("[T]he *Katz* reasonable-expectation-of-privacy test has been *added to*, not *substituted for*, the common-law trespassory test.").

[167] *See id.* at 953.

[168] *Id.* at 957.

[169] *Jones*, 132 S. Ct. at 954 ("[I]t remains unexplained why a 4-week investigation is 'surely' too long.").

[170] *Id.* at 954 ("We may have to grapple with these 'vexing problems' in some future case where a classic trespassory search is not involved and resort must be had to *Katz* analysis; but there is no reason for rushing forward to resolve them here.").

[171] *Id.* at 961 (Alito, J., concurring) ("First, the Court's reasoning largely disregards what is really important (the *use* of a GPS for the purpose of long-term tracking) and instead attaches great significance to something that most would view as relatively minor.")).

[172] *Id.* at 964 (Alito, J., concurring) ("[R]elatively short-term monitoring of a person's movements on public streets accords with expectations of privacy that our society has recognized as reasonable . . . [b]ut the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.").

[173] *Id.* at 964.

[174] *Id.* at 955 (Sotomayor, J., concurring) ("I agree with Justice Alito that, at the very least, 'longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy.'").

[175] United States v. Cuevas-Perez, 640 F.3d 272, 274 (7th Cir. 2011) (finding that surveillance of 60 hours in duration was insufficiently analogous to *Maynard*'s 28 days); United States v. Hernandez, 647 F.3d 216, 221 (5th Cir. 2011) (deciding that a single-cross country trip did not implicate the concerns raised in *Maynard*).

[176] *See Hernandez*, 647 F.3d at 221 ("We do not mean to suggest that the government's use of a top-of-the-line GPS, which Hernandez describes as being capable of continuous, precise surveillance, would constitute a search.").

[177] *See Cuevas-Perez*, 640 F.3d at 274 n.3 ("[O]ur discussion of *Maynard* is not meant to approve or disapprove the result the D.C. Circuit reached under the facts of that case.").

[178] *See, e.g.*, *In re* Application of the U.S. for an Order Authorizing the Release of Historical Cell-Site Info., No. 10-MC-0897, 2010 WL 5437209 (E.D.N.Y. Dec. 23, 2010); *In re* Application of the U.S. for Historical Cell Site Data, 747 F. Supp. 2d 827 (S.D. Tex. 2010). Both cases dealt with requests from the United States government for cell phone companies to release information regarding calls and text messages sent or received from specified phone numbers over an extended period of time. The information requested included location information made possible by the GPS receivers integral to modern cell phones that allow for precise determination of the cell phones' location at the time that calls were made or received. In both cases, the court denied the request, but allowed the government to submit search warrants for the requested information. *But cf. In re* Application of the U.S. for an Order Authorizing the Release of Historical Cell-Site Info., No. 11-MC-0113, 2011 U.S. Dist. LEXIS 15457, at *6 (E.D.N.Y. Feb. 16, 2011) (approving the re-application for an order when the government limited its request to records covering a three-day, six-day, and twelve-day period of time).

[179] *See* United States v. Sparks, 750 F. Supp. 2d 384, 393-396 (D. Mass. 2010). The Massachusetts District Court rejected the defendant's argument that "the whole of one's movements during the course of surveillance is not actually exposed to the public because the likelihood that anyone will observe all those movements is essentially nil," because it found that "[t]he proper inquiry, however, is not what a random stranger would actually or likely do, but rather what he feasibly could." *Id.* at 391. The District Court also criticizes *Maynard* for presenting an impractical standard for police to execute. *Id.* at 392. *See also* United States v. Walker, 771 F. Supp. 2d 803, 811, 814 (W.D. Mich. 2011) (dismissing the defendant's attempt to use *Maynard* as precedent since the defendant did not argue that an *actual* invasion of the defendant's privacy occurred, and further, dismissing the defendant's attempt to suppress evidence based on a potential violation of First Amendment rights due to "chilling effect" of GPS monitoring).

[180] *See* United States v. Jones, 625 F.3d 766, 769 (D.C. Cir. 2010) (Sentelle, J., dissenting) ("[I]t is not evident how it affects the reasonable expectation of privacy by Jones. The reasonable expectation of privacy as to a person's movements . . . is . . . zero. The sum of an infinite number of zero-value parts is also zero."); *Sparks*, F. Supp. 2d at 392 ("Although the continuous monitoring may capture qualitatively more information than brief stints of surveillance, the type of information collected is qualitatively the same.").

[181] *See Sparks*, 750 F. Supp. 2d at 392 (explaining how the rule is impractical and difficult to apply).

[182] *See Jones*, 625 F.3d at 769 (Sentelle, J., dissenting); *Sparks*, 750 F. Supp. 2d at 392.

[183] *See Sparks*, 750 F. Supp. 2d at 392 ("The court in *Maynard*, however, leaves police officers with a rule that is vague and unworkable.").

[184] *See* Kerr, *supra* note 11, at 828-30 (providing numerous examples of cases where courts held that certain police actions were permissible, including the conducting of aerial surveillance, the use of chemical tests to detect the presence of narcotics, and the recording of dialed telephone numbers, all of which created simple rules for police to follow).

[185] *See* United States v. Maynard, 615 F.3d 544, 568 (D.C. Cir. 2010) (failing to provide a bright-line rule as to how many days of surveillance would and would not be acceptable).

[186] *See, e.g.*, Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001) (finding that the State has an interest in "readily administrable rules"); New York v. Belton, 453 U.S. 454, 458 (1981) ("Fourth Amendment doctrine . . . ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged.") (quoting Wayne R. LaFave, "*Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma,* 1974 Sup. Ct. Rev. 127, 141 (1974)); Dunaway v. New York, 442 U.S. 200, 213-14 (1979) ("A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.").

[187] *See Jones*, 625 F.3d at 769 (Sentelle, J., dissenting); *Sparks*, 750 F. Supp. 2d at 392-93.

[188] *See* U.S. v. Knotts, 460 U.S. 276, 283-84 (1983) (leaving the question of 24-hour surveillance constitutionality to be answered later).

[189] *See Maynard*, 615 F.3d at 556-57.

[190] *See id.* at 556. The D.C. Circuit quoted a decision by the Fifth Circuit, which wrote, "[a]s did the Supreme Court in *Knotts*, we pretermit any ruling on worst-case situations that may involve persistent, extended, or unlimited violations of a warrant's terms." *Id.*

[191] *See id.* at 557-58 (referring specifically to the Ninth Circuit's decision in *United States v. Pineda-Moreno*, the Seventh Circuit's decision in *United States v. Garcia*, and the Eighth Circuit's decision in *United States v. Marquez*).

[192] *See Jones*, 625 F.3d at 769 (Sentelle, J., dissenting); *Sparks*, 750 F. Supp. 2d at 392.

[193] *See Maynard*, 615 F.3d at 561-62 (explaining that long-term GPS surveillance may reveal a person's habits as well as what he does and does not do).

[194] *See id.* (citing Smith v. Maryland, 442 U.S. 735 (1979)). *Smith* dealt with whether a person had a reasonable expectation of privacy in a list of phone numbers dialed. Although the Supreme Court found that no privacy interest existed in that list or in the individual numbers dialed, it examined both the individual numbers and the aggregated list in depth. *See Smith* at 741-46. Reasoning that subscribers realize that the phone company regularly aggregates information and provides it to the subscriber, the Supreme Court held that it was unreasonable to expect that such information would be private. *See id.* at 745. The D.C. Circuit correctly pointed out that if aggregated information had no greater privacy interest than its individual parts, then the Supreme Court would have had no reason to analyze the privacy interest in an aggregated list of phone numbers separately from that of the individual numbers. *Maynard*, 615 F.3d at 561.

[195] *See Maynard*, 615 F.3d at 562 (citing CIA v. Sims, 471 U.S. 159, 178 (1985)). *See also* Pozen, *supra* note 155, at 630 and accompanying text for more information regarding the mosaic theory.

[196] *See, e.g.*, Bennett L. Gershman, *Privacy Revisited: GPS Tracking As Search and Seizure*, 30 Pace L. Rev. 927, 928-29 (2010); Hutchins, *supra* note 14, at 411-413.

[197] *See* Hutchins, *supra* note 14, at 411-12. Hutchins notes that there are two primary schools of thought in contention. The first school dismisses the relevance of the Fourth Amendment and advocates for legislative remedies, while the second argues for an expansive interpretation of the Fourth Amendment that would require discarding of current Supreme Court precedent and beginning the legal analysis anew. *See id.* Hutchins argues for a third approach that would argue for an expansion of the warrant requirement to include GPS surveillance in a fashion that would work within existing Supreme Court precedent. *See id.* at 460-61.

[198] *See* United States v. Jones, 132 S. Ct. 945, 964 (2012) (Alito, J., concurring).

[199] *See* supra Section III.C.

[200] S*ee, e.g.*, Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001) ("Courts attempting to strike a reasonable Fourth Amendment balance thus credit the government's side with an essential interest in readily administrable rules"); Dunaway v. New York, 442 U.S. 200, 213-14 (1979) ("A single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.").

[201] United States v. Maynard, 615 F.3d 544, 557 (D.C. Cir. 2010) (quoting United States v. Knotts, 460 U.S 276, 281 (1983)).

[202] *Id.* at 560.

[203] *Id.* at 562.

[204] *See, e.g.*, *Atwater*, 532 U.S. at 347; *Belton*, 453 U.S. at 458; *Dunaway*, 442 U.S. at 213-14.

[205] *See* Christopher Slobogin, *Technologically-Assisted Physical Surveillance: The American Bar Association's Tentative Draft Standards*, 10 Harv. J.L. & Tech. 383, 446 (1997).

[206] *See id.*

[207] *See, e.g.*, United States v. Freitas, 800 F.2d 1451, 1456 (9th Cir. 1986) (requiring notification within seven days unless justified by a "strong showing of necessity").

[208] *See, e.g.*, *In re*. Application of the U.S. for an Order Authorizing the Release of Historical Cell-Site Info., No. 11-MC-0113, 2011 U.S. Dist. LEXIS 15457 (E.D.N.Y. Feb. 16, 2011) ("[T]here is nothing new in the use of such prescriptive time periods to provide a bright-line rule to serve as useful guides for law enforcement officers seeking to perform their duties without running afoul of their targets' constitutional rights.").

[209] *See, e.g.*, *id.* at *5 ("I recognize that any such line-drawing is, at least to some extent, arbitrary, and that the need for such arbitrariness arguably undermines the persuasiveness of the rationale of *Maynard*.").

[210] *See* United States v. Jones, 132 S. Ct. 945, 955 (2012) (Sotomayor, J., concurring); *id.* at 964 (Alito, J., concurring).

[211] Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. Pitt. L. Rev. 227, 231 (1984).

[212] *See Jones*, 132 S. Ct. at 954 ("[I]t remains unexplained why a 4–week investigation is 'surely' too long . . . [w]hat of a 2–day monitoring . . . [o]r of a 6–month monitoring.").

[213] *See, e.g.*, Gregory S. Fisher, *Cracking Down on Soccer Moms and Other Urban Legends on the Frontier of the Fourth Amendment: Is it Finally Time to Re-define Searches and Seizures*, 38 Willamette L. Rev. 137, 173-74 (2002) (arguing that improper police intent should be considered an affirmative defense that can be countered by the articulation of "neutral reasons"); Thomas K. Clancy, *What Is a "Search" Within the Meaning of the Fourth Amendment?*, 70 Alb. L. Rev. 1, 53-54 (2006) (arguing that the warrant requirement should be applied to "any intrusion with the purpose of obtaining physical evidence or information").

[214] Fisher, *supra* note 214, at 174.

[215] United States v. Knotts, 460 U.S. 276, 285 (1983).

[216] *See supra* Part IV., summarizing the conditions set by the D.C. Circuit's decision in *Maynard*.

[217] *See, e.g.*, Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001) (expressing a preference for "readily administrable rules"); Dunaway v. New York, 442 U.S. 200, 213-14 (1979) (determining that a "single, familiar standard is essential to guide police officers.").

[218] *See* United States v. Maynard, 615 F.3d 544, 567-68 (D.C. Cir. 2010) (noting that "[b]y combining them with Jones's cell-phone records[,] the Government was able to paint a picture of Jones's movements that made credible the allegation that he was involved in drug trafficking.").

[219] *See id.* at 567-68.

[220] *See id.* at 562 ("[P]rolonged surveillance of a person's movements may reveal an intimate picture of his life.").

[221] *Compare* Subsection II.B.1. (examining GPS by analogy with beeper technology, which had been analyzed as being supplementary) *and* Subsection I.C.1. (examining the methodology of dealing with extra-sensory technology, namely determining whether the technology can detect lawful activity subject to a reasonable expectation of privacy), *with* Subsection III.B.1. (distinguishing *Maynard* from previous jurisprudence) *and* Subsection III.B.2 (examining GPS technology and determining that it can reveal lawful activity subject to a reasonable expectation of privacy)

[222] *See, e.g.,* United States v. Jones, 132 S. Ct. 945, 955-56 (2012) (Sotomayor, J., concurring) (noting "the unique attributes of GPS surveillance"); *id.* at 963 (Alito, J., concurring) (describing the additional capabilities of GPS).

[223] *See, e.g.*, Patricia L. Bellia, *The Memory Gap in Surveillance Law*, 75 U. Chi. L. Rev. 137, 179 (2008) ("[T]here are strong reasons, related both to the quantity of information available and the inferences that can be drawn from it, to tweak our current surveillance law regimes to provide heightened protection."); James J. Tomkovicz, *Technology and the Threshold of the Fourth Amendment: A Tale of Two Futures*, 72 Miss. L.J. 317, 438 (2002) ("Devices that enhance ordinary human sensory faculties in ways that render information about people's lives more accessible should presumptively be objects of Fourth Amendment concern.").

[224] *See supra* Subsection III. B. 2., examining the D.C. Circuit's reasoning in *Maynard* in depth.

[225] *See Maynard*, 615 F.3d at 556-58.

[226] *Compare supra* Subsection I.C.1. (discussing Supreme Court jurisprudence concerning extra-sensory technology) *with supra* Subsection I.C.2. (discussing Supreme Court jurisprudence concerning supplementary technologies).

[227] *See* Hutchins, *supra* note 14, at 418.

[228] *See, e.g.*, United States v. Walker, 771 F. Supp. 2d 803, 805 (W.D. Mich. 2011). Although the GPS device used in *Walker* had a live track feature allowing the position to be monitored in real-time, in order to preserve battery life the police used a feature that allowed the device to report

its location only when it crossed a pre-determined virtual check-point. *See id.* This feature notified police by text message when the defendant left Chicago travelling northbound to Michigan, and served as part of the justification for a warrant to search the Defendant's home and vehicle. *See id.* at 805. The court qualitatively differentiated the use of GPS in *Walker* from the long-term GPS surveillance at question in *Maynard*, finding that the facts more closely matched those of *Knotts*. *See generally id.*

[229] *See* United States v. Knotts, 460 U.S. 276 (1983); Hutchins, *supra* note 14, at 435.

[230] *See Maynard*, 615 F.3d at 562.

[231] *See, e.g.,* Christopher Slobogin, *Government Data Mining and the Fourth Amendment*, 75 U. Chi. L. Rev. 317, 328-29 (2008) (noting that data mining implicates the Due Process Clause, the First Amendment, and the Fourth Amendment); Joseph T. Thai, *Is Data Mining Ever a Search Under Justice Stevens's Fourth Amendment?,* 74 Fordham L. Rev. 1731, 1749-50 (2006) (examining data mining as a means by which the government can learn far more than by traditional searches); Raymond Shih Ray Ku, *The Founders' Privacy: The Fourth Amendment and the Power of Technological Surveillance*, 86 Minn. L. Rev. 1325, 1331 (2002) ("The use of emerging technologies for gathering information . . . determine the substantive level of privacy and security of society in general[.]").

[232] *Maynard*, 615 F.3d at 566. However, since the only issue specifically reserved was the question of long-term visual surveillance, it is uncertain whether *Maynard* could apply to an issue such as data mining. *Id.*

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The §2254 Trinity: How the Supreme Court's Decisions in *Richter*, *Pinholster*, and *Greene* have Interpreted Federal Review into Near Nonexistence

Krista A. Dolan*

[H]abeas corpus review is critically important. It is the first time that life tenured federal judges instead of elected state judges determine the issues. It has been the stage where innocence has been established and where grievous constitutional violations have been found.[1]

When the Antiterrorism and Effective Death Penalty Act (AEDPA) passed in 1996, legal scholars expressed concern about the barriers it would place on prisoners trying to obtain federal review.[2] While initial decisions issued after the enactment of the AEDPA did not seem to fetter access too much,[3] it has become abundantly clear, particularly in light of several 2011 Supreme Court decisions,[4] that this is no longer the reality. While cases interpreted under the AEDPA did not seem to have an initial impact, cases interpreting provisions of the AEDPA between 2006 and 2011 have had a substantial impact.[5] One article notes that the most recent Supreme Court decisions prove that the "AEDPA's practical bite is even more ferocious than the initial legislative bark may have suggested."[6]

Justice John Paul Stevens, in what seemed to be an ominous observation, noted "[t]he text of the Antiterrorism and Effective Death Penalty Act of 1996 itself provides sufficient obstacles to obtaining habeas relief without placing a judicial thumb on the warden's side of the scales."[7] In light of recent decisions, it seems that the scales have effectively been tipped in favor of no review. "Much more so than in the pre-AEDPA era, state prisoners now face unique procedural barriers and one of the most uncharitable standards of review known to law."[8]

This article will focus on several recent cases, but specifically on the Supreme Court's decision in *Greene v. Fisher*,[9] a case that limits the temporal cutoff under the statute, and has effectively left retroactivity analysis in a state of confusion. The opinion was the Court's first unanimous decision of the 2011-2012 term, and was unusually brief considering the impact the case can potentially have on future prisoners seeking federal review. This article argues that the Court, in interpreting Section 2254(d) of the AEDPA, has all but abandoned independent federal review, to the detriment of state prisoners, but particularly to the detriment of indigent state prisoners. In each Section 2254 case that has been decided, the Court has erected one more barrier to seeking relief.

Part I of this article will provide an overview of the writ of habeas corpus and the AEDPA. Specifically, it will outline the requirements of obtaining federal review generally and of meeting the requirements of 28 U.S.C. § 2254, which requires that to obtain federal review, a state court's decision must have been "contrary to," or "an unreasonable application of," "clearly established federal law." Additionally, it will discuss how the Supreme Court's interpretation of this provision has been contrary to Congressional intent, and has made it increasingly difficult for prisoners to get relief.

