

**THE FOURTH AMENDMENT: ITS HISTORY AND INTERPRETATION (CAROLINA PRESS 2008)
by Thomas K. Clancy**

SUPPLEMENT: SUPREME COURT CASE UPDATE ©¹

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Contact information

Thomas K. Clancy
National Center for Justice and the Rule of Law
University of Mississippi School of Law
P.O. Box 1848
University, MS 38655
662-915-6918
tclancy@olemiss.edu
www.NCJRL.org

The treatise is available at www.cap-press.com/books/1795

1. Qualified Immunity: *Pearson v. Callahan*, 555 U.S. ___, 129 S. Ct. 808 (2009)

Treatise references:

- § 13.6. Substantiality of the violation and “good faith”
- § 13.8. Other remedies

Plaintiffs in civil damage suits against government agents have two burdens to overcome. It must be shown that the agent 1) violated the plaintiff’s Fourth Amendment rights and 2) is not entitled to qualified immunity, which would bar the law suit from proceeding. An agent is entitled to qualified immunity if the constitutional right violated was not clearly established at the time of the violation.² In *Saucier*, the Court established that courts considering such claims must address the first question prior to determining whether the agent is entitled to qualified immunity. This “order of battle” had been criticized by several justices³ and the Court had candidly admitted that it contradicts its policy of avoiding unnecessary adjudication of constitutional issues.⁴

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² *Saucier v. Katz*, 533 U.S. 194, 201 (2001). Put another way, police officers are entitled to qualified immunity unless it would have been clear to a reasonable police officer that his conduct was unlawful in the situation he confronted. *E.g.*, *Wilson v. Layne*, 526 U.S. 603 (1999); *Groh v. Ramirez*, 540 U.S. 551, 563 (2004).

³ *E.g.*, *Morse v. Frederick*, 127 S. Ct. 2618, 2641 (2007) (Breyer, J., concurring and dissenting) (collecting authorities).

⁴ *Scott v. Harris*, 127 S. Ct. 1769, 1774 (2007).

In *Pearson v. Callahan*, the Court overruled *Saucier* in an unanimous opinion written by Justice Alito. The Court concluded:

[W]hile the sequence set forth there is often appropriate, it should no longer be regarded as mandatory. The judges of the district courts and the courts of appeals should be permitted to exercise their sound discretion in deciding which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.

To support that conclusion, the Court rejected *stare decisis* considerations in light of the experience that lower courts had with the *Saucier* rule and criticisms of that rule from a variety of sources, including from members of the Court. Nonetheless, the Court recognized that a decision on the merits “is often beneficial.” Those situations included when little would be gained in terms of conservation of resources in just addressing the clearly established prong and when a discussion of the facts make it apparent that there was no constitutional violation. However, the Court stated that “the rigid *Saucier* procedure comes with a price,” including the expenditure of scarce judicial resources and wasting of the parties’ time. It noted that addressing the cases addressing the constitutional question “often fail to make a meaningful contribution” to the development of Fourth Amendment principles for a variety of reasons. *Saucier* also made it difficult for the prevailing party, who has won on the qualified immunity issue, to gain review of an adversely decided constitutional issue. The Court concluded its decision by finding that the government’s agents were entitled to qualified immunity and did not address the substantive Fourth Amendment claim. {The case involved an undercover drug buy in a house; a buyer signaled the police, who then entered the house without a warrant. Some lower courts have recognized a “consent–once–removed” doctrine to permit such warrantless intrusions. The Supreme Court did not address the merits of that doctrine.}

It takes little insight to observe that the new mode of analysis will result in fewer courts developing Fourth Amendment principles and fewer cases presenting such issues for review. Avoiding the constitutional issue is, after all, the purpose of giving lower courts the discretion to dispose of the case on qualified immunity grounds.⁵ What will also result is an increased muddling of Fourth Amendment and qualified immunity analysis. The Court has stated that, in analyzing qualified immunity claims, “[t]he question is what the officer reasonably understood his powers and