Part II of this article will discuss the Supreme Court's decisions in *Harrington v. Richter*,[10] *Cullen v. Pinholster*,[11] and *Greene v. Fisher*,[12] as well as the impact the cases have had, or are likely to have, on federal review.

Part III will discuss the implications and the impact of all three of the Court's decisions for state prisoners. Finally, Part IV will briefly conclude.

I. The Great Writ & The AEDPA

While nothing in the U.S. Constitution confers the right to habeas corpus, Article I, Section 9 prohibits its suspension.[13] The purpose of the writ is to give prisoners a mechanism by which to challenge the legality of their conviction and sentence.[14] The writ of habeas corpus was made available to federal prisoners through the Judiciary Act of 1789, and to state prisoners in 1867.[15] Before the passage of the AEDPA, the Supreme

Court made attempts both to restrict and expand the writ.[16] In 1996, however, in response to the Oklahoma City Bombings, Congress passed the AEDPA.[17] While the legislation seemingly focused on antiterrorism, it also functioned to limit federal review for all state prisoners, even those not charged with terrorism or a capital crime.[18] The AEDPA has been described as "less a legal text than a force of nature."[19]

At first, the passage of the AEDPA did not seem to impact the success rate of state habeas petitioners. In a study of 105 Supreme Court cases between 1990 and 2005, the pre-AEDPA petitioners were successful 33% of the time, while the post-AEDPA petitioners were successful 34% of the time.[20] In a new study updating and expanding upon that data, however, a different picture of the post-AEDPA landscape is painted. The examination of the AEDPA cases decided between 2006 and 2011 show that relief has declined steadily since 2001, dropping from 50% for cases decided between 1996 and 2000, to 13.6% for cases decided between 2010 and 2011.[21] The numbers remain stark for capital cases as well. A 2007 DOJ-funded study found that post-AEDPA, relief was granted in less than 1% of non-capital cases, and in 12% of capital cases.[22] When the AEDPA first passed, very few of those cases reached the Supreme Court, whereas now, most cases are governed by the AEDPA, and prisoners' success rates in those cases are greatly declining.[23] Indeed, according to a study by the U.S. Department of Justice, the AEDPA seems to have increased the number of habeas petitions filed by state prisoners.[24] In 2000, state prisoners filed 50% more habeas petitions than in 1995.[25] While the number of habeas petitions filed by state prisoners has decreased since 2000, the percentage of petitions filed is still much higher than pre-AEDPA.[26]

A. Getting Into Federal Court

A prisoner seeking habeas relief files a civil post-conviction complaint[27] and must meet several requirements. He must 1) be in custody,[28] 2) have a cognizable claim,[29] 3) meet the timely filing requirements,[30] 4) have claims that are not procedurally defaulted,[31] and 5) have exhausted all his claims in state court.[32] Further, petitioners may not file abusive or successive petitions,[33] and may not obtain the benefit of new rules of constitutional law that did not exist at the time their convictions became final.[34]

1. Timely Filing

The AEDPA imposed, for the first time, a time requirement on the filing of federal habeas petitions.[35] It requires that applications be filed one-year from the latest of four dates: 1) the date the judgment became final by the conclusion of direct review, or the time for seeking that review expires,[36] which is after the Supreme Court denies certiorari on direct review, or the time for seeking certiorari on direct review expires[37] – this is the most commonly used date; 2) if an impediment to filing was caused by the state in violation of the Constitution or the laws of the United States prevented the applicant from filing, the date the impediment is removed;[38] 3) if a newly recognized right has be made retroactively applicable to cases on collateral review, the date on which the constitutional right asserted was first recognized by the Court;[39] or 4) the date the factual predicate of the claim could have been discovered through due diligence.[40] The timing requirements interact with the requirement that petitioners exhaust state remedies, as prisoners often have to file state postconviction applications prior to seeking federal habeas relief. Under the statute, once state postconviction proceedings are initiated, the federal clock is tolled during the pendency of state proceedings.[41]

2. Procedural Default/Exhaustion

If a prisoner fails to raise a claim in state court proceedings, whether on direct appeal or during state postconviction proceedings, courts consider those claims procedurally defaulted for purposes of federal review.[42] This rule works in connection with the exhaustion requirement, because state courts must be given the first opportunity to adjudicate claims. A claim also is procedurally barred if the state court has an independent and adequate state ground for rejecting a constitutional claim.[43]

3. Abusive/Successive Petitions

Before enactment of the AEDPA, petitions that raised both exhausted and unexhausted claims had to be dismissed;[44] however, the AEDPA now bars a federal court from hearing meritorious unexhausted claims while allowing them to deny frivolous unexhausted claims.[45] Also, the state has to actively waive the exhaustion requirement.[46]

4. "New" Rule Retroactivity Analysis

In *Teague v. Lane*,[47] the Court announced that prisoners seeking collateral review would not receive the benefit of new rules of constitutional law unless the rule: 1) "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe,"[48] or 2) the rule is a "watershed rule[] of criminal procedure."[49] "Watershed rules of criminal procedure" are those that "alter [the] understanding of the *bedrock procedural elements* that must be found to vitiate the fairness of a particular conviction."[50]

A petitioner's case is in collateral review once his conviction and sentence have become final.[51] This date is the date either when the Supreme Court denies a petition for certiorari, or the time for seeking certiorari from the Supreme Court, ninety days, expires.[52]

The Court said that "[r]etroactivity is properly treated as a threshold question, for, once a new rule is applied to the defendant in the case announcing the rule, evenhanded justice

requires that it be applied retroactivity to all who are similarly situated."[53]

A new rule is one that "breaks new ground or imposes a new obligation on the States or Federal Government,"[54] or "if the result was not *dictated* by precedent existing at the time the defendant's conviction became final."[55] The Court, referring to its decision in *Griffith v. Kentucky*,[56] said that with regard to cases on direct review when a new rule is announced, the new rule should apply so as not to "violate[] basic norms of constitutional adjudication."[57] The Court offered two reasons for its decision: the integrity of judicial review, and equal protection of similarly situated defendants.[58]

B. Obtaining Federal Review Under Section 2254

Even if a state prisoner meets all of these requirements, he will only have his claim heard in federal court if the state court's adjudication of the claim "on the merits" was "contrary to" or "an unreasonable application of" "clearly established federal law."[59]

1. "Adjudicated on the merits"

A state court's decision on a state prisoner's claims can take one of three forms. It can provide 1) a detailed analysis of the basis of its decision for all claims, citing to federal law when necessary, 2) analysis for some claims, but not for others, or 3) a summary disposition, or "postcard denial," simply stating that the petitioner's claims are without merit, or are denied.[60] Until the Supreme Court's decision in *Richter*, discussed infra Part III, federal courts handled the forms of decisions differently, with some circuits holding that postcard denials were not "adjudicated on the merits,"[61] which resulted in similarly situated petitioners obtaining varying relief depending on the circuit. Whether a court's postcard denial of a claim should be considered adjudication on the merits of that claim has been the subject of contentious debate,[62] namely because of the question of whether analysis under Section 2254(d)(1) requires a federal court to look at a state court decision's *reasoning* or its *result*.[63] This issue has largely been resolved by *Richter*, discussed in infra Part III.

2. "Contrary to" or "an unreasonable application of"

In a decision announced four years after the passage of the AEDPA,[64] the Supreme Court addressed the meaning of these provisions.[65] Justice O'Connor, writing for the majority, noted that "contrary to" and "unreasonable application of," should be read separately. She further noted that unreasonable application did not mean an incorrect application.[66] One study found that since *Williams* was decided in 2000, the Court has split in its decisions regarding cases decided under Section 2254(d)(1).[67] Looking at twenty-two capital cases decided since *Williams,* the study grouped the justices into blocs—the "blind deference" bloc and the "de novo" bloc.[68] Justices Scalia, Thomas, Rehnquist, Roberts, and Alito fall into the "blind deference" camp, while Justices Ginsburg, Souter, Stevens, and Breyer "have basically applied 'de novo' review or some standard even less deferential."[69] The camps are largely in line with the ideological split of the Court, with the more conservative justices deferring to state court judgments and the more liberal justices favoring federal review. The "blind deference" group found state application of federal law unreasonable in 4-14% of cases, while the "de novo" group found state application of federal law unreasonable 54-63% of the time.[70] Based on ideology, Roberts would likely fall into the "blind deference" group, while Justices Kagan and Sotomayor would likely fall into the "de novo" group.[71] These separate standards are clearly problematic for federal review. The two groups are applying completely different standards of review, leading to ambiguity, arbitrariness, and inconsistency in treatment of similarly situated defendants.[72]

3. "Clearly established federal law"

In addition to addressing the "contrary to" or "unreasonable application of" clauses, the Court in *Williams* also tackled the meaning of "clearly established federal law." While Justice O'Connor, writing the opinion for Part II of the Court's decision, described clearly established federal law as the law established as of the *time of the relevant state court decision*,[73] Justice Stevens, writing the opinion for Parts I, III, and IV of the Court's decision, said the threshold question is whether the law was clearly established at the *time the state-court conviction became final*,[74] leaving confusion as to which cutoff should be considered for Section 2254 analysis. Further, the majority agreed that "clearly established federal law" referred to the holdings, rather than the dicta of the *Supreme Court*, rather than other federal courts.[75] The Court discussed the relationship between *Teague* and Section 2254 and rejected the notion that Section 2254 codified *Teague*.[76] The Court said that if a rule is announced after a state prisoner's conviction became final, he would be barred by *Teague* from having the rule apply on collateral review, and also would not have the benefit of the rule's application in habeas.[77]

Carey v. Musladin,[78] a 2006 opinion in which Justice O'Connor wrote for the majority, noted that if a holding did not *specifically* apply then the state court's decision would not be contrary to, or an unreasonable application of clearly established federal law. There, family members of a murder victim wore pins with photos of her while sitting in the front row of the spectator's gallery.[79] Musladin argued that this violated his Fourteenth and Sixth Amendment rights.[80] The Court of Appeals found that the Supreme Court's decisions in *Estelle v. Williams*[81] and *Holbrook v. Flynn*[82] were the applicable law.[83] The Court

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in *Estelle* held that the state forcing the defendant to stand trial in prison clothes did not further essential state policy.[84] The Court in *Flynn* held that the practice of four uniformed troopers sitting in the spectators' seats directly behind the defendant "further[ed] no essential state policy."[85] Extending these cases to spectator conduct, the Ninth Circuit reversed the district court to provide habeas relief. The Supreme Court, however, said that because those decisions were applied to government conduct, as opposed to spectator conduct, the state court's decision was not unreasonable. Justice O'Connor said that the decisions in *Estelle* and *Flynn* did not apply to the conduct of private actors in the courtroom, but rather to government-sponsored conduct.[86] Given the lack of directly applicable holdings, the Court said it could not say that the state court unreasonably applied clearly established federal law.[87]

While O'Connor and the majority interpreted clearly established federal law very narrowly, Justice Stevens, in a concurrence, stated that some explanatory language is necessary to provide guidance: "It is quite wrong to invite state-court judges to discount the importance of such guidance on the ground that it may not have been strictly necessary as an explanation of the Court's specific holding in the case."[88]

Justice Kennedy, who concurred in the judgment, offered a little more guidance in how holdings might apply to a given case. He said that while general rules provide state courts wider latitude in making case-by-case determinations, "the AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied."[89]

It is said that all of these hurdles exist to promote principles of comity, finality, and federalism;[90] however, recent decisions go beyond comity to a near failure to conduct independent federal judicial review, contrary to Congressional intent.

One article examining the legislative history of the AEDPA found that several members of Congress were concerned about how the "unreasonable application of" language might be applied.[91] The history indicates that while the standard was intended to be deferential, several members of Congress worried the Court might interpret the language to mean "wrong but reasonable."[92] Senator Orrin Hatch, a supporter of the bill, defended the language, noting that "the standard 'allows the Federal courts to review State court decisions that improperly apply clearly established Federal law.'"[93] Senator Hatch's substitution of the word "improper" for the word "unreasonable" shows that he likely considered the terms to be interchangeable, much like the terms "incorrect" and "unreasonable."[94] While Congress seemed to intend for "unreasonable" to mean "incorrect," the Supreme Court expressly rejected that interpretation in *Williams v. Taylor*.[95]

In his signing statement of the AEDPA, President Clinton noted that while some "suggested" that the provisions amending Section 2254 would limit independent federal review, "he expected the courts to construe AEDPA to avoid the constitutional problems that would accompany a law purporting to 'preclude the Federal courts form making an independent determination about'" the law.[96]

Though Congress seems to have intended for the courts to correct incorrect applications of law, "[t]he Court is not obligated to follow the legislative history of an Act of Congress; rather, the Court is required to apply its interpretation of the statute as written."[97]

II. The Section 2254 Trinity

During 2011, the Supreme Court decided three cases interpreting long-debated provisions of Section 2254.[98] These decisions indicate that the Supreme Court has interpreted Section 2254 so narrowly that it has nearly eliminated federal review.[99] While each individual decision has erected an additional barrier to federal view, the cumulative impact of the decisions is crippling to the ability of federal courts to meaningfully review state court decisions.[100] These interpretations have contradicted Congressional intent,[101] yet Congress remains silent. While *Richter* has broadly expanded the degree of deference federal courts are to give to state court decisions, *Pinholster* limited the availability of evidentiary hearings in federal court, and *Greene* narrowed the temporal window of federal case law available to state courts adjudicating a claim on the merits. Additionally, *Greene* has left retroactivity analysis in an utterly unclear state.

A. *Harrington v. Richter*

In January 2011, the Supreme Court issued an 8-0 opinion, authored by Justice Kennedy, holding that Section 2254(d) does

not require a state court to provide a reasoned opinion for its decision to be deemed "adjudicated on the merits."[102]

1. *Procedural History*

A jury found Richter guilty on charges of murder, attempted murder, burglary, and robbery. He was sentenced to life without parole, and his sentence was affirmed on appeal.[103] The California Supreme Court denied review and Richter declined to file a petition for certiorari with the U.S. Supreme Court.[104]

Richter filed a petition for state habeas with the California Supreme Court. He raised many claims, including ineffective assistance of counsel at the trial phase for his counsel's failure to present expert testimony on serology, pathology, and blood spatter patterns.[105] The California Supreme Court denied his petition in a summary order with one sentence. He then filed for federal habeas, reasserting his state habeas claims. The District Court denied, and then a panel of the Ninth Circuit Court of Appeal affirmed. On a rehearing en banc, the Ninth Circuit reversed the District Court.[106] The Court of Appeals questioned the applicability of Section 2254, specifically, whether the one-sentence summary denial constituted adjudication in the merits, but determined that even if Section 2254 were applicable, the California Supreme Court's decision was unreasonable.[107]

2. *The Supreme Court Decision*

In determining whether summary denials constitute adjudication on the merits, Justice Kennedy, writing for the Court, observed that the statute did not require a statement of reasons, only a decision.[108] "[D]etermining whether a state court's decision resulted from an unreasonable legal or factual conclusion does not require that there be an opinion from the state court explaining the state's reasoning."[109] In justifying state courts' use of summary dispositions, Justice Kennedy, citing caseloads, said that summary dispositions afford courts the opportunity to "concentrate its resources on the cases where opinions are most needed."[110] He added that absent a statement to the contrary, federal courts are to assume that a state court adjudicated the merits of a federal claim when a state court denies relief.[111] Taking it one step further than presuming adjudication on the merits, federal courts have to determine arguments or theories supported or *could have* supported the state court decision.[112] The court must then "ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with the holding in a prior decision of this Court."[113] Beyond that, the Court said that even if there is a strong case for relief, it "does not mean the state court's contrary conclusion was unreasonable."[114]

The *Richter* decision went so far as to make it a condition that to obtain habeas, a prisoner must show the state court's ruling to be "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."[115] Noting that habeas review should be difficult to meet, Justice Kennedy said that Section 2254(d) "complements the exhaustion requirement and the doctrine of procedural bar to ensure that state proceedings are the central process, not just a preliminary step for later federal habeas proceeding."[116]

3. *The Effect*

In handing down *Richter*, the Court not only constricted the opportunity for federal review, but also seems to have heightened the deferential standard to the point of no return.[117] Now, federal courts not only have to presume adjudication on the merits, but also have to formulate all possible reasons a court could have made a decision.[118] Federal courts must deny relief unless the state court's decision completely lacked justification.[119] This is raising the standard for federal habeas review, a civil standard, to that of almost a criminal "beyond a reasonable doubt" type standard.[120] Justice Kennedy's call for review to be conditioned upon the proving of an error "well understood and comprehended in existing law beyond any possibility for fairminded disagreement,"[121] seems to be a far cry from the statutory language of "unreasonable application of" clearly established federal law.

Further, while deference should be given to state court decisions, this overly deferential approach makes it so that prisoners may never have certain claims "adjudicated on the merits." If a state court is presented with a number of claims, and only one is federal, a summary denial could mean that the state court thought all or none of the claims had merit, but without a discussion, it is entirely unclear why the state court did not think a claim had merit. Without knowing how a state court applied the law, it seems impossible to determine whether that application is "unreasonable." Unless a federal court finds it *impossible* for a state court's application to be reasonable, *Richter* has made state court decisions per se reasonable.[122]

The majority opinion in a Sixth Circuit case came to just this conclusion.[123] While Judge Clay, who wrote the dissent, said the majority "erroneously interpret[ed]"[124] *Richter* to heighten the standard of review, the language from the Court has muddied the standard of review, thus making it more difficult to determine what that standard is.

B. *Cullen v. Pinholster*

A second blow to habeas relief came in the Supreme Court's April 2011 decision in *Cullen v. Pinholster*. The Court, in a 5-4 opinion authored by Justice Thomas, held that Section 2254(d)(1) review is "limited to the record that was before the state court that adjudicated the claim on the merits."[125]

1. The Facts

Scott Pinholster, along with two accomplices, broke into a house and beat and stabbed two men to death who interrupted the burglary.[126] At trial, Pinholster was found guilty of first-degree murder and sentenced to death.[127] The California Supreme Court twice denied Pinholster state habeas relief before a federal district court granted him an evidentiary hearing because it determined that his counsel had been ineffective during the penalty phase of trial.[128] The Ninth Circuit, sitting en banc, affirmed after considering the evidence developed in the District Court hearing, noting that the California Supreme Court's decision was "contrary to, or involved an unreasonable application of, clearly established federal law."[129]

Before the appointment of Harry Brainard and Wilbur Dettmar, Pinholster had rejected other attorneys and insisted on proceeding pro se.[130] During this time, the government notified him that it intended to use aggravating evidence to support a death sentence.[131] During the guilt phase, Pinholster was convicted on both counts of first-degree murder.[132] Before the penalty phase, his counsel moved to exclude aggravating evidence because he had not received notice, and further stated that he was "not presently prepared" to offer any mitigation.[133] His counsel then, while conceding that notice may have been given, declined a continuance stating that he "could not think of a mitigation witness other than Pinholster's mother," and that he did not think the additional time would "make a great deal of difference."[134] The only mitigating evidence counsel put on was testimony by Pinholster's mother, and the jury unanimously voted to impose the death penalty.[135]

2. Habeas Proceedings

In his first state habeas proceeding, Pinholster brought an ineffective assistance of counsel (IAC) claim based on failure to adequately investigate and present mitigating evidence.[136] He supported this claim with school, medical, and legal records, as well as with declarations from family members and one of his attorneys.[137] The records indicated that he suffered from seizure disorders, and from bipolar mood disorder.[138] The California Supreme Court found his argument to be without merit and denied his petition.[139]

Pinholster then filed a federal habeas petition reiterating his previous claims and submitting an additional declaration by a psychiatrist, who had evaluated Pinholster before the penalty phase, stating that trial counsel had provided him only with some police reports and a probation report.[140] He said that had he known about the existence of the other records, he would have conducted "further inquiry," before making his diagnosis.[141] Because this declaration had never been submitted to the California Supreme Court, the district court temporarily suspended his federal petition in order to allow Pinholster to go back to state court.[142] In a second state habeas petition, Pinholster submitted the psychiatrist's declaration and requested judicial notice of the other documents submitted during his first habeas petition; the California Supreme Court again dismissed it as being without merit.[143]

Pinholster then amended his federal habeas petition, alleging the same ineffective assistance of counsel claims that were in his second habeas petition.[144] Both parties moved for summary judgment; Pinholster also moved, in the alternative, for an evidentiary hearing.[145] The district court held that AEDPA did not apply and granted an evidentiary hearing, which led to the granting of habeas relief for "for inadequacy of counsel by failure to investigate and present mitigation evidence at the penalty hearing."[146] After a Supreme Court case clarified that the AEDPA did, in fact, apply to cases like Pinholster's, the court amended its order, but reached the same conclusion.[147]

A panel of the Ninth Circuit then reversed, and on an en banc rehearing, the panel opinion was vacated and the District Court's opinion affirmed.[148] The Ninth Circuit found that the new evidence could be considered to assess whether the California Supreme Court's decision "was contrary to, or involved an unreasonable application of, clearly established federal law."[149] In doing so, the court found that the California Supreme Court had unreasonably applied *Strickland v. Washington*[150] in denying Pinholster's claim of ineffective assistance of counsel at the penalty phase of trial.[151] It found the performance of Pinholster's attorneys to be "far more deficient" than the performance of the attorneys in *Wiggins v. Smith*[152] and *Rompilla v. Beard*,[153] cases where the Supreme Court upheld IAC claims.[154]

In *Wiggins*, counsel did not investigate Wiggins' history for mitigating evidence beyond the presentence investigation report and Department of Social Services records.[155] The Court found this performance fell below the standards set forth by the American Bar Association's Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.[156] The Guidelines, which help to determine the reasonableness of an attorney's conduct under the first prong of *Strickland*, require that investigations of mitigating evidence "comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor."[157] In *Rompilla*, counsel failed to investigate his prior conviction at the sentencing phase of trial.[158] The Supreme Court found that counsel's performance was deficient, and that the deficient performance prejudiced Rompilla.[159]

The Ninth Circuit, in evaluating Pinholster's claim, said it "could not 'lightly disregard' a failure to introduce evidence of 'excruciating life history' or 'nightmarish childhood,'" and thus granted him relief.[160] The Supreme Court granted certiorari "to consider whether § 2254(d)(1) permit[ted] consideration of evidence introduced in an evidentiary hearing before the federal

habeas court," and whether Pinholster was properly granted relief on his penalty phase IAC claim.[161]

3. *The Supreme Court Decision*

Justice Thomas, writing for the majority, discussed the principle of exhaustion and how the exhaustion barrier requires deference to the state courts. "It would be contrary to that purpose to allow a petitioner to overcome an adverse state-court decision with new evidence introduced in federal habeas court and reviewed by that court in the first instance effectively *de novo*."[162] He reiterated the principle announced in *Lockyer v. Andrade*,[163] that the decision made by the state court must be measured against Supreme Court precedent that existed "as of '*the time the state court renders its decision*.'"[164] In assessing the impact of its decision on Section 2254(e), the Court noted that Pinholster's contention that its ruling "renders § 2254(e)(2) superfluous is incorrect . . . § 2254(e)(2) continues to have force where § 2254(d)(1) does not bar federal habeas relief."[165]

Because the Ninth Circuit alternatively ruled that Pinholster was entitled to habeas relief on the state record alone, the Supreme Court went on to review the state record. In a rather dismissive opinion, Thomas quickly disposed of each piece of evidence indicating that counsel was ineffective, noting that counsel billed six hours in preparation for the death penalty phase, that "family sympathy" mitigation defense was commonly used by the California defense bar, that counsel acted strategically, and thusly counsel had performed adequately.[166] Thomas said Pinholster's attorneys were aware that the state was going to put on aggravating evidence and that the billing records indicated the time spent investigating mitigating evidence.[167] Further, "the record demonstrated that they represented a psychotic client whose performance at trial hardly endeared him to the jury."[168]

After concluding that performance was not deficient, Thomas went on to say that even if trial counsel was deficient, Pinholster neglected to show prejudice.[169] Thomas said that to determine whether there was a reasonable probability, absent the error, that the sentencer would have found the balance of aggravating and mitigating factors not to warrant a death sentence, the Court had to "reweigh the evidence in aggravation against the totality of available mitigating evidence."[170] After considering all the aggravating and mitigating evidence, the Court concluded that the California Supreme Court did not unreasonably apply Supreme Court precedent in finding that Pinholster did not establish prejudice.[171]

Justice Alito, in a concurring opinion, said that while he agreed with the judgment, he agreed in part with Part I of Justice Sotomayor's dissent—when a federal evidentiary hearing is properly held, Section 2254(d)(1) review must take into account evidence adduced from that hearing.[172]

> As the dissent points out, refusing to consider evidence received in the hearing in federal court gives § 2254(e)(2) an implausibly narrow scope and will lead either to results Congress surely did not intend or to the distortion of other provisions of the Antiterrorism and Effective Death Penalty Act.[173]

Justice Alito further explained that while evidentiary hearings should be rare, Section 2254(e)(2) already imposes a stringent standard to hold a hearing.[174]

Justice Breyer, concurring in part and dissenting in part, said that he would have remanded to the Ninth Circuit Court of Appeals to apply the standard announced by the court.[175] In discussing the relationship between sections 2254(d)(1) and 2254(e), Breyer explained that the Court's decision allows a federal habeas court to review a state court's rejection of a claim based on the materials the state court considered.[176] "If the federal habeas court finds that the state-court decision fails (d)'s test (or if (d) does not apply), then an (e) hearing may be needed."[177]

4. *Sotomayor's Dissent*

The dissent, authored by Justice Sotomayor and joined by Justices Ginsburg and Kagan, pointed out that along with the conflation of the two sections of the statute, the Court's ruling would produce unjust results.[178] "Under the Court's novel interpretation of § 2254(d)(1) . . . federal courts must turn a blind eye to new evidence in deciding whether a petitioner has satisfied § 2254(d)(1) . . . *even when it is clear that the petitioner would be entitled to relief in light of that evidence*."[179] Calling the result "harsh," Sotomayor criticized the majority's failure to note statutory differences in the language of Section 2254(d)(1) and the language of Section 2254(d)(2).[180] She also found that the Court did not need to reach the result of whether § 2254(d)(1) analysis is limited to the state record, because she found that Pinholster had satisfied the threshold under either record.[181] The holding reached by the majority, she noted, would be unduly burdensome for habeas petitioners. "Even absent the new restriction created by today's holding, AEDPA erects multiple hurdles to a state prisoner's ability to introduce new evidence in a federal habeas proceeding."[182]

In parsing the text of the statute, Sotomayor refused to give more import to the meaning of the statute than provided by the text. "By construing § 2254(d)(1) to do the work of other provisions of the AEDPA, the majority has subverted Congress' careful balance of responsibilities. It has also created unnecessarily a brand-new set of procedural complexities that lower courts will have to confront."[183] Sotomayor pointed out that while both Section 2254(d)(1) and Section 2254(d)(2) have backward-looking language, only Section 2254(d)(2) expressly requires courts to review "'the evidence presented in the State

Pinholster has had an immediate and expansive impact as many cases have been remanded to determine whether evidentiary hearings that were previously granted are no longer justified in light of the decision.

court proceeding.'"[184] She explained that if Congress' use of the past tense were meant to limit federal review to the state-court record, then the addition of "'in light of the evidence in the State court proceedings'" in Section 2254(d)(2), language that does not appear in Section 2254(d)(1), would be unnecessary.[185] She criticized the majority's treatment of the phrase in (d)(2) as "clarifying" language, noting that they were speculating about Congressional intent.[186] If it were clarifying language, Sotomayor explained, it would make more sense if it appeared in Section 2254(d)(1) because between the two, Section 2254(d)(2) needs less clarification because it "more logically depends on the facts presented to the state court."[187]

5. *The Effect*

By substantially limiting the availability of evidentiary hearings in federal court, the Court effectively thwarted the ultimate likelihood of success.[188] When evidentiary hearings are held, petitioners are more likely to obtain relief—by thirty-two percentage points—than when evidentiary hearings are not held.[189] *Pinholster* has had an immediate and expansive impact as many cases have been remanded to determine whether evidentiary hearings that were previously granted are no longer justified in light of the decision.[190] As of August 2012, just a little more than one year since the decision was handed down, nearly 1,900 federal cases have cited to the decision, including nine Supreme Court cases, 228 Courts of Appeal cases, and more than 1,600 District Court cases; only twenty-seven of those gave *Pinholster* negative treatment.[191] As one scholar notes, *Pinholster* creates a situation making it all but impossible for state prisoners to get an evidentiary hearing in federal court:

> *Pinholster* creates a stifling catch-22 for many federal habeas petitioners. On the one hand, *Pinholster* holds that "if the factual allegations a petitioner seeks to prove at an evidentiary hearing" would not satisfy the requirements for relief under (d)(1), then "there is no reason for a hearing." In other words, a hearing is generally not permitted unless the facts sought to be developed at the hearing would satisfy the strictures of (d)(1). But on the other hand . . . if the new evidence that would be adduced at a hearing would demonstrate that (d)(1) is satisfied, then the use of the evidence is conclusively barred because the review for relief eligibility under § 2254(d)(1) "is limited to the record that was before the state court that adjudicated the claim on the merits."[192]

Justices Alito and Sotomayor seem to have reached the correct conclusion regarding the narrow reading of Section 2254(e). While Justice Breyer states that there are times when a federal court, after finding that a state court's decisions was contrary to, or an unreasonable application of clearly established federal law, may order a Section 2254(e) hearing to determine "whether the alleged facts were true,"[193] this seems to be both an overly complex reading of the statute, and a conflation of two previously independent sections of the statute.

C. *Greene v. Fischer*

While the impacts of *Richter* and *Pinholster* seem to be a little more obvious, the impact of *Greene*, while potentially vast, is more nuanced, and slightly more complicated—in fact, based on the oral arguments and the opinion of the Supreme Court, it is unclear whether the justices understood its potential import.[194]

1. *The Facts*

Eric Greene and four co-conspirators robbed a Philadelphia grocery store in 1993; during the robbery, one of the men fatally shot the store's owner.[195] Two of the five men confessed to taking part in the robbery.[196] Greene did not confess, but was implicated in the statements of the others.[197] Greene sought severance from his coconspirators at trial, arguing that the admission of the nontestifying codefendants at his trial would be a violation of the Confrontation Clause.[198] The trial court denied the motion to sever, but redacted references to Greene, sometimes using blanks or omitting the names without substitution.[199] Greene was convicted of second-degree murder, robbery, and conspiracy.[200]

2. *Procedural History*

On appeal, Greene argued that he should obtain relief under *Bruton v. United States*,[201] which held that the Confrontation Clause bars the prosecution from introducing a nontestifying codefendant's confession that implicates the defendant.[202] The

Pennsylvania Superior Court rejected the argument and concluded that the redaction cured any problem.[203] Greene then filed for discretionary review with the Pennsylvania Supreme Court, raising the same claim.[204] During the time his petition was pending, the Supreme Court decided *Gray v. Maryland*,[205] which held that redactions giving notice to the jury that a name had been deleted were similar enough to *Bruton's* unredacted confessions "as to warrant the same legal results."[206]

The Pennsylvania Supreme Court granted the petition, limited to the question of whether the redacted confessions violated Greene's Sixth Amendment rights—however, before issuing a decision, the Supreme Court dismissed the appeal as improvidently granted, making the Superior Court decision the last adjudication on the merits.[207] Greene, who did not have counsel at this point,[208] did not file a petition for certiorari with the United States Supreme Court.[209] When his time for filing the petition expired, his conviction became final.[210]

Greene then filed for relief under Pennsylvania's Post Conviction Relief Act (PCRA), but did not raise the Confrontation Clause claim.[211] Although he did not raise these claims in state postconviction, the Pennsylvania Supreme Court and the Third Circuit said that Greene properly exhausted his state remedies because, under Pennsylvania law, he was barred from bringing claims already raised on direct appeal.[212] The petition was denied as frivolous and Greene, who was acting pro se, appealed to the Pennsylvania Superior Court, again without reference to the Confrontation Clause claim.[213] The dismissal was affirmed.[214] Greene filed for discretionary appeal with the Pennsylvania Supreme Court and it denied review.[215]

In his federal habeas petition, Greene asserted his Sixth Amendment claim.[216] The magistrate judge issued a certificate of appealability on the Confrontation Clause claim, but struggled with whether the "clearly established law" for purposes of his claim was the date of the last state-court adjudication, or the date Greene's conviction became final; the former not including the benefit of the Court's *Gray* decision, while the latter did.[217] The judge ultimately determined that the date of the last state court decision was the cutoff for review under Section 2254(d)(1).[218] Because *Gray* was not within that timeframe, the judge recommended that the District Court deny the petition.[219] The District Court did deny the petition, but issued a certificate of appealability as to the Confrontation Clause claim.[220]

The Court of Appeals discussed several sources of "clearly established federal law."[221] Under *Williams*, discussed supra Part I, clearly established federal law is determined based on "the time of the relevant state-court decision,"[222] "the time [the] state-court conviction became final,"[223] or "some combination thereof."[224] The Third Circuit ultimately decided that the controlling date was that of the relevant state-court decision.[225]

The Third Circuit discussed this cutoff date with respect to *Teague*. It noted that the Supreme Court has held that decisions qualifying as "old" rules under *Teague* would constitute clearly established federal law under Section 2254(d)(1).[226] The Third Circuit reasoned that under this language, an old rule is one that was "dictated by the governing precedent . . . at the time" the conviction became final.[227] The Third Circuit recognized that this would include decisions decided after the last state court's adjudication on the merits, but before the conviction became final.[228] That result, the Third Circuit determined, would contradict Justice O'Connor's pronouncement that clearly established law "should be determined based on the date of the relevant state-court decision."[229] Ultimately, in keeping in line with Justice O'Connor's interpretation, the Court found that AEDPA necessitates that federal law be clearly established at the time of the "state-court *decision*."[230] The Third Circuit also said the dissent mischaracterized *Griffith* as applying to cases on collateral review, and that the *Teague* "new rule" issue is not raised in the case because *Gray* was decided before the case became final.[231] "[W]e caution that the use of *Teague*'s new rule retroactivity exceptions for purposes of § 2254, while not implausible . . . has yet to gain support from the Supreme Court."[232] The Court further stated that under the Supreme Court's decision in *Horn v. Banks*, "AEDPA and *Teague* inquiries are distinct,"[233] and that a petitioner qualifying for review under Section 2254 is the minimum required for habeas relief.[234] The Third Circuit, quoting *Horn*, said that while state prisoners are required to meet the standards set forth in Section 2254, meeting those standards does not automatically guarantee relief, nor does it alleviate courts from addressing *Teague* arguments.[235]

The Third Circuit conceded that a Section 2254 petitioner may invoke *Griffith* if relevant Supreme Court precedent was not applied on direct review.[236] *Griffith* alone, however, is not controlling with respect to retroactivity for cases on collateral review.[237] The Court criticized Greene's failure to raise the Confrontation Clause claim in his postconviction petition.[238] While noting that it was "unfortunate" that the body of clearly established federal law available to Greene on federal review did not include *Gray*, the court said his current predicament easily could have been avoided.[239]

3. *The "Twilight Zone"*

Judge Ambro, the sole dissenter for a three-member panel of the Third Circuit, coined the term "twilight zone" in describing Greene's predicament—a situation where a petitioner's case is not yet final, but where the claim had been adjudicated on the merits by the last state court's decision.[240] "Greene is in the unwelcome twilight zone where, in the United States Supreme Court's own words, 'uncertainty' currently exists."[241]

The majority's opinion, Judge Ambro said, leaves a criminal defendant without recourse to federal review if a state court fails, under *Griffith*, to apply a new constitutional rule to his case on direct review.[242] Contrary to what the majority opinion

said, Judge Ambro simply noted that Greene *should have* benefited from the court's decision in *Gray*.[243] Because *Gray* was decided while Greene's petition to the Pennsylvania Supreme Court was pending, meaning his case was still on direct review, the retroactivity rule of *Griffith* should have applied.[244] Discussing Greene's pending petition before the Pennsylvania Supreme Court, Judge Ambro said that while the Pennsylvania Supreme Court did grant review on the issue decided by *Gray*, it dismissed its grant as improvidently granted, leaving the Superior Court's pre-*Gray* decision in place.[245] He further recognized that the reason Greene did not raise his Confrontation Clause claim on postconviction review was because the statute specifically prohibited Greene from bringing claims brought on direct appeal.[246] Judge Ambro said that the Court does not consider federal claims procedurally defaulted unless the last state court decision on the merits specifically states that its judgment relied on a state procedural bar.[247] "There is no clear or express statement [that it relied on a state procedural bar] here."[248] Acknowledging that Section 2254(d)(1) did not express a cutoff date, Judge Ambro said that the *Griffith-Teague* retroactivity jurisprudence was left in tact.[249] Because Greene's conviction was not yet final at the time *Gray* was decided, *Griffith* should apply.[250]

The time period that conflates retroactivity and the AEDPA is the twilight zone – the period after the last state-court adjudication on the merits but before finality.