⁵ The standard for qualified immunity is equivalent to the good faith exception to the exclusionary rule. *Groh v. Ramirez*, 540 U.S. 551, 565 n.8 (2004). In *United States v. Leon*, 468 U.S. 897 (1984), the Court established that evidence seized pursuant to a judicial warrant should not be suppressed unless the warrant or the affidavit on which it was based was so clearly defective that the officers who executed the warrant could not reasonably have relied upon it. *Id.* at 922-23. The Court explained that lower courts had “considerable discretion” either to “guide future action by law enforcement officers and magistrates” by deciding the substantive Fourth Amendment question “before turning to the good-faith issue” or to “reject suppression motions posing no important Fourth Amendment questions by turning immediately to a consideration of the officers’ good faith.” *Id.* at 924-25. In light of that discretion, many courts opt to dispose of cases on the basis of good faith, without first considering whether there was a Fourth Amendment violation. *E.g.*, *United States v. Proell*, 485 F.3d 427, 430 (8th Cir. 2007).

responsibilities to be, when he acted, under clearly established standards.” Those standards will not be further clarified if courts address only the second question. Indeed, *Pearson* itself illustrates this point. The case involved an undercover drug buy in a house by an informant. After entering the home and confirming that the seller had the drugs, the purported buyer signaled the police, who then entered the house without a warrant. The alleged seller, after obtaining suppression of the evidence in the criminal case against him, sued the police. In defense to that suit, a claim was made that the “consent–once–removed” doctrine, which has been recognized by some courts, permitted the warrantless intrusion.⁶ The Supreme Court did not address the merits of that doctrine, skipping directly to the qualified immunity aspect of the case and finding that the officers were entitled to qualified immunity because the illegality of their actions had not been clearly established. The result of *Pearson* may become typical: we are left with uncertainty as to the status of a controversial legal principle that has divided lower courts.

Pearson’s new battle order—and the result in *Pearson*—is likely to make the avoidance of difficult Fourth Amendment questions the norm in cases where a defense of qualified immunity is available. Hence, many civil cases will no longer be decided by the lower courts on the merits of the Fourth Amendment claims and, therefore, there will be less cases worthy of review by the Supreme Court. The end result is that the Court will not take as many cases for review because it can always be said: although the police officer may have violated the Fourth Amendment, that issue need not be addressed because any such violation was not clearly established.

2. The Exclusionary Rule: *United States v. Herring*, 555 U.S. ___, 129 S. Ct. 695 (2009)⁷

Treatise section references:

§ 13.2. Evolution of exclusionary rule doctrine

§ 13.3. Causation: fruit and attenuation analysis

§ 13.6. Substantiality of the violation and “good faith”

This case can be read narrowly or broadly. The broader reading signals a dramatic restriction in the application of the exclusionary rule. *Herring*, in the short run, will generate a significant amount of litigation as to which reading is correct and will require the Court to address its implications. If the broad language employed in *Herring* prevails, it will fundamentally change the litigation of motions to suppress in criminal cases. That is, a central question will be whether the officer had a culpable mental state; if not, the rule will not apply. If that mode of analysis prevails,

⁶ The “consent–once–removed” doctrine has been applied by some courts when an undercover officer enters a house at the express invitation of someone with authority to consent, establishes probable cause to arrest or search, and then immediately summons other officers for assistance. *United States v. Pollard*, 215 F.3d 643, 648 (6th Cir. 2000); *United States v. Diaz*, 814 F.2d 454, 459 (7th Cir. 1987); *United States v. Bramble*, 103 F.3d 1475, 1478 (9th Cir. 1996). The Sixth and Seventh Circuits have broadened this doctrine to grant informants the same capabilities as undercover officers. *See United States v. Paul*, 808 F.2d 645, 648 (7th Cir. 1986); *United States v. Yoon*, 398 F.3d 802, 807 (6th Cir. 2005).

⁷ The discussion of *Herring* and *Pearson* is drawn from Thomas K. Clancy, *The Irrelevancy of the Fourth Amendment in the Roberts Court*, __ Chicago Kent L. Rev. __ (forthcoming 2009).

it will reduce appreciably the number of cases addressing the merits of Fourth Amendment claims and expand dramatically the inapplicability of the exclusionary rule.

Narrowly, the issue in *Herring* was whether the good faith doctrine should be applied when police officers in one jurisdiction checked with employees of the sheriff's office in another jurisdiction and were told that there was an outstanding warrant for Herring, who was then arrested. Contraband was discovered during the search incident to Herring's arrest. The report was in error and the warrant should have been removed from the records but had not been due to the negligence of personnel in the reporting jurisdiction's sheriff's office.

Writing for a majority of five, Chief Justice Roberts stated that the exclusionary rule did not apply. A narrow reading of *Herring* can be drawn from the following statement by the majority of its holding: "Here the error was the result of isolated negligence attenuated from the arrest. We hold that in these circumstances the jury should not be barred from considering all the evidence." Words of limitation jump out from these sentences: "isolated negligence;" attenuation.⁸ Hence, some may see *Herring* as a narrow expansion of good faith that has little application.⁹

In contrast, the rest of the majority opinion is very broadly written and represents a significant recasting of modern exclusionary rule theory. Instead of viewing the issue as part of a good faith exception to the exclusionary rule, Roberts seemed to dismiss that notion; instead, he viewed *United States v. Leon*,¹⁰ the genesis of that exception, as follows:

When police act under a warrant that is invalid for lack of probable cause, the exclusionary rule does not apply if the police acted "in objectively reasonable reliance" on the subsequently invalidated search warrant. We (perhaps confusingly) called this objectively

⁸ Consistent with a narrow view, Roberts later asserted: "An error that arises from nonrecurring and attenuated negligence is thus far removed from the core concerns that led us to adopt the rule in the first place." *Id.* at __.

⁹ Justice Kennedy, a crucial fifth vote for the majority in *Hudson* and *Herring*, might be attracted to such a view. He joined the Court's opinion in *Herring*. In *Hudson*, the majority viewed the knock and announce violation attenuated from the recovery of the evidence in the house. It stated: "Attenuation . . . occurs when, even given a direct causal connection, the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained." 547 U.S. at __. Kennedy wrote a concurring opinion in which he stated that the *Hudson* "decision determines only that in the specific context of the knock--and--announce requirement, a violation is not sufficiently related to the later discovery of evidence to justify suppression. *Id.* at ____ (Kennedy, J., concurring in part and concurring in the judgment). He added that "the causal link between a violation of the knock--and--announce requirement and a later search is too attenuated to allow suppression." *Id.* at __. The concept of attenuation in *Hudson* and in *Herring* differs markedly from the concept of attenuation that prevailed in pre-*Hudson* Supreme Court jurisprudence. See Thomas K. Clancy, *The Fourth Amendment: Its History and Interpretation* §§ 13.3.1.2., 13.3.6. (2008).

¹⁰ 468 U.S. 897 (1984).

reasonable reliance “good faith.”¹¹

Roberts also expansively reframed exclusion analysis; he asserted that suppression “turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct.” He later repeated: “The extent to which the exclusionary rule is justified by these deterrence principles varies with the culpability of the law enforcement conduct.” He added:

Judge Friendly wrote that “[t]he beneficent aim of the exclusionary rule to deter police misconduct can be sufficiently accomplished by a practice . . . outlawing evidence obtained by flagrant or deliberate violation of rights.”¹²

Exclusion—and deterrence—appears justified after *Herring* based on culpability. It does not further that inquiry, it appears, to label the situation as a “good faith” exception to the exclusionary rule. Thus, Roberts recounted several cases of “intentional” and “flagrant” misconduct, including in *Weeks*,¹³ which was the case that initially adopted the exclusionary rule, that would support exclusion. Roberts thereafter flatly asserted:

To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence. The error in this case does not rise to that level.¹⁴