Like the majority, Judge Ambro recognized that two different majorities of the Court in *Williams* provided two different cutoff dates.[251] Justice Stevens said the cutoff is the time the conviction becomes final while Justice O'Connor said the cutoff is the time of the last relevant state-court decision.[252] Judge Ambro noted that the Court was not abandoning its retroactivity jurisprudence in discussing these dates.[253] To distinguish between "old rule" and "new rule," Judge Ambro included a chart in his dissenting opinion. For a decision before the last state-court decision on the merits on direct review, a rule would be considered an "old rule" under *Teague* because it is pre-finality.[254] Because it would be an "old rule," it would be applicable to criminal cases on both direct and collateral review, and would constitute "clearly established federal law" under the AEDPA.[255] A decision occurring after finality would be a "new rule" under *Teague*, and would only apply retroactively on collateral review if one of two narrow exceptions were met; it also would not qualify as "clearly established federal law."[256]

The time period that conflates retroactivity and the AEDPA is the twilight zone – the period after the last state-court adjudication on the merits but before finality.[257] Under *Griffith*, rules announced during this time would be applicable to cases on direct review.[258] Under the majority's reading of Section 2254 of the AEDPA, however, this would not qualify as "clearly established federal law," and thus a petitioner would be unable to seek habeas relief.[259]

While *Griffith* generally applies to cases on direct review, Judge Ambro said that the Supreme Court's decision in *Whorton v. Bockting* acknowledged that "old rules" should apply to cases on direct and collateral review.[260] This, Judge Ambro noted, meant that *Whorton* endorsed *Griffith* and the proposition that decisions announced before finality are old rules that are applicable under the AEDPA.[261] Judge Ambro called the majority's reading of Section 2254 "inflexible," and a "catch-22" reading that "effectively disregards *Griffith* and *Teague* even as the Supreme Court has maintained that both decisions remain viable."[262] He also noted that if a state court failed to apply *Griffith* on direct review, the petitioner should still receive the benefit of the rule on collateral review.[263]

4. *The SCOTUS Decision*

Justice Scalia, writing the first unanimous opinion of the term,[264] hastily resolved the issue in a seven-page opinion.[265] Adopting the Third Circuit's interpretation of the cutoff date, the Court cited to its decision in *Pinholster* regarding the backward-looking language of the statute.[266] Justice Scalia said that *Pinholster*'s reasoning determined the result in Greene.[267] Section 2254(d)(1) requires federal courts to focus on what a state court "'knew and did,'" and to assess state-court decisions under Supreme Court precedents "as of '*the time the state court renders its decision*.'"[268] While the Supreme Court addressed the fact that *Teague* would not apply, it failed to discuss *Griffith*.[269] The Court criticized Greene and said that his dilemma was his own fault because "he missed two opportunities to obtain relief under *Gray*."[270] He could have filed a petition for writ of certiorari with the Supreme Court after the Pennsylvania Supreme Court dismissed his appeal, "which would almost certainly have produced a remand in light of the intervening *Gray* decision."[271] Or, the Court noted, he could have raised the issue in his state postconviction petition.[272]

5. *The Effect*

Several outstanding issues remain unresolved by the Court's very brief opinion. Many of the viable issues addressed

during oral argument were left untouched in the opinion. It is unclear why the Court declined to discuss *Griffith*, thus leaving the Third Circuit dissenter's interpretation somewhat in tact; it should have applied because the case was still on direct appeal. Also, it is notable that Justice Sotomayor did not dissent in this case, particularly because the Court based its decision on the reasoning of *Pinholster*, namely, the backward-looking language of Section 2254(d)(1).[273] This is the reasoning that Sotomayor vehemently objected to in her *Pinholster* dissent. It seems somewhat contradictory that she would take issue with the narrow interpretation given to Section 2254(d)(1) in *Pinholster*, yet sign on to the opinion in its entirety under the same reasoning in *Greene*. At oral argument, Eric Fisher, Greene's attorney, contended that it would be consistent with *Pinholster* to take the set of facts as the y were in the state court, "but that new law up to the point of finality . . . can be considered."[274] While Justice Kagan said that there may be a distinction between facts and law, the decision ultimately rested on the fact that the statute was framed in the past tense.[275] Fisher said that while the statute required that reading with regard to the facts, the statutory structure with regard to the law "compels the opposite conclusion."[276] Justice Sotomayor asked how Greene could get past the Court's decision in *Horn*, which states that *Teague* and the AEDPA must have distinct analyses.[277] She said that each "can serve as an independent bar."[278] Fisher argued that *Horn* was precisely why Greene should prevail—because the inquiries must be distinct.[279] "[W]e think the best way to understand them as distinct is to understand that § 2254 deals with a standard of review, and *Teague* continues to control finality . . . . [If] § 2254(d) is actually concerned with setting a cutoff at the time of the last State court decision for retroactivity purposes, you don't need *Teague* anymore."[280]

The Court also neglected to discuss Pennsylvania's statutory prohibition on raising claims heard on direct appeal in postconviction, merely stating that because Greene missed the opportunity to bring the claims in state postconviction, it was his own fault that he did not receive the benefit of *Gray*.[281] The Court further stated that he should have sought certiorari from the Supreme Court on direct review because the case likely would have been GVRed (grant, vacate, and remand); however, it did not really address the issue raised by Fisher in oral argument – namely that the Court is not bound to grant certiorari petitions to GVR. "[T]his Court has decided that habeas is a better place to work that out, not GVR . . . I don't think the Court wants to take on that responsibility."[282]

Finally, in a brief footnote, the Court noted that it did not need to address whether Section 2254(d)(1) precluded a twilight zone petitioner from relying on a decision that did fall within one of the *Teague* exceptions.[283] Even though Greene's case did not involve either of the *Teague* exceptions, the footnote "did not further discuss, however, how or why the Court might find a different 'plain reading' of Section 2254(d)(1) in such a circumstance."[284] By neglecting to address the possibility of this issue, though likely to be rare, the Court avoided tackling more complicated issues because it thought the petitioner did not really deserve much thought.[285]

III. What Does This Mean For State Prisoners?

A. Decline in Meaningful Review, Even at the Expense of Justice

These decisions have greatly weakened federal review, which will be particularly burdensome to indigent petitioners trying to navigate the complexities of state postconviction procedures and of federal habeas corpus without an attorney. While there is a right to counsel in federal postconviction proceedings, there is no federal requirement to provide counsel during state collateral review.[286] Without effective representation, it is unlikely that even the savviest prisoner would be able to effectively navigate the postconviction and habeas maze.

Justice Alito, in his concurring *Pinholster* opinion, noted that the "thrust of AEDPA is essentially to reserve federal habeas relief for those cases in which the state courts acted unreasonably."[287] On the one hand, the Court is stating that a federal court should not substitute its judgment for that of the state court, but on the other hand, after *Richter*, the Court is essentially doing just that.[288] It is speculating as to what decisions a state court *could have* made to come to its conclusion, which it is expressly required to do under *Richter*.[289] Indeed, that was just one more criticism given by Justice Sotomayor in her *Pinholster* dissent: "Determining whether a state court could reasonably have denied a petitioner relief in light of newly discovered evidence is not so different than determining whether there is any reasonable basis for a state court's unreasoned decision."[290]

Under these decisions, even if a prisoner's claim could be meritorious, the Court would still decline federal review.[291] In announcing these interpretations of the AEDPA, the Supreme Court seems to be foregoing its right to be the ultimate arbiter of Constitutional issues. Indeed, as stated in a Supreme Court decision[292] more than 200 years ago: "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each."[293]

The combined impact of *Richter*, *Pinholster*, and *Greene* are crushing. *Richter* requires federal courts to defer to state court judgments, even when those judgments give no indication of what law is applied or whether they applied it.[294] *Pinholster* severely limits the availability of federal evidentiary hearings that could produce evidence that would entitle a habeas petitioner to

These decisions seem greatly in conflict with the federal courts' function to remedy unfairness at the state court level. While petitioners are entitled to a merits-based review of state court adjudications, the AEDPA has made it so that more than 40% of federal habeas petitions are dismissed by federal district courts based on a procedural provision without a merits review.

relief.[295] And *Greene* prevents a petitioner who happens to be denied discretionary review by a higher-level appellate court the benefit of a new rule of constitutional law if it came down after last state adjudication on the merits, even if his case is still on direct review.[296] These decisions seem greatly in conflict with the federal courts' function to remedy unfairness at the state court level. While petitioners are entitled to a merits-based review of state court adjudications, the AEDPA has made it so that more than 40% of federal habeas petitions are dismissed by federal district courts based on a procedural provision without a merits review.[297]

Justice Sotomayor recognized that the result in *Pinholster* would mean less meaningful review, even for petitioners with viable claims:

> We should not interpret § 2254(d)(1) to foreclose these diligent petitioners from accessing the Great Writ when the state court will not consider the new evidence and could not reasonably have reached the same conclusion with the new evidence before it.[298]

Indeed, since the enactment of the AEDPA, many of the questions being decided at the federal level are procedural, rather than substantive.[299] "The increase in certiorari grants in federal habeas cases reflects, we believe, technical litigation about AEDPA rather than doctrinal development, because procedural questions are emerging as more petitions are governed by AEDPA."[300]

B. Detriment to Indigent Petitioners

Many petitioners, especially non-capital habeas petitioners, will not have access to counsel, leaving pro se individuals to navigate the complexities of federal habeas on his or her own. "The prisoner will finish his state post-conviction proceedings and, still without counsel, be expected to generate substantial new facts in support of his claims within the one-year statute of limitations."[301] Even among states that do provide a right to postconviction counsel, very few states provide a right to effective assistance of postconviction counsel.[302] Further, there are not necessarily quality assurance standards for those attorneys.[303] Depending on what state a petitioner is in, he may have highly competent and experienced counsel, or he may be left with inexperienced counsel, or counsel not bound by quality assurance standards.[304] Access to an attorney, without more defined contours, does not necessarily guarantee that a petitioner will have his claims adequately addressed in the state courts.[305] This leads to highly inequitable results at the state level that will no longer be reviewed by federal courts.[306]

One district court decision suggests that *Pinholster* does not bar informal investigation that may be used to identify new habeas claims, but noted that investigation is "a far cry from using formal discovery."[307] What the Court failed to discuss, however, was how an indigent petitioner, with no counsel, who is currently incarcerated, is expected to go about this investigation in order to develop these claims. Without a court-ordered hearing, in which counsel likely would be appointed, the notion that a habeas petitioner is free to conduct an informal investigation is illusory, and unlikely to yield any fruitful results. Formal discovery procedures and evidentiary hearings provide petitioners with access to materials they are otherwise unable to obtain.

One study suggests that the gap between the percentage of federal certiorari petitions and state certiorari petitions may indicate that state court criminal practitioners are not as familiar with, nor as focused on, Supreme Court practice.[308] There are many reasons why this gap exists. The policies at state public defender agencies may prohibit defenders from filing certiorari petitions, or may not fund the activity.[309] Also, defenders may not be familiar with certiorari practice.[310] It is unlikely that even a defender who is familiar with federal certiorari practice would be willing to complete the complicated task of filing a certiorari petition without compensation. If a defender agency does happen to fund this practice, defenders may not "expend resources on cert petitions deemed to be 'long-shots.'"[311] Finally, there

may be a "cultural disconnect between state criminal practice and certiorari practice in the Supreme Court."[312]

C. Blurred Lines Between AEDPA and Retroactivity Analysis

The Twilight Zone argument is that under the Court's reading of Section 2254(d)(1), some state prisoners, whose convictions are not yet final, will not get the benefit of new Supreme Court rules.[313] Before the Court's decision in *Greene*, it would seem that *Gray* should have applied to his case under *Griffith*; however, it is now unclear whether pending direct appeal petitions will always be eligible for new rules of Constitutional law:

> A state court's decision to forego discretionary review would freeze the available body of Supreme Court law to an earlier date, oftentimes, as in *Greene's* case, by more than a year….Although a difference of several months or even a year or two may not seem significant, in the realm of constantly evolving constitutional criminal procedure, it can mean the difference between life and death for a capital habeas petitioner.[314]

While the Supreme Court has not repudiated *Griffith* and *Teague*, it seems it will be more difficult to determine cutoffs for each one, particularly for *Griffith*. When Justice O'Connor wrote her opinion in *Williams*, her requirement that the law be clearly established as of the time of the relevant state court decisions "focused not on timing but on the substantive meaning of the requirements that the law be 'clearly established.'"[315]

Teague and Section 2254 are distinct inquiries, but it has been argued that the temporal cutoff dates should be parallel, so as to minimize confusion and avoid the inconsistent and unjust result that a petitioner who should benefit from a retroactive rule does not, simply because the new rule was announced after the last state court decision.[316]

In oral argument, Fisher inquired about the AEDPA's effect on *Griffith*, noting that finality does not exist independent of *Griffith*. "So the question is did AEDPA change that rule? . . . . [AEDPA] changed the standard of review, it changed the statute of limitations, but it didn't need to change *Teague*."[317] Further, Fisher argued, *Griffith* and *Teague* work in tandem, and because *Griffith* applies before a state conviction becomes final, "*Teague* is necessary as the other side of the coin to make *Griffith* work."[318] Justice Ginsburg, apparently not understanding the implications of the Court's interpretation on the *Griffith-Teague* analysis, said, "Well, I don't understand the problem. If you look at the Pennsylvania Superior Court decision and say, as of that time it was no violation of any clearly established law, period. Why is that complicated?"[319] It is complicated, Fisher explained, because of the varying retroactivity cutoffs for different claims adjudicated at different points in review. "You have retroactivity cutoff at the intermediate court for certain claims, a retroactivity cutoff at . . . the State Supreme Court for other claims; and a retroactivity cutoff in finality for certain other claims. And we think that's just unwieldy, and not only that, it's just difficult."[320] Engaging with Justice Breyer, who also asked why it was complicated, Fisher responded that "disjoining habeas law from *Griffith* . . . [is] going to create a whole new level of arbitrariness that we think is undesirable and unnecessary."[321]

D. Blurred Lines Between Section 2254(d) and Section 2254(e)

Prior to *Pinholster*, the standard for determining whether a petitioner was entitled to an evidentiary hearing was Section 2254(e).[322] The provision bars evidentiary hearings for petitioners who failed to develop the factual basis of their claims in state court, unless they were able to show that their claim relied on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or "a factual predicate that could not have been previously discovered through the exercise of due diligence," and "the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense."[323] Basically, if the petitioner was diligent in his state court efforts, he would be entitled to a hearing under the statute.[324] For some unknown reason, the court has conflated Sections 2254(d) and 2254(e), making it so that the petitioner has to satisfy Section 2254(d) before addressing the Section 2254(e) question, which previously was an independent inquiry. "[I]t seems that the threshold question in determining access to an evidentiary hearing is now a question of 2254(d), and the questions of diligence and non-fault that dominate (e)(2) analysis may be only secondarily important."[325] Indeed, lower courts have begun to interpret *Pinholster* this way. "Petitioner asserts that *Cullen* made no holding on whether § 2254(e)(2) would preclude or allow an evidentiary hearing. While . . . technically correct, *Cullen* unmistakably views § 2254(e)(2) as an additional *limitation* on evidentiary hearings . . . not as a free standing grant for wholesale evidentiary hearings."[326]

E. Increased Certiorari Review

Even before the Court's decision in *Greene*, some scholars recognized the importance of seeking certiorari.[327] Because the AEDPA limits the body of clearly established federal law to Supreme Court jurisprudence, the importance of Supreme Court precedent has increased.[328]

The AEDPA also limits the ability of lower courts to "work forward" from general Supreme Court pronouncements in federal habeas, thus "freez[ing] the development of doctrine."[329] Prior to the AEDPA, courts were able to, on a case-by-case basis, pronounce broad principles of constitutional law that the lower courts could more narrowly interpret.[330] Now, however,

"[a]s long as the state courts do not stray far from Supreme Court precedent, AEDPA prevents federal courts from interfering."[331] In fact, this is precisely what occurred in *Musladin*.[332] This essentially leaves federal law developed by state courts unchallenged at the federal level. If state prisoners petitioned for certiorari on direct review, however, this would give the Supreme Court the opportunity to more clearly define previously broad opinions before the case enters collateral review.[333] The Supreme Court's certiorari granting practice seems to reflect the Court's desire to expand upon federal law.[334]

One article pointed out that lower federal courts have had to deny habeas relief simply "because there was no clearly established federal law at the time of the state court decision."[335] Another issue that may surface deals with the scope of Supreme Court precedent, which occurs when a habeas court has to determine whether Supreme Court precedent applies to the facts of a petitioner's case.[336]

While Scalia suggested that Greene might have had a different outcome had he sought certiorari after the Pennsylvania Supreme Court denied review,[337] Greene likely would have had only a 25% chance at having his petition granted.[338] Many petitioners, however, do not have counsel to assist in preparation of certiorari petitions, so even if there is a chance a certiorari petition might be granted during direct appeal, it is unlikely that a state prisoner would be able to file this petition on his own.

IV. Conclusion

It appears the Supreme Court's recent decision in *Martinez v. Ryan*[339] may be an outgrowth of the Court's decisions, but it is outside the scope of this article, and it is too early to see the impact that decision will have on state postconviction claims. *Martinez* held that where a state requires that ineffective assistance of counsel claims be raised in an initial-review collateral proceeding, procedural default will not bar review of those claims in federal court if there was no counsel, or counsel was ineffective, at the initial-review collateral proceeding.[340]

The Court's decisions in *Richter*, *Pinholster*, and *Greene* have placed additional barriers on state prisoners who already have to overcome the many hurdles imposed by the AEDPA to obtain federal review. These cases interpreting Section 2254 have all but removed federal courts from the review process. When federal courts are involved, they make many more procedural decisions about the technicalities of the AEDPA as opposed to developing any substantive federal law. This has left development of substantive areas of federal law involving constitutional questions in the hands of state courts; decisions unlikely to go challenged under the current habeas regime. The abysmal state of habeas review under the AEDPA leaves prisoners with very little recourse for injustices that occur at the state level, and meaningful review is likely to remain near non-existent until either Congress steps up to make a change, or the Court overrules its precedents. "Ultimately it is Congress that has created a nightmarishly complex statutory structure for the review of state habeas petitions, and it seems much to ask pro se defendants to figure it out without counsel when experienced federal judges and Justices cannot."[341]

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1 *The Innocence Protection Act: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 111th Cong. (2009) (statement of Stephen B. Bright, President and Senior Counsel, Southern Center for Human Rights), *available at* http://judiciary.house.gov/hearings/pdf/Bright090922.pdf [hereinafter Statement of Stephen Bright], 111th Cong. (2009) (statement of Stephen B. Bright, President and Senior Counsel, Southern Center for Human Rights), http://judiciary.house.gov/hearings/pdf/Bright090922.pdf [hereinafter Statement of Stephen Bright].