¹¹ 555 U.S. at ___. The label “good faith” is misleading to the extent that it suggests that the actual belief of the officer is examined. Instead, the inquiry focuses “expressly and exclusively on the *objective reasonableness* of an officer’s conduct, not on his or her subjective ‘good faith’ (or ‘bad faith’).” *People v. Machupa*, 872 P.2d 114, 115 n.1 (Cal. 1994). *See also* *United States v. Leon*, 468 U.S. 897, 918 (1984) (stating that the Court has “frequently questioned whether the exclusionary rule can have any deterrent effect when the offending officers acted in the objectively reasonable belief that their conduct did not violate the Fourth Amendment”). However, labeling the officer’s conduct as “objectively reasonable” has also been criticized as misleading. For example, Justice Stevens has taken issue with the Court’s characterization of the police’s conduct as being objectively reasonable, even if they have not complied with the Fourth Amendment, because “when probable cause is lacking, then by definition a reasonable person under the circumstances would not believe there is a fair likelihood that a search will produce evidence of a crime. Under such circumstances well-trained professionals must know that they are violating the Constitution.” *Id.* at 975 (Stevens, J., dissenting).

¹² *Id.* at ___, quoting *The Bill of Rights as a Code of Criminal Procedure*, 53 CALIF. L. REV. 929, 953 (1965) (footnotes omitted) and citing *Brown v. Illinois*, 422 U.S. 590, 610-611 (1975) (Powell, J., concurring in part) (“[T]he deterrent value of the exclusionary rule is most likely to be effective” when “official conduct was flagrantly abusive of Fourth Amendment rights”).

¹³ *Weeks v. United States*, 232 U.S. 383 (1914).

¹⁴ 555 U.S. at ___. Roberts maintained that recordkeeping errors by the police are not immune from the exclusionary rule but “the conduct at issue was not so objectively culpable as to require exclusion.” *Id.* at ___. He noted: “If the police have been shown to be reckless in maintaining a

The Chief Justice emphasized that negligence is simply not worth the costs of exclusion.¹⁵ He ended the majority opinion by quoting one of the more famous statements in opposition to the adoption of the exclusionary rule and stated:

[W]e conclude that when police mistakes are the result of negligence such as that described here, rather than systemic error or reckless disregard of constitutional requirements, any marginal deterrence does not “pay its way.” In such a case, the criminal should not “go free because the constable has blundered.”¹⁶

Justice Ginsburg, joined by Justices Stevens, Souter, and Breyer dissented.¹⁷ Justice Ginsburg certainly did not view the *Herring* decision as narrow. She replied with a broad defense of the rule, which is notable for the fact that, for the first time in decades, a member of the Court has clearly suggested that the exclusionary rule may be constitutionally based.¹⁸ Addressing what she perceived

warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would certainly be justified under our cases should such misconduct cause a Fourth Amendment violation.” *Id.* at ___.

¹⁵ *Id.* at ___ n.4. Despite all of the Court’s references to apparently subjective states of mind, Roberts added a confusing twist: all of these inquiries are objective ones. He emphasized that “the pertinent analysis of deterrence and culpability is objective, not an ‘inquiry into the subjective awareness of arresting officers[.]’” *Id.* at ___. Factors in making that determination include a “particular officer’s knowledge and experience, but that does not make the test any more subjective than the one for probable cause, which looks to an officer’s knowledge and experience, but not his subjective intent[.]” *Id.* at ___.

Perhaps the Chief Justice was seeking to preserve the Court’s general approach to measuring reasonableness, which has been an objective analysis of the facts. *See* Thomas K. Clancy, *The Fourth Amendment: Its History and Interpretation* § 11.6.2.1. (2008) (summarizing the Court’s general approach to measuring reasonableness). Nonetheless, in situations where a police officer intentionally or recklessly places false information in a warrant (or omits such information), the inquiry has required an examination of the officer’s actual state of mind. *See id.* § 12.3.3. (collecting authorities); *Franks v. Delaware*, 438 U.S. 154 (1978). Indeed, the concepts of knowledge, recklessness, and negligence are familiar criminal law concepts, each requiring inquiry into the actor’s actual state of mind. *E.g.*, Model Penal Code § 2.02. *Herring* seems to create the bizarre principle that, to ascertain if an officer was intentionally or recklessly violating a person’s Fourth Amendment rights, that inquiry is an objective one.