2 *See, e.g.*, Justin F. Marceau, *Challenging the Habeas Process Rather Than the* Result, 69 Wash. & Lee L. Rev. 85; Margery I. Miller, *A Different View of Habeas: Interpreting the AEDPA's "Adjudicated on the Merits" Clause When Habeas Corpus is Understood as an Appellate Function of the Federal Courts*, 72 Fordham L. Rev. 2593; Lee Kovarsky, *AEDPA's Wrecks: Comity, Finality, and Federalism*, 82 Tul. L. Rev. 443.

3 *See* Marceau, *supra* note 2, at 88 (asserting that such decisions merely resulted in uncertainty and confusion, rather than substantial roadblocks).

4 *See* Harrington v. Richter, 131 S. Ct. 770, 785 (2011) (expanding AEDPA to cover state summary judgments) [hereinafter *Richter*]; Cullen v. Pinholster, 131 S. Ct. 1388, 1398 (2011) (limiting AEDPA review to the record before the initial state court) [hereinafter *Pinholster*]; Greene v. Fisher, 132 S. Ct. 38, 41-42 (2011) (applying only the law relevant at the time of initial state judgment to AEDPA review cases) [hereinafter *Greene*].

5 *See generally*, Marceau, *supra* note 2, at 100-01 (noting the contrast between the initially low usage of AEDPA provisions between 1996 and 1997, AEDPA's first years, and the nearly universal of AEDPA in reviewing state convictions between 2006 and 2011).

6 *Id.* at 88.

7 Carey v. Musladin, 549 U.S. 70, 79 (2006).

8 Marceau, *supra* note 2, at 97.

9 132 S. Ct. 38 (2011).

10 131 S. Ct. 770 (2011).

11 131 S. Ct. 1388 (2011).

12 132 S. Ct. 38 (2011).

13 *See* U.S. Const. art. I, § 9, cl. 2 (stating that "[t]he privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it").

14 Kovarsky, *supra* note 2, at 447.

15 *Id.* at 446-47.

16 *See* Giovanna Shay & Christopher Lasch, *Initiating a New Constitutional Dialogue: The Increased Importance Under AEDPA of*

Seeking Certiorari From Judgments of State Courts, 50 Wm. & Mary L. Rev. 211, 217-21.

[17] *See* Marceau, *supra* note 2, at 93 (noting that after failed attempts to limit habeas in the past, the Antiterrorism and Effective Death Penalty Act provided a new opportunity for such legislation); Kovarsky, *supra* note 2, at 447 (noting that the habeas provision was attached as a rider given the high unlikelihood that such a provision would be challenged); Miller, *supra* note 2, at 2610 (noting that the Antiterrorism and Effective Death Penalty Act [was] the most recent alteration to habeas regulation).

[18] Marceau, *supra* note 2, at 93.

[19] Kovarsky, *supra* note 2, at 444.

[20] *See* Marceau, *supra* note 2, at 98 (discussing a study by Professor John Blume analyzing Supreme Court habeas cases from 1990-2005).

[21] *Id.* at 101-02.

[22] *Id.* at 105.

[23] *See id*. at 102 (arguing that based on the decline in successful petitions from the 37.5% rate of pre-AEDPA petitions to the 27.4% success rate of post-AEDPA petitions, that rates of successful habeas petitions has declined since the passage of AEDPA).

[24] *See* John Scalia, Bureau of Justice Statistics Special Report, Prisoner Petitions Filed in U.S. District Courts, 2000, with Trends 1980-2000 (2002), *available at* http://bjs.ojp.usdoj.gov/content/pub/pdf/ppfusd00.pdf (showing a rise in habeas petitions filed by state prison inmates from 13,627 in 1995, to 21,345 in 2000).

[25] *Id.*

[26] *See* U.S. District Courts, Prisoner Petitions Filed, by Nature of Suit (2010), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2009/Table406.pdf (showing that there were 11,880 petitions filed in 2000 compared to 8,951 filed in 1995) [hereinafter Prisoner Petitions].U.S. District Courts, Prisoner Petitions Filed, by Nature of Suit (2010), http://www.uscourts.gov/uscourts/Statistics/JudicialFactsAndFigures/2009/Table406.pdf (showing that there were 11,880 petitions filed in 2000 compared to 8,951 filed in 1995) [hereinafter Prisoner Petitions].

[27] *See* Kovarsky, *supra* note 2, at 447 (commenting that a habeas petition is formally known as a postconviction complaint).

[28] 28 U.S.C. § 2254(a) (2006).

[29] *Id.* The claim must be based on a violation of the federal constitution or other federal law; however, otherwise cognizable claims are barred if they are decided in state court on independent and adequate state grounds.

[30] 28 U.S.C. § 2244(d).

[31] *See* Kovarsky, *supra* note 2, at 449-50 (noting that a prisoner may procedurally default his claim if he fails to properly raise it at a state level proceeding).

[32] *See id.* at 452 (asserting that exhaustion requires a petitioner to pursue all available appeals to lower level courts).

[33] *See id.* at 450-52 (stating that examples of abusive and excessive petitions include those that are frivolous, include previously litigated claims, or claims that petitioner abusively failed to raise previously).

[34] *Id.* at 449.

[35] *See id*. at 453 (regarding the imposition of a one-year statute of limitations on claims, generally from the date that a sentence and conviction become final on direct review).

[36] 28 U.S.C. § 2244(d)(1)(A).

[37] *See supra* text accompanying note 35.

[38] 28 U.S.C. § 2244(d)(1)(B).

[39] 28 U.S.C. § 2244(d)(1)(C).

[40] 28 U.S.C. § 2244(d)(1)(D).

[41] 28 U.S.C. § 2244(d)(2).

[42] *See supra* text accompanying note 31.

[43] *See* Miller, *supra* note 2, at FN 82 (discussing how the doctrine of procedural default works with that of independent and adequate state grounds).

[44] Kovarsky, *supra* note 2, at 452.

[45] *Id.*

[46] *Id.*

[47] 489 U.S. 288 (1989).

[48] *Id.* at 311 (quoting Mackey v. U.S., 401 U.S. 667, 692 (Harlan, J., concurring)).

[49] *Id.*

[50] *Id*. (quoting *Mackey*, 401 U.S. at 693-94) (emphasis in original).

[51] *See id.* at 295 (quoting Allen v. Hardy, 478 U.S. 255, 258 (1986) ("[Collateral review occurs when a conviction becomes final such that] where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed . . . .")).

[52] *See* Greene v. Palakovich, 606 F.3d 85, 91 (3rd Cir. 2010) (noting ninety days to be the allowable period for filing a petition for certiorari) [hereinafter *Palakovich*].

[53] *Teague*, 489 U.S. at 300.

[54] Teague v. Lane, 489 U.S. 288, 301 (1989).

[55] *Id*. (emphasis in original).

[56] 479 U.S. 314 (1987).

[57] *Teague*, 489 U.S. at 304 (quoting *Griffith*, 479 U.S. at 322).

[58] *Id.*

[59] 28 U.S.C. § 2254(d)(1) (2006). Section 2254(d)(1) will be the focus of this paper; however, petitioners may also obtain federal review under § 2254(d)(2) if the state court's decision "was based on an unreasonable determination of the facts in light of the evidence presented at the state court proceeding."

[60] Kovarsky, *supra* note 2, at 492-94 (noting that an unarticulated decision on the merits of a case is still valid, so long as the merits were considered. As such, a partial or even absent justification for a decision on the merits is valid).

[61] *See id.* at 493 (noting that postcard denials did not satisfy merits adjudication in the Courts of Appeal for the First, Third, and Sixth Circuits).

[62] *See, e.g.,* Kovarsky, *supra* note 2; Monique Anne Gaylor, *Postcards From the Bench: Federal Habeas Review of Unarticulated State Court Decisions*, 31 Hofstra L. Rev. 1263 (2003).

[63] *See* Kovarsky, *supra* note 2, at 496 (noting that by 2003, seven federal circuits held that § 2254(d)(1) analysis applied to the result of state court decisions, as opposed to the reasoning) (emphasis added).

[64] Williams v. Taylor, 529 U.S. 362 (2000).

[65] *See generally id.*

[66] Daniel J. McGrady, *Whose Line is it Anyway?: A Retrospective Study of the Supreme Court's Split Analysis of § 2254(d)(1) Since 2000*, 41 Seton Hall L. Rev. 1599, 1609-10 (2011).

[67] *See id.* at 1615 (showing a two-sided ideological split between justices).

[68] *Id.* at 1615.

[69] *Id.*

[70] *Id.*

[71] I did not analyze Supreme Court decisions interpreting Section 2254(d)(1) since 2010, the cutoff of McGrady's analysis.

[72] McGrady, *supra* note 67, at 1622.

[73] *See* Melissa M. Berry, *Seeking Clarity in the Federal Habeas Fog: Determining What Constitutes "Clearly Established" Law Under The Antiterrorism and Effective Death Penalty Act*, 54 Cath. U. L. Rev. 747, 766.

[74] *See* Williams v. Taylor, 529 U.S. 362, 390 (2000).

[75] *Id.* at 365.

[76] *Id.* at 379-80.

[77] *Id.* at 382.

[78] 549 U.S. 70, 77 (2006).

[79] *Id.* at 72.

[80] *Id.* at 73.
[81] 425 U.S. 501 (1976).
[82] 475 U.S. 560 (1986).
[83] *Id.* at 70.
[84] *See* Carey v. Musladin, 549 U.S. 70, 75 (2006) (stating that the state cannot, consistent with the Fourteenth Amendment, compel a person to stand trial in prison clothes).
[85] *Id.* (quoting *Flynn*, 475 U.S. at 568-69).
[86] *See id.* at 76-77 (noting that a lack of Supreme Court precedent, and a fair amount of uncertainty caused by varied lower court decisions, it was not unreasonable for the state court to stay their hand in extending *Estelle* and *Flynn*).
[87] *Id.* at 76-77 (citing 28 U.S.C. § 2254(d)).
[88] *Id.* at 79 (Stevens, J., concurring).
[89] *Id.* at 81 (Kennedy, J., concurring) (internal citations omitted).
[90] *See generally* Kovarsky, *supra* note 2 (alluding that these are the foundational legal principles regulating habeas doctrine).
[91] *See* McGrady, *supra* note 67, at 1606 (regarding the fear that such language would permissibly allow for a reading of the standard so long as it was sufficiently reasonable, though it may be contrary to established law).
[92] *Id.*
[93] *Id.* at 1607 (quoting 41 Cong. Rec. S7803 (daily ed. June 7, 1995) (statement of Sen. Hatch) 41 Cong Rec S7803, at *7803, 101 (LEXIS)).
[94] *Id.*
[95] *See Williams*, 529 U.S. at 365 (noting that because Congress specifically chose not to use "incorrect" or "erroneous," a federal court is not able to grant relief because it found the state-court decision applied clearly established federal law erroneously or incorrectly).
[96] Shay & Lasch, *supra* note 16, at 222 (internal citations omitted).
[97] McGrady, *supra* note 67, at 1608.
[98] Harrington v. Richter, 131 S. Ct. 770 (2011); Cullen v. Pinholster, 131 S. Ct. 1388 (2011); Greene v. Fisher, 132 S. Ct. 38 (2011).
[99] *See Richter*, 131 S. Ct. at 786-87 (noting that unless completely unreasonable, a state court denial of a habeas petition is valid); *Pinholster*, 131 S. Ct. at 1398-99 (noting that it would be unfair for a court to review any new evidence offered in a habeas petition since such review would essentially be de novo); *Greene*, 132 S. Ct. at 44 (reaffirming that the bar to habeas relief is set at the statute of limitations regarding the proper filing of such an application, not at the establishment of new applicable Federal law).
[100] Given these developments, federal court review of state court decisions has been significantly hampered.
[101] *See* Kovarsky, *supra* note 2, at 479-80 (noting that there are three reasons why these interpretations were contrary to the intent of Congress: First, the Senate was not concerned with comity or federalism, it was concerned only with finality. Second, there is no strong evidence from the House to suggest that they intended to change "unreasonableness" to mean "arbitrariness." Finally, the support in the Senate was stronger than that of the House in support of a less restrictive interpretation than the text suggests) ; Evan Tsen Lee, *Section 2254(d) of the New Habeas Statute: An (Opinionated) User's Manual*, 51 Vand. L. Rev. 103, 121 (1998) (noting that while a poll of subjective Republican intentions to interpret the text narrowly, there is no formal record or history supporting such an argument); Gaylor, *supra* note 62, at 1294 (asserting that a Federal court upholding a state court rejection under the "unreasonable application" theory would run counter to the legislative intent of the AEDPA).
[102] *Richter*, 131 S. Ct. at 785.
[103] *Id.* at 782.
[104] Harrington v. Richter, 131 S. Ct. 770, 782 (2011).
[105] *Id.* at 783.
[106] *Id.*
[107] *Id.* at 783.
[108] *Id.* at 784.
[109] Harrington v. Richter, 131 S. Ct. 770, 784 (2011).
[110] *Id.*
[111] *Id.* at 784-85.
[112] *Id.* at 786.
[113] *Id.*
[114] *Id.* (emphasis added).
[115] Harrington v. Richter, 131 S. Ct. 770, 786-87 (2011).
[116] *Id.* at 787.
[117] *See id.* at 786. It can be inferred from Justice Kennedy's assertion that habeas review should be difficult to meet that the Court is entrenched against lenient interpretation of habeas doctrine.
[118] *See id.* at 786-87 (requiring a reviewing court to determine if there was no possibility for fair-minded disagreement to uphold a state court's decision).
[119] *Id*. at 786-87.
[120] *See id.* (comparing a standard of "beyond any possibility for fairminded disagreement" to that of "beyond a reasonable doubt").
[121] Harrington v. Richter, 131 S. Ct. 770, 786-87 (2011).
[122] *See Richter*, 131 S. Ct. at 786-87 (indicating that unless the state court lacks the rational grounds for barring a habeas claim, such a claim is reasonable).
[123] *See* Peak v. Webb, 673 F.3d 465, 472 (6th Cir. 2012) (noting that the Supreme Court has made it clear that the review granted under the AEDPA is more narrow than the language suggests).
[124] *Id.* at 486 (Clay, J., dissenting).
[125] Cullen v. Pinholster, 131 S. Ct. 1388, 1398 (2011).
[126] *Id.* at 1394.
[127] *Id.*
[128] *Id.*
[129] *Id.* (quoting 28 U.S.C. § 2254(d)(1)).
[130] *See id.* at 1395 (noting that Pinholster insisted on representing himself).
[131] Cullen v. Pinholster, 131 S. Ct. 1388, 1395 (2011).
[132] *Id.*
[133] *Id.*
[134] *Id.* (internal citations omitted).
[135] *Id.* at 1396.
[136] *Id.* at 1396.
[137] Cullen v. Pinholster, 131 S. Ct. 1388, 1396 (2011).
[138] *Id.*
[139] *Id.*
[140] *Id.*
[141] *Id.*
[142] *Id.*
[143] *See* Cullen v. Pinholster, 131 S. Ct. 1388, 1396-97 (2011) (noting that the allegations in this second claim mirrored those of his federal habeas petition).
[144] *Id.* at 1397.
[145] *Id.*
[146] *Id.* (internal citations omitted).
[147] *Id.*
[148] *See id.* (noting that the Ninth Circuit's holding was vacated by the Court of Appeals).
[149] Cullen v. Pinholster, 131 S. Ct. 1388, 1397 (2011).
[150] *See* 466 U.S. 668 (1984) (holding that to succeed on an ineffective assistance of counsel claim, the petitioner must show that counsel's performance was deficient, and that the deficient performance prejudiced the outcome).
[151] *Pinholster*, 131 S. Ct. at 1396.
[152] *See* 539 U.S. 510, 510 (2003) (noting that the claim of ineffective assistance was based on a failure to introduce evidence of Wiggins' dysfunctional upbringing).

[153] *See* 545 U.S. 374, 374 (2005) (noting that the claim of ineffective assistance was based on a failure to introduce evidence of Rompilla's childhood, police record, mental capacity and health, and his alcoholism).

[154] *Pinholster*, 131 S. Ct. at 1406 (internal citations omitted).

[155] *Wiggins*, 539 U.S. at 514.

[156] *See id.* at 524 (quoting *Strickland*, 466 U.S. at 688 ("[that such standards have long been referred to as the] guides for determining what is reasonable")).

[157] *Id.* (quoting ABA Guidelines for the Appointment and Performance of Def. Counsel in Death Penalty Cases, § 11.4.1 (1989) (emphasis in original)).

[158] *Rompilla*, 545 U.S. at 382; *see also supra* text accompanying note 153 (noting this specific evidentiary failure, in addition to other evidentiary failures).

[159] *See Rompilla* , 545 U.S. 374, 374, 391 (2005) (noting that even when a defendant and his family assert that there are no mitigating factors, his lawyer is bound to make reasonable efforts to obtain and review materials that counsel knows the prosecution will rely).

[160] Cullen v. Pinholster, 131 S. Ct. 1388, 1406 (2011) (quoting Pinholster v. Ayers, 590 F.3d 651, 684 (9th Cir. 2009)).

[161] *Id.* at 1398.

[162] *Id.* at 1399.

[163] 538 U.S. 63 (2003).

[164] *Pinholster*, 131 S. Ct. at 1399 (emphasis added) (internal citations omitted).

[165] *Id.* at 1401.

[166] Cullen v. Pinholster, 131 S. Ct. 1388, 1404-06 (2011).

[167] *See id.* at 1404-05 (2011) (noting that such awareness was evidenced by hours billed for "preparation argument, death penalty phase," epilepsy research, and an interview with Pinholster's mother).

[168] *Id.*

[169] *See id.* at 1408 (asserting that Pinholster failed to show that the California Supreme Court must have unreasonably concluded that he was not prejudiced).

[170] *Id.* (quoting *Wiggins*, 539 U.S. at 534).

[171] *Id.* at 1411.

[172] Cullen v. Pinholster, 131 S. Ct. 1388, 1411 (2011). (Alito, J., concurring).

[173] *Id.*

[174] *See id.* (noting the implausibly narrow scope of §2254(e)(2)).

[175] *Id.* at 1412 (Breyer, J., concurring in part, dissenting in part).

[176] *Id.*

[177] *Id.*

[178] *See generally* Cullen v. Pinholster, 131 S. Ct. 1388, 1413-16 (2011) (Sotomayor, J., dissenting) (noting that limiting review to the record and barring new evidence, is unnecessary to promote AEDPA's purpose, and is inconsistent with the provision's text. In addition, by adopting a "backward looking" interpretation of § 2254(d)(1) of the AEDPA to apply only to the state court record, this would make language contained in § 2254(d)(2) superfluous.).

[179] *Id.* at 1413 (Sotomayor, J., dissenting) (emphasis added).

[180] *See supra* text accompanying note 179.

[181] *Pinholster*, 131 S. Ct. at 1413 (Sotomayor, J., dissenting).

[182] *Id.*

[183] *Id.* at 1415 (Sotomayor, J., dissenting).

[184] Cullen v. Pinholster, 131 S. Ct. 1388, 1415 (2011) (Sotomayor, J., dissenting).

[185] *Id.*

[186] *Id.* at 1416.

[187] *Id*.

[188] Marceau, *supra* note 2 at 117 (noting that a 2007 study found that "one of the most reliable predictors of ultimate success for a habeas petitioner was whether the federal court ordered an evidentiary hearing in the case.").

[189] *Id.*

[190] *Id.* at 122.

[191] This number is based on a Westlaw Next search of the references citing to *Pinholster*. The numbers reflect the citing references as of August 30, 2012.

[192] Marceau, *supra* note 2, at 123-24 (internal citations omitted).

[193] Cullen v. Pinholster, 131 S. Ct. 1388, 1412 (2011) (Breyer, J., concurring in part, dissenting in part).

[194] *See* Rory Little, *Argument Recap: Arguing in the Twilight Zone is No Easy Task*, SCOTUSblog (Oct. 14, 2011, 11:36 AM), http://www.scotusblog.com/2011/10/argument-recap-arguing-in-the-twilight-zone-is-no-easy-task/ (noting that based on the arguments, it appears that the justices did not understand Greene's basic arguments) [hereinafter Argument Recap].

[195] Greene v. Fisher, 132 S. Ct. 38, 42 (2011).

[196] *Id.*

[197] *Id.*

[198] *See id.* at 42-43 (specifically raising the same Confrontation Clause claim as in Bruton v. United States, 391 U.S. 123 (1968)) .

[199] *Id.*

[200] *Id.*

[201] *See* 391 U.S. 123 (1968) (noting that the confession in this case violated the Petitioner's right to cross-examination secured by the confrontation clause of the Sixth Amendment).

[202] Greene v. Fisher, 132 S. Ct. 38, 43 (2011).

[203] *Id.*

[204] *Id.*

[205] 523 U.S. 185 (1998).

[206] *See Greene*, 132 S. Ct. at 43 (quoting *Gray*, 523 U.S. at 195 ("considered as a class, redactions that replace a proper name with an obvious blank, the word 'delete,' a symbol, or similarly notify the jury that a name has been deleted are similar enough to *Bruton's* unredacted confessions as to warrant the same legal results.").

[207] *See id.* at 45 (noting that Greene having foregone two opportunities for asserting his claim, has asked for relief by interpreting AEDPA in a manner contrary to both its text and previous precedent. As such, the Court declined to grant relief.).

[208] Rory Little, *Opinion Analysis: The Court Quickly Disposes of "Twilight Zone" Habeas Arguments*, SCOTUSblog (Nov. 11, 2011, 9:54 AM), http://www.scotusblog.com/2011/11/opinion-analysis-the-court-quickly-disposes-of-%e2%80%9ctwilight-zone%e2%80%9d-habeas-arguments/ [hereinafter Greene Opinion Analysis].

[209] *Id.*

[210] *See id.* (noting that a conviction becomes final "upon either the denial of certiorari or the expiration of the time to file certiorari").

[211] Greene v. Palakovich, 606 F.3d 85, 91 (3d Cir. 2010).

[212] Greene Opinion Analysis, note 208.

[213] *Palakovich*, 606 F.3d at 91.

[214] *Id.*

[215] *Id.*

[216] *Id.* at 91-93.

[217] *See* Greene v. Palakovich, 606 F.3d 85, 92 (3d Cir. 2010).(noting that the underlying issue was whether or not the *Gray* decision would apply to Greene's case).

[218] *Id.*

[219] *Id.*

[220] *Id.* at 93.

[221] *See Palakovich*, 606 F.3d at 93-94 (attempting to determine what is "clearly established Federal law" under 29 U.S.C. § 2254(d)(1). The Court asserted three different options; the time of the relevant state court decision, the time the state court conviction became final, or some combination of the two.).

[222] *Id.* (quoting *Williams*, 529 U.S. at 412).

[223] Greene v. Palakovich, 606 F.3d 85, 93-94 (3d Cir. 2010) (quoting *Williams*, 529 U.S. at 390).

[224] *Id.* (citing to Horn v. Banks, 536 U.S. 266 (2002)).

[225] *Id.* at 95.

[226] *Id.* (quoting *Williams* 529 U.S. at 412).

[227] *Id*. (quoting Whorton v. Bockting, 549 U.S. 406, 417 (2007)).

[228] *Id.*

[229] Greene v. Palakovich, 606 F.3d 85, 95 (3d Cir. 2010).

[230] *Id.* at 98 (emphasis in original).

[231] *See id.* at 102 (noting that *Griffith* alone does not control retroactivity for cases on collateral review).

[232] *Id.* at 100.

[233] *Id.* (quoting *Horn*, 536 U.S. at 272).

[234] *Id.*

[235] Greene v. Palakovich, 606 F.3d 85, 100-01 (3d Cir. 2010).(quoting *Horn*, 536 U.S. at 272).

[236] *Id.* at 102.

[237] *Id.*

[238] *Id.* at 104.

[239] *See id*. (noting that had Greene simply raised his Confrontation Clause claim in his PCRA petition, the date of the last relevant state court decision on the merits would have been later, thus expanding the body of "clearly established Federal law" available).

[240] *See id.* at 107 (Ambro. J., dissenting) (asserting that a legal gap has been created by the majority's opinion between the time when a petitioner's case is not yet final and the Supreme Court's retroactivity analysis applied in *Griffith* and *Teague)*.

[241] Greene v. Palakovich, 606 F.3d 85, 108 (3d Cir. 2010).(quoting Smith v. Spisak, 130 S. Ct. 676, 681 (2010)).

[242] *Id.* at 108 (Ambro, J., dissenting).

[243] *See id.* (noting specifically that the protections offered to redacted names in a confession under *Gray* would have been taken into account by the Pennsylvania Supreme Court).

[244] *Id.*

[245] *Id.*

[246] *See id.* (noting that raising such claims was barred by the PCRA, which proscribes the re-litigation of matters already considered on direct appeal).

[247] Greene v. Palakovich, 606 F.3d 85, 108 (3d Cir. 2010) (Ambro, J., dissenting).

[248] *Id*.

[249] *See id.* at 109 (noting that since there is uncertainty in the "natural reading" of § 2254(d)(1) such that it is difficult to find a cutoff date).

[250] *Id.*

[251] *Id.* at 109.

[252] *Id.*

[253] Greene v. Palakovich, 606 F.3d 85, 111 (3d Cir. 2010) (Ambro, J., dissenting).

[254] *Id.*

[255] *Id.*

[256] *Id.*

[257] *Id.* at 115-16.

[258] *Id.* at 116.

[259] Greene v. Palakovich, 606 F.3d 85, 116 (3d Cir. 2010).(quoting Lockyer v. Andrade*,* 538 U.S. 63, 123 (2003)).

[260] *Id.* at 116.

[261] *Id.*

[262] *Id.* at 117.

[263] *Id.*

[264] Greene Opinion Analysis, *supra* note 207.

[265] *Id.*

[266] *Id.*

[267] Greene v. Fisher, 132 S. Ct. 38, 44 (2011).

[268] *Id.*

[269] *Id.*

[270] *Id*. at 45.

[271] *Id.*

[272] *Id.*

[273] Greene v. Fisher, 132 S. Ct. 38, 45 (2011) (noting that Greene is barred by the requirement that cases must be decided on prior "clearly established Federal law").

[274] Transcript of Oral Argument at 12, Greene v. Fisher, 132 S. Ct. 38 (2011) (No. 10-637).

[275] *Id.*

[276] *Id.* at 12-13.

[277] *Id.* at 14.

[278] *Id.*

[279] *Id.* at 15.

[280] Transcript of Oral Argument at 15, Greene v. Fisher, 132 S. Ct. 38 (2011) (No. 10-637).

[281] Greene v. Fisher, 132 S. Ct. 38, 45 (2011).

[282] Transcript of Oral Argument, *supra* note 274, at 3.

[283] *Greene*, 132 S. Ct. at 45.

[284] Greene Opinion Analysis, *supra* note 207.

[285] *Id.*

[286] Kovarsky, *supra* note 2, at 466.

[287] Cullen v. Pinholster, 131 S. Ct. 1388, 1411 (2011) (Alito, J., concurring).

[288] *See* Harrington v. Richter, 131 S. Ct. 770, 792 (2011) (stating that the California Supreme Court's decision on the merits of Richter's claim required more deference, and reversed).

[289] *Id.* at 786.

[290] *Pinholster*, 131 S. Ct. at 1419 (Sotomayor, J., dissenting).

[291] *See id.* It can be inferred from Sotomayor's dissent that as long as some rational basis for denial exists, the Supreme Court may still deny federal review, even if there is a potential chance that a prisoner's claim could be meritorious.

[292] Marbury v. Madison, 5 U.S. 137 (1803).

[293] *Id.* at 177.

[294] *See generally* 131 S. Ct. at 784 (noting that there is no requirement that a state court explain its reasoning when issuing an opinion).

[295] *See generally* Cullen v. Pinholster, 131 S. Ct. 1388, 1399 (2011) (noting that it would be contrary to congressional intent to channel prisoner claims to state courts initially and allow new evidence to be introduced in a federal habeas court resulting in an effective de novo review).

[296] *See generally* Greene v. Fisher, 132 S. Ct. 38, 44 (2011) (requiring federal courts to focus on what information the state court possessed at the time the court rendered its final decision).

[297] Marceau, *supra* note 2, at 138.

[298] *Pinholster*, 131 S. Ct. at 1421 (Sotomayor, J., dissenting).

[299] *See* Shay & Lasch, *supra* note 16, at 246 (noting a shift in certiorari granting behavior).

[300] *Id.*

[301] Marceau, *supra* note 2, at 164.

[302] *See generally* Brief of Former State Supreme Court Justices as Amici Curiae in Support of Petitioner at 24-25, Martinez v. Ryan,132 S. Ct. 1309 (2012) (No. 10-1001) (noting that only twenty-eight states provide some form of counsel in postconviction hearings in non-capital cases;

fifteen provide counsel for capital proceedings only; and in the District of Columbia and seven other states, there is no right to postconviction counsel).

[303] *See id.* at 27 (suggesting that because Martinez was provided with ineffective postconviction assistance, there may not be specific standards in place for ensuring quality assistance).

[304] *See id.* at 26 (noting that quality of assistance is contingent largely on what resources a particular state is willing to provide).

[305] *See id*. (suggesting that other factors such as funding and allowances for investigation, experts, and discovery, may impact adequate treatment).

[306] *See id.* at 27 (asserting that without adequate postconviction resources, prisoners will not have a fair opportunity to raise federal claims before being subjected to the final decisions of state courts).

[307] Coddington v. Cullen, No. CIV S-01-1290 KJM GGH DP, 2011 U.S. Dist. LEXIS 57442, at *10 (E.D. Cal. May 27, 2011).

[308] Shay & Lasch, *supra* note 16, at 251.

[309] *Id.*

[310] *See id.* (asserting that this lack of familiarity may come from the fact that state practitioners may not encounter certiorari worthy cases on a regular basis, or because they are not specifically familiar with federal law).

[311] *Id.*

[312] *See id.* at 252 (noting that while state criminal practice is a local endeavor, Supreme Court litigation is a more national body, characterized by sophisticated issue advocates searching for specifically "cert-worthy" cases).

[313] Greene Opinion Analysis, *supra* note 207.

[314] George A. Couture & Joshua N. Friedman, *What is the Cutoff Date for Determining When Supreme Court Cases Qualify as Clearly Established Federal Law in Federal Habeas Corpus Proceedings?*, 39 Preview 23 (Oct. 3, 2011).

[315] Brief of the National Association of Criminal Defense Lawyers as Amicus Curiae in Support of Petitioner at 5, Greene v. Fisher, 132 S. Ct. 38 (2011) (No. 10-637).

[316] *Id.* at 6.

[317] Transcript of Oral Argument, supra note 275, at 18-19.

[318] *Id.* at 19.

[319] *Id.* at 20.

[320] *Id.* at 21.

[321] *Id.* at 23.

[322] *See* Cullen v. Pinholster, 131 S. Ct. 1388, 1400-01 (2011) (noting the continued applicability of the § 2254(e) standard, but also now requiring satisfaction of § 2254(d)).

[323] 28 U.S.C. § 2254(e) (2006).

[324] *See* 28 U.S.C. § 2254(e) (2006) (suggesting that as long as the petitioner develops a factual basis for his claim, or an exception under § 2254(e)(2)(A) or (B) applies, the petitioner should not be precluded from the hearing).

[325] Marceau, *supra* note 2, at 149.

[326] Coddington v. Cullen, No. CIV S-01-1290 KJM GGH DP, 2011 U.S. Dist. LEXIS 57442,at *6 (E.D. Cal. May 27, 2011) (emphasis in original).

[327] *See generally* Shay & Lasch, *supra* note 16.

[328] *Id.* at 215.

[329] *See id.* at 228 (noting that Supreme Court dicta alone will not provide sufficient basis for federal and state courts to significantly shift doctrine).

[330] *Id.* at 230.

[331] *Id.*

[332] *See* Carey v. Musladin, 549 U.S. 70, 79 (2006) (noting that if the Supreme Court has not specifically addressed an issue, it is not clearly established federal law).

[333] *See generally* Shay & Lasch, *supra* note 16 (noting that while federal prisoner direct appeals to the Supreme Court make up the majority of certiorari petitions, given that there are far more state criminal proceedings each year, there is an opportunity for state prisoners to file more and better petitions; and realizing this opportunity would hopefully result in a greater amount of Supreme Court review, and as such, would promote further development of state law that would otherwise go unchallenged at the federal level).

[334] *See id.* at 241 (noting that the Court's cert-granting practice is "consistent with the theory that the Court is increasingly turning to state court judgments for certiorari grants which will allow the Court to develop criminal constitutional doctrine.").

[335] Berry, *supra* note 74, at 789.

[336] *Id.* at 798.

[337] Greene v. Fisher, 132 S. Ct. 38, 45 (2011).

[338] *See* Shay & Lasch, *supra* note 16, at 239-40 (discussing the Supreme Court's cert granting practice). In a study looking at the criminal cert. grants between the 1995 and 2000 terms, 23.5% were direct appeals from state criminal convictions. Between the 2001-2006 terms, 29% of grants were direct appeals from state criminal convictions.

[339] Martinez v. Ryan, 132 S. Ct. 1309 (2012).

[340] Steve Vladeck, , SCOTUSblog (Mar. 21, 2012, 10:30 AM), http://www.scotusblog.com/2012/03/opinion-analysis-a-new-remedy-but-no-right/.

[341] Argument Recap, note 195.

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Supreme Court Watch

Recent Decisions of Selected Criminal Cases | By Calen Weiss and Joe Hernandez

Marshall v. Rodgers

Docket Number: 12-382
Per Curium

Issue:

Whether a defendant retains his right to court-appointed representation after multiple waivers of counsel and no attempt to support his final motion for representation.

Facts:

In 2001, Rodgers was charged by the state of California with making criminal threats, assault with a firearm, and being a felon in possession of a firearm and ammunition. Initially, Rodgers chose to waive his Sixth Amendment rights and represent himself. Though eventually Rodgers would retain a lawyer (before his preliminary hearing), he would eventually fire him. Two months later, Rodgers changed his mind again and asked the court to appoint him another attorney. The court agreed and Rodgers was appointed an attorney. However, right before trial began, Rodgers fired his new lawyer.

After being found guilty, Rodgers asked the court to appoint him another attorney to help him file a motion for a new trial. His oral and written motions offered no support for his motion and Rodgers refused to provide any when prompted. His motion to appoint counsel, as well as his *pro se* motion for a new trial, was denied. The California Court of Appeals also denied Rodgers's subsequent appeal of his convictions.

Rodgers filed a federal *habeas corpus* petition in district court. The court denied the petition, but granted it was appealable. The Court of Appeals for the Ninth Circuit reversed the decision, arguing that the trial court violated Rodgers's Sixth Amendment right to counsel when they denied Rodgers's timely motion. The Supreme Court granted certiorari.

Supreme Court

The Supreme Court recognized that an individual has the ability to utilize the Sixth Amendment's right to counsel, as well as waive it and proceed *pro se*. Prior to this ruling, the Supreme Court had never established guidelines for a criminal defendant to reestablish his right to counsel after proceeding *pro se*.

The California trial courts apply a totality of the circumstances test when determining whether to grant

a defendant counsel once they have waived their Sixth Amendment right and in many ways give trial court judges a great degree of discretion. The Ninth Circuit, however, made it clear in *Robinson v. Ignacio* that a "defendant's post trial request for the assistance of an attorney should not be refused."

The Court reserved and remanded the Court of Appeals after determining the denial of counsel was not contrary to California law. Additionally, the court did not recognize whether the issue on direct review would present a Sixth Amendment violation. Though the denial of counsel may not have been in conflict with California case law, nor contrary to "clearly established Federal Law", the issue still should have been judged on its merits.

Millbrook v. United States

Docket Number: 11-10362
Argued: February 19, 2013

Issue:

Whether the Federal Tort Claims Act is only limited to intentional torts committed by law enforcement or investigative officers while engaged in investigative or law enforcement activity, or executing a search, seizing evidence, or making an arrest.