¹⁶ 555 U.S. at ___, *quoting* *People v. Defore*, 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926) (opinion of the Court by Cardozo, J.).

¹⁷ Justice Breyer, in a separate dissent joined by Justice Souter, applied a traditional good faith analysis and concluded that it should not apply in *Herring*. He added that negligent record keeping errors were susceptible to deterrence through application of the exclusionary rule.

¹⁸ Ginsburg stated:

Others have described “a more majestic conception” of the Fourth Amendment and its adjunct, the exclusionary rule. Protective of the fundamental “right of the people to be secure in their persons, houses, papers, and effects,” the Amendment “is a constraint on the power of the sovereign, not merely on some of its agents.” I share that vision of the

as the Court’s creation of a system of exclusion based on distinctions between reckless or intentional actions on the one hand and mere negligence on the other, Ginsburg argued that the rule was also justified when the police are negligent. She believed that the mistake in *Herring* justified its application and concluded:

Negligent recordkeeping errors by law enforcement threaten individual liberty, are susceptible to deterrence by the exclusionary rule, and cannot be remedied effectively through other means. Such errors present no occasion to further erode the exclusionary rule.

If *Herring*’s broader implications are realized, Fourth Amendment litigation will change to one focused primarily on the culpability of the government agent and, often, the merits of the Fourth Amendment claim will not have to be decided. The inquiry after *Herring* becomes a quest to ascertain police culpability: was there intentional misconduct; reckless misconduct; a pattern of recurring negligence; or mere negligence? “Mere negligence” would make many—if not most—Fourth Amendment violations inappropriate candidates for suppression. For example, a police officer—instead of relying on information from other officers as in *Herring*—may believe that her actions are reasonable based on her own investigation, even though the actions do not comply with the Fourth Amendment.¹⁹ Based on a broad reading of *Herring*, a court could simply skip the merits of a claim and address solely the lack of an exclusionary remedy. Thus, a court could simply rule: although the police officer may have violated the Fourth Amendment, that issue need not be addressed because any such violation was merely a result of negligence.

3. Frisks of Vehicle Passengers: *Arizona v. Johnson*, 555 U.S. __ (2009)

Treatise section references:

§ 5.1.4. Show of authority seizures

§ 6.4.3. Traffic stops

§ 9.1. Protective weapons searches [frisks]

§ 11.3.2.1.2. Articulable suspicion

Amendment.

The exclusionary rule is “a remedy necessary to ensure that” the Fourth Amendment’s prohibitions “are observed in fact.” The rule’s service as an essential auxiliary to the Amendment earlier inclined the Court to hold the two inseparable.

Beyond doubt, a main objective of the rule “is to deter-to compel respect for the constitutional guaranty in the only effectively available way-by removing the incentive to disregard it.” But the rule also serves other important purposes: It “enabl[es] the judiciary to avoid the taint of partnership in official lawlessness,” and it “assur[es] the people-all potential victims of unlawful government conduct-that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government.”

555 U.S. at __ (citations omitted).

¹⁹ *E.g.*, *Moore v. State*, 986 So. 2d 928, 934-35 (Miss. 2008) (collecting cases and finding that, when a police officer, under a reasonable mistake of law, believed that there is probable cause to make a traffic stop, the stop is valid, even though the vehicle did not violate the law).

In an unanimous opinion written by Justice Ginsburg, the Court established that a vehicle passenger can be frisked during the course of a vehicle stop if the police have articulable suspicion to believe that that person is armed and dangerous. Johnson was a back-seat passenger of a vehicle legally stopped for a non-criminal vehicular infraction. The Court reviewed prior case law that had established a variety of activities that the police can permissibly engage in during a traffic stop. It also recognized, consistent with *Brendlin v. California*, 551 U.S. 249 (2007), that passengers of a motor vehicle are “seized” when police stop a vehicle. It applied that principle to *Johnson*. The sole aspect of *Johnson* that is new is that, even if the police do not believe that the passenger is engaged in criminal activity, the passenger can be frisked *if* the police “harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous.”