Facts:

Petitioner Kim Millbrook filed suit in Federal District Court under the Federal Tort Claims Act (FTCA). In his complain, Millbrook alleged that correctional officers sexually assaulted

and verbally threatened him while Millbrook was in the custody of the Federal Bureau of Prisons (BOP). The District Court dismissed the action and the Third Circuit Court of Appeals affirmed. In its decision, the Court of Appeals held that the FTCA only waives sovereign immunity for certain intentional torts committed by law enforcement officers in the course of executing a search, seizing evidence, or making an arrest.

Supreme Court:

The FTCA gives federal district courts exclusive jurisdiction over claims against the U.S. for "injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission" of a federal employee "acting within the scope of his office or employment." The FTCA does have its exceptions, including the government's immunity from suit for any claim arising out of assault or battery. However, Congress amended this exception by adding a proviso that covers claims that arise out of the wrongful conduct of law enforcement officers ("law enforcement proviso"). The law enforcement proviso contains language that extends the liability of the government to assault and battery claims that are based on the "acts or omissions of investigative or law enforcement officers."

The Court looked at various interpretations of the law enforcement proviso and determined that the proviso was meant to focus on the tort being committed and the legal authority of the officer committing. Whereas the Court of Appeals focused on the particular exercise of authority ("executing a search, seizing evidence, or making an arrest"), the Supreme Court found that it was the legal status of the officer that determined whether he was acting within the scope of his employment. Additionally, Congress could have limited the language of the statute had it been meant to only include investigative or law enforcement activity. The Court held that the waiver effected by the law enforcement proviso is not limited to torts committed by officers engaged in investigative or law enforcement activity, or are executing a search, seizing evidence, or making an arrest. The Court reversed the judgment of the Court of Appeals and remanded the case for further proceedings.

Clapper v. Amnesty International

Docket Number: 11-1025
Argued: October 12, 2012

Issue:

Whether Amnesty International has standing to pursue a claim for a possible violation of the group's fourth amendment using surveillance tactics authorized following the 9/11 attacks required a warrant from the FISA Court.

Facts:

After the September 11th attacks, President George W. Bush authorized the National Security Agency (NSA) with the power to initiate warrantless wiretaps on communications where one party to the communication was outside the United States and at least one of the participants in the call was "reasonably believed" to be a member of Al Queda or an affiliated terrorist organization. This power, authorized by the FISA Amendments Act of 2008 (the original FISA Act was passed in 1978), is subject to statutory conditions, judicial authorization, congressional supervision, and compliance with the Fourth Amendment. Section 1881(a) of FISA requires that the government obtain the Foreign Intelligence Surveillance Court's (FISC) approval of "targeting" procedures, "minimization" procedures, and a governmental certification regarding proposed surveillance.

Amnesty International and other respondents argue that they engage in sensitive, international communications with individuals who may be targets of FISA surveillance. Amnesty argued that it will suffer impending, costly injuries if the amendment is upheld. Amnesty looked to acquire a declaration from the Supreme Court that FISA amendments were unconstitutional, as well as a permanent injunction against the instant-FISA surveillance. The District Court found that Amnesty International lacked standing, and Amnesty appealed to the Second Circuit Court of Appeals. The Second Circuit reversed the decisions on the grounds that Amnesty International showed (1) an objectively reasonable likelihood that their communications will be intercepted, and (2) that they are suffering from present injuries from the measures taken to protect confidentiality.

Supreme Court:

The court reversed the decision of the Second Circuit and remanded the case. The Supreme Court determined that standing under Article III of the U.S. Constitution requires: (1) concrete, particularized, and actual or imminent; (2) fairly traceable to the challenged action; and (3) redressable by a favorable injury. The standard of "possible future injuries" the Court of Appeals applied did not meet this standard.

The Court first addressed the Second Circuit's holding that there was an objectively reasonable likelihood that Amnesty International's communications would be intercepted. The Court found that this did not meet the standard of a "threatened injury." Amnesty International was relying on a "chain of possibilities" which did not create a clear nexus between the passed legislation and the potential for subsequent injury. The Court made this determination on five foundations: (1) the speculative nature that Amnesty International, a U.S. based party, will be targeted; (2) there is no evidence to support the notion that the government will use FISA surveillance methods rather than an alternative means

of surveillance; (3) government usage of FISA surveillance is still subject to the FISC approval; (4) the probability that the government may be unsuccessful in acquiring the intended communications of Amnesty's foreign contacts; and (5) the government may acquire communications of foreign targets in which Amnesty International is not a party. Using these foundations, the Court found that the threatened injury had too many assumptions to meet the Article III standing standards.

The Court also addressed the Second Circuit's holding that Amnesty International was already suffering present injuries because of the extra precautions taken to avoid FISA surveillance. The Court dismissed this argument by explaining that Amnesty International's precautions were simply a by-product of their own fear of surveillance. This is not enough to create standing. As discussed in the Court's first argument, the possibility of injury was too speculative in nature to establish an injury-in-fact. As such, the precautions taken by Amnesty International could not be used to establish standing.

Justice Breyer, Ginsburg, Sotomayor, and Kagan dissented. In the joint dissent, Justice Breyer explains the high likelihood that Amnesty International and other respondents would be targeted. Breyer discusses the strong motive Amensty has to engage in sensitive communications with interested parties, and the strong motive the government has to listen to those communications. Lastly, Breyer used the past behavior of the government to support the strong likelihood that the government will use FISA surveillance methods to monitor Amnesty International's clients. As a result, the dissent believes that there is a high probability that Amnesty International will suffer concrete injury.

Henderson v. United States

Docket Number: 11-9307
Argued: November 12, 2012

Issue:

Under rule 52(b) of the Federal Rules of Criminal Procedure, may a defendant appeal an issue that was not preserved at trial because the issue was unsettled at the time of the trial court's decision?

Facts:

Armarcion Henderson pled guilty to being a felon in possession of a firearm. Henderson was sentenced to an above-guidelines prison term of sixty months. The district court judge explained the longer sentence as a means to help Henderson by qualifying him to an in-prison drug rehabilitation program. At the time of sentencing, Henderson's counsel did not object, even though they were directly asked.

When Henderson was sentenced the Supreme Court had not ruled in *Tapia v. United States* that it is erroneous for a court to "impose or lengthen a prison sentence to enable an offender to complete a treatment program or otherwise to promote rehabilitation." If *Tapia* had been decided before Henderson's sentencing, the lengthened sentence would be unlawful. However, because Henderson's counsel did not object, the Fifth Circuit Court of Appeals could not correct the error unless Rule 52(b) of the Federal Rules of Criminal Procedure (plain error) applied. The court ruled that since the issue of extended rehabilitation sentences had not been decided at the time of sentencing, the error was not plain and Rule 52(b) did not apply. As a result, the Fifth Circuit declined to overturn the district court's decision.

Supreme Court:

The Supreme Court reversed the ruling of the Fifth Circuit Court of Appeals and remanded the issue. In *United States v. Olano*, the Supreme Court held that Rule 52 requires plaint error to reverse a forfeited objection and affects a substantial right that jeopardizes the fairness, integrity, or public reputation of judicial proceedings. The distinction presented in *Henderson* involves whether that error is valid when it arises post-trial and during the appeals process.

The Court's determination means that an appellate court should apply the law in effect at the time it renders its decision. The Court reasoned this was necessary to avoid uneven rulings for similar defendants. Rather than adopt a "time of error" rule (the evaluation of the error is based on the time when it was made), the Court chose to adopt a "time of review" (the evaluation of the error is based on the law at the time it is reviewed). The "time of review" standard maintains the initial purpose of Rule 52(b): to create a "fairness-based" exception to the rule that a defendant's counsel preserves issues at trial.

Henderson's sentencing represents an example of an error that was "plain" only once it was appealed. Using the "time of review" standard, Henderson maintained his right to appeal as a result of plain error pursuant to Rule 52(b), regardless of his failure to object the issue at trial.

Smith v. United States

Docket Number: 11-8976
Argued: November 6, 2012

Issue:

Is participation in a criminal conspiracy subject to the statute of limitations once an individual has withdrawn from the conspiracy?

Facts:

Calvin Smith was tried for his role in a criminal conspiracy for distribution of cocaine, crack cocaine, heroine, and marijuana. Smith was tried alongside five codefendants then convicted for numerous drug related crimes. Before trial, Smith moved to dismiss his conspiracy counts because he had spent the final five years of the conspiracy counts in prison for a felony conviction. Smith argued that his convictions were thus barred by a five-year statute of limitations. The trial court denied Smith's motion and Smith renewed his issue at trial.

At trial, the jury was instructed, "the relevant date for purposes of determining the statute of limitations is the date, if any, on which a conspiracy concludes or a date on which that defendant withdrew from that conspiracy." Withdrawal from the conspiracy was defined as affirmative acts that were inconsistent with the goals of the conspiracy. The jury then convicted Smith of his role in the conspiracy.

Smith argued that once he presented evidence that he withdrew from the conspiracy, the burden shifted to the government to prove his involvement. This was contrary to the trial court instructions that the defense must prove by a preponderance of the evidence that the defendant withdrew from the conspiracy. Smith argued that it was a violation of due process to leave the burden on the defense once evidence of a withdrawal has been presented.

Supreme Court:

The Supreme Court affirmed the decision of the D.C. Circuit Court of Appeals. The Court recognized that established case law places the burden of proving a crime beyond a reasonable on the government, but that does not require proving all affirmative defenses are not valid. In *Martin v. Ohio*, the Court established that the burden of proof shifts to the government only when an affirmative defense negates the elements of the crime. Smith failed to demonstrate this point, since criminal conspiracy is not negated by withdrawal. Instead, withdrawal, in many ways, insists that the defendant committed the initial crime.

In the instant case, Smith's withdrawal does not exonerate him from the criminal activity of the conspiracy. Smith's statute of limitations argument does not negate the fact that his membership in the conspiracy holds him, in part, responsible for the criminal acts committed by the conspiracy, regardless of his later inactivity. The Court held that Smith "tied his fate to that of the group." Therefore, the Court affirmed the decision of the D.C. Circuit.

Kaley v. United States

Docket Number: 12-464
Argument Date: TBD

Issue:

Whether a defendant during a post-indictment, pre-trial hearing challenge the underlying indictment and traceability of assets frozen ex parte, when the defendant needs the frozen assets to pay for defense counsel pursuant to their Fifth and Sixth Amendment right?

Facts:

The defendants are accused for stealing of medical devices from hospitals. A grand jury rendered an indictment for seven criminal counts with one criminal forfeiture account for all proceeds of the underlying crime. This included a $500,000 deposit certificate that would have been used to pay for defense fees. Without any other available assets, the restraining order on the deposit prevented the Kaleys from retaining the attorney of their choice. They moved to vacate the restraining order. The District Court denied the motion and then was reversed and remanded by the Eleventh Circuit Court of Appeals.

On remand the District Court held a pretrial hearing that was limited to challenging the grand jury's probable cause determination that the property was traceable proceeds. The Kaleys were unable to put forward any evidence challenging the probable cause determination and the District Court denied their motion to vacate. The Kaleys argued they should have been allowed to challenge the basis for the indictment against them. They appealed but the Eleventh Circuit affirmed the District Court.

Supreme Court:

The Supreme Court granted certiori to resolve a circuit split. The main argument advanced by the United States is that the forum for challenging the theory of the case is a trial. Otherwise, it undermines the determination of a grand jury, and it allows the defendants to have two bites at the apple. Plus, the defendant is entitled to a forfeiture proceeding following trial. Therefore, to preserve the defendants Fifth and Sixth amendment rights all that should be permitted are determinations relating to the traceability of the assets as proceeds of criminal activities.

Alternatively, the defendants argue that unless they are permitted to attack the underlying theory of the case, it prevents them from getting to the question of traceability. In effect to sever the two questions prevents the defendant from *actually* challenging the restraining order. The date for arguments will eventually be set for some time in the fall.

Schuette v. Coalition to Defend Affirmative Action

Docket No: 12-682
Argument Date: TBD

Issue:

Whether a state constitutional amendment prohibiting race and sex based discrimination or preferential treatment in public university admission decisions violates the federal constitution.

Facts:

The State of Michigan through a voter initiative adopted an amendment to its constitution in the November 2006 elections that prohibits "all sex- and race-based preferences in public education, public employment, and public contracting." It passed with 58% of voters supporting it. Supporters of the amendment were inspired in part by the Supreme Court's decision in *Grutter v. Bollinger*, 539 U.S. 306 (2003) that approved of the University of Michigan Law School's admission policy that allowed race to be considered as one factor in a holistic review of a candidate's application. The reaction from affirmative action supporters was swift with the formation of the Coalition to Defend Affirmative Action, Integration and Immigration Rights and Fight for Equality by Any Means Necessary (Coalition).

The Coalition sued to have the amendment declared unconstitutional. Defendants included the governor, as well as the regents and boards of trustees of three state universities. The Michigan Attorney General and Eric Russell, a University of Michigan Law School applicant, filed motions to intervene as defendants at the trial level, which was granted. The plaintiffs successfully secured the dismissal of Russell as a defendant-intervener.

Both sides moved for summary judgment with a favorable decision for the defendants. The Sixth Circuit Court of Appeals by an 8-to-7 vote affirmed the dismissal of Russell as a defendant and reversed the core holding that the amendment was not a violation of the U.S. Constitution. The Appeals Court reasoned that a student with family connection to one of Michigan's universities could petition for admission through several avenues, whereas a minority student seeking adoption of a constitutionally permissible race-conscious admission policy would have fewer means available.

The decision by the Sixth Circuit appeared odd to many observers and dissenting judges. If the majority's decision were taken to its logical limit, then it would effectively mandate affirmative action and restrict policies specifically forbidding denial of equal treatment. The U.S. Court of Appeals for the Ninth Circuit similarly held in 1997 that it would be "paradoxical" when it upheld California's ban on racial preferences in higher education.

Arguments for the case will be in the fall with briefs submitted in June.

Burrage v. United States

Docket No: 12-7515
Argument: TBD

Issue:

(1) Whether, under 21 U.S.C. § 841, drug distribution that results in death creates a strict liability crime with no foreseeability or proximate cause requirement; and (2) whether a person can be convicted for a distribution of heroin leading to death require a jury instruction that the heroin "contributed to" death by "mixed drug intoxication" but was not the sole cause of death.

Facts:

Marcus Burrage is accused of selling drugs to Joshua Banka, a longtime intravenous drug abuser. Banka was found dead from a drug overdose, including heroin sold to him by Burrage. When his body was discovered there were several recently used and unused syringes. The area around his apartment revealed evidence of extensive drug use, including prescription drugs and marijuana. The medical examiner concluded the cause of was a "mixed drug intoxication with the drugs contributing to death, including heroin, the oxycodone, the alprazolam and the clonazepam." Additionally, Banka had indications of heart and lung disease.

Several of the drugs were potentially fatal but available testing methodologies could not distinguish between what levels of each drug were in Banka's system. A toxicologist confirmed these conclusions who along with the medical examiner could not make a determination heroin was the cause of death, or that but for the heroin use Banka would have survived. With this information the defense requested that a jury instruction be provided that a conviction could only be supported upon a showing that the heroin was the proximate cause of death and Banka's death was reasonably foreseeable. The judge rejected the instruction and Burrage's guilty conviction led to a minimum twenty-year sentence.

Supreme Court:

The Court's decision to take the case will resolve a split between the Circuits. In the Eight Circuit Court of APpeals, the law provides that a conviction under 21 U.S.C. § 841 requires only a showing that a death "result from" the use of a substance the defendant distributed as only a "contributing cause" of the victim's death. This means the government need only show it was "a factor" in causing death. However, the Seventh Circuit

Court of Appeals held in a similar case that such a standard confused the jury as to the minimal legal causation necessary to convict and ordered a new trial (*United States v. Hatfield*, 591 F.3d 945 (7th Cir. 2010)). The Seventh Circuit noted the language regarding causation was at best muddled because the statute confuses "proximate cause," a standard relating to the foreseeability of harm, against whether that was a "substantial factor" in causing the harm. There was no disagreement, though, that the statute does impose strict liability. Therefore, the Court's grant of certiorari is expected to lead to a narrow result to clarify the evidentiary basis necessary to meet the causation standard and the instructions the jury must hear on that point.

About the Authors

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Symposium Report: The Fourth Amendment and Modern Practices: Drug Sniffing Dogs and Stop and Frisk

By Sarah Tynan

Introduction

The 2013 Criminal Law Brief Symposium addressed the Fourth Amendment in the modern age of policing. We brought together a diverse panel of practitioners, policy experts, and advocates to address the controversies surrounding two distinct law enforcement practices, specifically: the constitutionality of using drug sniffing dogs in light of two Supreme Court cases involving the practice; and the challenges created by the police tactic known as "Stop and Frisk."

The Fourth Amendment protects the right of the people to be free from government instrusion, and specifically, "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures."[1] A search or seizure is presumptively unreasonable without a warrant supported by probable cause.[2] Generally, a search is defined in relation to the subjective and objective expectation of privacy a person has in that place or thing.[3] There are certain zones of privacy in which we enjoy a stronger privacy interest than in others. Typically, our privacy interest is the strongest in and around our homes;[4] however, we have a reduced expectation of privacy in our cars, for instance.[5] We expect to be able to exercise exclusive control and possession of our belongings, and to keep our personal information private from the government when we are in our own homes, and Fourth Amendment jurisprudence tends to encourage the "home as castle" mentality, drawing a firm, bright line at the entrance of the home.[6]

The canine sense of smell has long been used to aid law enforcement. It can be a quick, nonintrusive way for police to determine whether there is contraband on a person, or in a place or container. When it comes to the use of sense or technology enhancements to further a law enforcement investigation, if the tool or technology is not widely publically available, the police action constitutes a search.[7] It is not immediately obvious how a dog sniff fits into that rubric. The Supreme Court has stated that the sniff test is *sui generis*, or unique, in the sense that it is used to detect only the presence of illicit drugs and nothing more;[8] therefore, in certain non-residential settings a dog sniff does not constitute a search in the meaning of the Fourth Amendment.[9] Whether it is considered a Fourth Amendment search requiring probable cause when employed at the front door of a private house had never been specifically addressed by the Supreme Court until *Jardines v. Florida*,[10] one of a pair of dog sniffing cases the Court heard in 2012. The other case, *Florida v. Harris*, addressed whether an alert from a drug-sniffing dog gives law enforcement probable cause to execute a search on a vehicle, an area in which we know the Court has found a reduced expectation of privacy.[11] With these cases, the Court took its first serious look at the use of drug-sniffing dogs.[12]

Jardines and *Harris* sought to clarify the relationship between drug-sniffing dogs and privacy rights under the Fourth Amendment. On February 19, 2013, a week before the Symposium, a unanimous Court issued its opinion in *Harris*, reversing the Florida Supreme Court when it held that "evidence of a dog's satisfactory performance in a certification or training program can itself provide sufficient reason [for a law enforcement officer] to trust his alert," and conduct a search.[13] The Court rejected the strict evidentiary checklist Florida Supreme Court required to assess a dog's reliability, saying it "flouted" the traditional totality of circumstances test for probable cause.[14] The standard to be used is "whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime."[15]

The implications of the Court's opinion in *Jardines* would prove more complicated than *Harris*, in spite of being a "straightforward" case according to Justice Scalia.[16] The Court considered whether a sniff by a trained narcotics detection dog at the front door of a home was a "search" requiring a warrant. At the time of the Symposium, the case had not yet been decided, but the Court has since held that the sniff was a search within the meaning of the Fourth Amendment.[17] Our experts on Panel 1 focused on the two cases, and their potential impact on

individual privacy rights, and the meaning of a search as law enforcement tools and technology develop.

Panel 2 addressed Stop and Frisk, a common but controversial police practice derived from the *Terry* stop.[18] The practice has received much attention in New York City, where it is used prolifically, and there are currently three federal class actions suits pending. The panelists focused on New York City and Prince George's County, Maryland, and addressed the current litigation in New York, as well as how to bring about change in police practices generally.

Detective Richard Grapes and K9 Diesel

The Symposium opened with a live K-9 demonstration of how a detective uses a trained drug detection dog to search for the presence of illegal drugs. We welcomed Detective Grapes, from the Metro Area Drug Task Force, and his drug-sniffing dog, Diesel. The use of dogs by police departments has changed in recent years. Detective Grapes said that many people expect the dogs used by police to be German Shepherds, or other breeds with bad reputations for being aggressive, but Diesel is a seven-year-old black Labrador Retriever who lives at home with Det. Grapes. Det. Grapes explained that, for example, the Metropolitan Police Department (MPD), in Washington, DC, made a policy decision to use dogs, like Labradors, that are more personable and less frightening to people.

Diesel has been on the job for seven years, and is certified by the United States Police Canine Association, one of three certifying organizations. He is recertified every 12-18 months to alert to certain odors. For example, Diesel is trained to alert to dried marijuana, but not cannabis plants.

For their demonstration, Det. Grapes placed three small FedEx boxes on the floor, one of which contained a small amount of marijuana. He explained that Diesel knows when he is working, and there are certain indicators that Diesel will exhibit, like the "squaring off" of his ears, that tell the detective that playtime is over. Perhaps sensing that he was not really at work—or, as Det. Grapes joked, maybe it was a case of stage fright—Diesel did not alert to the marijuana. On a more serious note, however, Det. Grapes explained that was why he prefers not to do demonstrations for judges and juries. Accuracy, as was discussed earlier in relation to *Harris*, is a contentious issue in the use of dog sniffs. Det. Grapes acknowledged that it is a "touchy area," and can be inexact, but estimated that Diesel is 98% accurate. Diesel has only given a "nonproductive alert," an alert when there were no drugs found, three times out of thousands of scans. Det. Grapes noted that even in those cases, calling the alert a "false positive" is a misnomer because it is impossible to know whether drugs were present prior to the sniff.

Panel 1: Darpana Sheth, Duncan Getchell, Howard Blumberg, Jim Harper, Andrew Ferguson

The panelists of Panel 1 discussed *Harris* and *Jardines*. Because *Harris* had just been decided, our guests analyzed the meaning of the decision, and speculated on how *Jardines* might be decided, and what potential consequences would result.

Darpana Sheth of the Institute for Justice, and Duncan Getchell, Solicitor General of Virginia, shared their differing perspectives on *Harris*. Sheth's organization, the Institute for Justice (IJ), is a civil liberties law firm dedicated to protecting property rights, with a particular interest in civil forfeiture. Because police frequently use dog sniffs in civil forfeiture cases in order to seize cash, cars, and other property, IJ took an interest in the *Harris* case and filed an amicus brief on behalf of Harris. Sheth said that in some states, all that is required for civil forfeiture is probable cause. After *Harris*, probable cause is now established with an alert from a trained dog. Sheth explained that *Harris* created a rebuttable presumption whereby a dog that is certified and trained will give an officer probable cause to take and keep an individual's property. As a result, IJ fears that defendants will face a difficult hurdle when contesting forfeitures. Sheth predicts the *Harris* decision will exacerbate what IJ views as systemic abuse by state law enforcement agencies who have a financial stake in the money brought in by civil forfeitures. She said that law enforcement agencies typically rely on forfeiture monies to supplement their budgets, and the *Harris* decision could facilitate unlawful seizure of property because all that will be required for the police to take and keep an individual's property is an alert from a trained dog.

Duncan Getchell offered a counterpoint to the position taken by Sheth and IJ. As Solicitor General of Virginia, he drafted the amicus brief for the states supporting Florida, which totaled 24, plus Puerto Rico and Guam. Unlike Sheth, Getchell anticipates that the Court's decision will have little practical impact, and argued that states would have suffered significant impact if the Court had decided differently. Like the Court in its decision, Getchell objected to the Florida Supreme Court's prescription of "rigid forms and rules" to prove a dog's reliability before allowing the sniff to be probable cause, saying that a probable cause analysis is meant to be a practical test based on the totality of the circumstances, not to be confined by any "artificial rules or formulas." Had the Court upheld the decision of the Florida Supreme Court, Getchell believes the result would be mini-trials requiring supporting evidentiary documents to determine if a particular dog's sniff could be found reliable enough to give probable cause to search; these procedures would add enormous burdens to the criminal justice process, and more importantly, fundamentally alter the traditional determination of probable

cause based on a totality of the circumstances. Additionally, the Solicitor General shared with the audience what he sees as the value of the role of states in important Supreme Court and Courts of Appeals decisions generally. He said states are able to share their experiences, and can voice the practical burdens that would result in the event of a decision contrary to that being urged.

Howard Blumberg, the Miami-based public defender representing Joelis Jardines, highlighted the importance of the issues brought up in *Harris* and *Jardines* for ordinary people. Blumberg began the panel's discussion of *Jardines*, which he described as a case requiring the Supreme Court to resolve the tension between two fundamental principles: privacy in the home, and no privacy in contraband. *Jardines* raised the question of whether all details in the home are private, and if so, is taking a dog to the front door of a home and suspected grow house an invasion of privacy, and a search in and of itself? Blumberg noted *United States v. Jones*, in which the Court found that a Global Positioning System (GPS) device placed on the bottom of a car is a common law trespass, and therefore, a violation of the Fourth Amendment[19] In relying on the common law trespassory test, the Court said it was returning to the Fourth Amendment jurisprudence that ruled the first half of the 20th century, and explained that the *Katz* test[20] did not substitute for the common law trespassory test, but added to it.[21] As a result, the Court declined to address the reasonableness of Jones' expectation of privacy since its holding was based exclusively on a property-based approach[22] How the Court would square *Jones* with *Jardines*, said Blumberg, was the crucial question. Justice Scalia perhaps offered a clue when he stated in *Jones*, "The Government physically occupied private property for the purpose of obtaining information. We have no doubt that such a physical intrusion would have been considered a "search" within the meaning of the Fourth Amendment when it was adopted.[23]

In essence, the Court used the same formula in *Jardines* as in *Jones*, but failed to name it (though the concurring and dissenting opinions did).[24] Like in *Jones*, in *Jardines* the Court declined to address whether Jardines had a reasonable expectation of privacy, only this time there was no reference to the trespassory test; in fact, writing for the majority, Scalia never once used the word trespass. Instead, he focused on the "physical intrusion" of the government in order to obtain information, which made the case "a straightforward one," and clearly a search in the original meaning of the Fourth Amendment.[25] However, years earlier in *Katz,* the Court rejected an exclusively property-based analysis finding that the Fourth Amendment is not limited only to tangible property, but extends to where there may not be any technical trespass.[26] While *Jardines* and *Jones* do not purport to require a physical invasion in order to find a search, it looks like the *Katz* test may be getting phased out, and it is not exactly clear what is left in its place.[27]

Offering an alternative point of view, Jim Harper, of the Cato Institute, suggested that *Jones* is more accurately a seizure case; and *Kyllo v. United States* is a better analog to the dog sniff cases. In *Kyllo* the Court held that the government's use a thermal imaging device, not in general use, on a private home, constitutes a search in violation of the Fourth Amendment. He expressed general dissatisfaction with the state of Fourth Amendment law as it relates to law enforcement officers, citizens, and lower courts, calling the "reasonable expectation of privacy" standard an "unadministratable rule." He believes the *Katz* two-pronged test[28] requires courts to make objective decisions about subjective circumstances, and that the case law reflects "subjective decisions by justices of what America's values on privacy are." But how would the Court have decided *Kyllo* under a physical intrusion test in light of *Jones*, and now *Jardines*? Like the wiretapping in *Katz*, the thermal imaging device requires a different standard than common law trespass. Harper advocates altogether replacing the current doctrine with a simple definition of search: looking for, or seeking out, that which is concealed from view. With this new definition, any government activity that seeks to find information otherwise unavailable would be a search.[29] As for the Cato Institute's amicus brief for *Jardines*, Harper explained that they involved themselves not to try to cause a certain result in the case, but rather to help with doctrine.

Resolving the aforementioned doctrinal issues will be particularly important as technology advances, and as Andrew Ferguson suggested, the police have technology performing the same function as the dogs in *Jardines* and *Harris*. Getchell added, however, that the dog sniff cases may not be useful for future technology, and the doctrine may have to shift to an inquiry of whether or not the government has a particularized reason that makes it reasonable to deploy a given tool. To that point, Ferguson explained, perhaps forecasting the future, that *Katz* may not be a test that will survive as the technology used to conduct searches changes. In the meantime, Ferguson expected *Jardines* would be an opportunity for the Court to decide if the *Jones* decision really "means what it says." For the moment, it looks like the answer is yes.

Panel 2: Darpana Sheth, Howard Blumberg, Glenn Ivey, and Andrew Ferguson

For Panel 2, the discussion shifted from the dog sniff cases before the Supreme Court to the controversial police practice of Stop and Frisk. Andrew Ferguson provided an overview of three related federal lawsuits in New York challenging the tactic: *Ligon v. City of New York*,[30] a class action of 1044 members, specifically challenging "Operation Clean Halls," which authorized trespass stops by the New York Police Department

(NYPD), often made without reasonable suspicion, outside of privately-owned apartment buildings in the Bronx; *Davis v. City of New York*,[31] another class action suit based on the same type of practice conducted in and outside of public housing dwellings; and *Floyd v. City of New York*,[32] a class action that focuses on the racial disparity of the Stop and Frisk program. On January 8, 2013, the plaintiffs' motion for preliminary injunction in *Ligon* was granted, and the NYPD was ordered to stop its practice of trespass stops outside of the Clean Halls buildings in the Bronx.[33]

Ferguson described New York City's Stop and Frisk program as "overwhelming, extreme, and cutting edge." Glenn Ivey, former State's Attorney for Prince George's County, Maryland, helped design Prince George's County's Stop and Frisk policy, shared his insights into how to address the challenges Stop and Frisk has come to present in practice.

The panel addressed the problems of defining what is a "high crime area," one of the factors used after *Illinois v. Wardlow* to determine "reasonableness" for a police stop, and key to the Fourth Amendment analysis.[34] *Wardlow* did not provide a definition for "high crime area," which one panelist suggested was an "odd measure" for Fourth Amendment rights anyway. Ivey noted that in his experience as a prosecutor he had never heard a single challenge to the designation, and emphasized that it needs to be challenged at the trial level.

Ivey described the need to effectively balance fixing crime problems with solutions that are free from bias and discrimination. In Prince George's County, Ivey's constituents wanted something to be done about violent crime in their neighborhoods, and Stop and Frisk, along with saturation and "jump out squads" seemed like part of the solution. Then by the early 2000s, Ivey saw a "normalizing of incarceration" in the African-American community with a large number of African-Americans sentenced to lengthy prison sentences. This destroyed nuclear family units, led to family and community disruptions, and decreased economic opportunity; all of which suggested to Ivey a need for intervention and prevention programs for young people, rather than a reliance on traditional policing. Furthermore, the tension between police and community members presented problems for prosecutors who struggled to find witnesses willing to testify for them, and juries without biases towards police. From Ivey's point of view, the county lacked a strategy that evolved with the policy shift.

While judicial review of stop and frisk policies is one avenue of addressing the constitutional questions the practice raises, our panelists debated the efficacy of a multiyear court strategy. Ivey suggested that the "political piece" should not be ignored when it comes to influencing crime policy generally, noting in particular the significant of elections for local prosecutors; he also encouraged participation in other local elections since it is typically a mayor, or a jurisdiction's chief executive, who will appoint the police chief. He described affecting change in a police department as a chain reaction, requiring a police chief to be there long enough to influence mid-level management, who in turn can change what happens on the streets since they represent the department leadership to whom new police have the greatest access.

From sharing advocacy strategies to engaging in high-level analysis of Fourth Amendment jurisprudence, the panelists provided lively discussion on privacy, property rights, police practices, and the future implications of the dog sniff cases. As one participant said, the diversity of the panel, and of those who submitted amicus briefs in *Harris* and *Jardines*, is a reflection of the significance of the issues presented. The Criminal Law Brief is grateful to the participants for sharing their unique perspectives on this important and evolving area of law.

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1 U.S. Const. amend. IV.

2 *Id.*

3 *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (positing that though the Fourth Amendment protects people, not places, how much protection a person is afforded requires reference to a place).

4 *See* Silverman v. United States, 365 U.S. 505, 511 (1961) ("At very core of man's personal right stands the right to retreat into his own home and there be free from unreasonable governmental intrusion."); *see also* Oliver v. United States, 466 U.S. 170, 180 (finding the curtilage, the area immediately surrounding the home where intimate activity associated with the sanctity of home and privacies of life may occur, to be protected by the Fourth Amendment).

5 California v. Carney, 47 U.S. 386 (1985).

6 Kyllo v. United States, 533 U.S. 27, 40 (2001).

7 *Id*. at 27.

8 United States v. Place, 462 U.S. 696 (1983) (holding a dog sniff that can only detect the presence of contraband in luggage at an airport is *sui generis* and does not constitute a search in the meaning of the Fourth Amendment because it is so uniquely limited both in the manner in which the information is obtained and in the content of the information revealed).

9 *See* Illinois v. Caballes, 543 U.S. 405 (2005) (holding there is no privacy interest in contraband); *see e.g.*, Indianapolis v. Edmond, 531 U.S. 32, 40 (2000) (holding that a dog sniff of a car at a vehicle checkpoint was not a search).

10 Jardines v. Florida, 133 S. Ct. 1409 (2013).

11 Florida v. Harris, 133 S. Ct. 1050 (2013).

12 Jim Harper, Florida v. Jardines: *Bolstering the Fourth Amendment*, JURIST.ORG, (Oct. 31, 2012), http://jurist.org/hotline/2012/10/jim-harper-florida-jardines.php (suggesting the pair of dog sniff cases, *Jardines v. Florida* and *Florida v. Harris*, was the first real review of drug sniffing dogs, notwithstanding *Caballes* decided in 2005).

13 *Harris*, 133 S. Ct. at 1057.

14 *Id.* at 1056.

15 *Id.* at 1058.

16 Jardines v. Florida, 133 S. Ct. 1409, 1414 (2013).

17 *Id*. at 1412.

18 *See* Terry v. Ohio, 392 U.S. 1 (1968) (landmark case that created the *Terry* stop, a brief, limited intrusion to confirm or dispel the suspicion of

criminal activity, based only on reasonable articulable suspicion, instead of a standard of probable cause).

[19] United States v. Jones, 132 S. Ct. 945 (2012).

[20] *See* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring) (reasonable expectation of privacy is determined by a two-pronged test to determine whether there was 1) an actual expectation of privacy on the part of the individual, and 2) whether that expectation is one society accepts as reasonable).

[21] *Jones*, 132 S. Ct. at 947.

[22] *Id*. at 952.

[23] *Id.* at 949.

[24] *See* Jardines v. Florida, 133 S. Ct. 1409, 1418 (2013) (Kagan, J., concurring) ("Was [the activity of the government] trespass? Yes, as the Court holds today.").

[25] *Id*. at 1414.

[26] *Katz*, 389 U.S. at 352-53 (overruling Olmstead v. United States, 277 U.S. 438 (1928), which limited the Fourth Amendment to searches and seizures of tangible property, citing the trespass doctrine as so eroded it can no longer be regarded as controlling).

[27] *See* Orin Kerr, *What is the State of the* Jones *Trespass Test After* Florida v. Jardines? The Volokh Conspiracy (Mar 27, 2013, 2:56 AM), http://www.volokh.com/2013/03/27/what-is-the-state-of-the-jones-trespass-test-after-florida-v-jardines/ (arguing that after looking at the history of Fourth Amendment doctrine no trespass test actually existed pre-*Katz*, suggesting that *Jones* was the first case to apply it).

[28] *Katz,* 389 U.S. at 361.

[29] Harper, *supra* note 1.

[30] Ligon v. City of New York, No. 12 Civ. 2274(SAS), 2013 WL 628534 (S.D.N.Y. Feb. 14, 2013) (granting injunctive relief to class seeking immediate changes to New York Police Department unconstitutional practice of stopping people on suspicion of belief of trespass outside certain privately-owned buildings).

[31] Davis v. City of New York, No. 10 Civ. 0699(SAS), 2012 WL 4813837 (S.D.N.Y. Oct. 9, 2012) (precluding city's motion for summary judgment on unlawful arrest and stop claims).

[32] Floyd v. City of New York, 283 F.R.D. 153 (granting class certification in race-based challenge to Stop and Frisk).

[33] *Ligon*, 2013 WL 628534, at *41.

[34] Illinois v. Wardlow, 528 U.S. 119 (2000).

About the Author

Sarah Tynan is a second year law student at American University, Washington College of Law, where she serves as a staff member of the Criminal Law Brief. Her interest in criminal law grew out of her work at the Vera Institute of Justice, where she spent three years working on a project to improve oversight in prisons and jails before beginning law school. Sarah has interned in the Office of the Inspector General in the Prince George's County Police Department, in the Civil Rights Division of the Department of Justice, and will be at the United States Attorney's Office for the District of Columbia this summer. She will be a student attorney in WCL's General Practice Clinic in the fall of 2013.

Notes

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