Ginsburg’s opinion does not note that lower courts had divided on whether the right to frisk is dependent on whether the police suspected the person of criminal activity. *Johnson* has potentially broad applicability to a variety of situations where the police are validity detaining a person (or confronting one) but do not believe that the person has been, is, or is about to be, engaged in criminal activity but do have articulable suspicion that the person accosted is armed and dangerous. Hence, in addition to passengers in a vehicle, *Johnson* could apply to material witnesses, detainees in a house where a warrant is being executed, or even to any person the police confront (but do not seize) on the street.

4. Search Incident to Arrest of Vehicle Occupants: *Arizona v. Gant*, 129 S. Ct. 1710 (2009)

Treatise section references:

§ 8.1. General considerations and evolution of the doctrine

§ 8.1.2. Exigency versus categorical approach

§ 8.1.3. Officer safety and evidence recovery justifications

§ 8.2. Permissible objects sought

§ 8.3. Timing and location of the search

§ 8.6. Scope: vehicle searches incident to arrest

§ 8.7. Justice Scalia’s opinion in *Thornton* and alternative views regarding search incident to arrest

For searches incident to arrest, it had long been established that the police can always search the person and the area of immediate control around that person.²⁰ If that person is in a vehicle, under

²⁰ *E.g.*, *Thornton v. United States*, 541 U.S. 615 (2004); *Michigan v. DeFillippo*, 443 U.S. 31, 39 (1979) (“the fact of a lawful arrest, standing alone, authorizes a search [of the person arrested]”); *Gustafson v. Florida*, 414 U.S. 260, 266 (1973) (“Since it is the fact of custodial arrest which gives rise to the authority to search,” the lack of a subjective belief by the officer that the person arrested is armed and dangerous is irrelevant.); *Robinson v. United States*, 414 U.S. 218 (1973) (adopting a “categorical” search incident to arrest rule: it applied to all arrests, regardless of the underlying factual circumstances).

Belton, the police could always search the entire passenger compartment incident to the arrest.²¹ The Court in *Gant* rejected that second principle and created two new rules for searches incident to arrest of persons who are in vehicles. Under *Gant* one of the following must be shown:

1. *Belton* does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee is secured and cannot access the interior of the vehicle.

or

2. Circumstances unique to the automobile context justify a search incident to arrest only when it is reasonable to believe that evidence of the offense of arrest might be in the vehicle.

Explaining the first rule, Stevens stated that a search of a vehicle incident to arrest is permissible "only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." In footnote 4, he opined for the majority:

Because officers have many means of ensuring the safe arrest of vehicle occupants, it will be the rare case in which an officer is unable to fully effectuate an arrest so that a real possibility of access to the arrestee's vehicle remains.

Explaining the second rule, Stevens asserted that circumstances unique to automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be in the vehicle. In another part of the opinion he called this standard a "reasonable basis." This appears to be the familiar articulable suspicion standard, used to justify *Terry* stops and frisks.

Justice Stevens, who was writing for a narrow majority of five, viewed the primary rationale of the new rules as protecting privacy interests. He saw *Belton* searches, which authorized police officers to search not just the passenger compartment but every purse, briefcase, or other container within that space, as creating "a serious and recurring threat to the privacy of countless individuals." He also maintained that *Belton* was not as bright a rule as had been claimed and that *Belton* was unnecessary to protect legitimate law enforcement interests.

Justice Scalia, in a concurring opinion, said that he did not like the majority's new rules but liked the dissent's view even less; he did not want to create a 4-1-4 situation and, therefore, joined the majority opinion, although acknowledging that it was an "artificial narrowing" of prior cases. Scalia stated that the rule he wanted was that the police could only search a vehicle incident to arrest if the object of the search was evidence of the crime for which the arrest was made.

Justice Breyer's dissent essentially argued that *stare decisis* applies. Alito, in dissent (joined by C.J. Roberts, Kennedy, and Breyer (in relevant part)), maintained that *Belton* was good rule and

²¹ *New York v. Belton*, 453 U.S. 454 (1981), (holding that, as an incident to arrest of an automobile occupant, the police may search the entire passenger compartment of the car, including any open or closed containers, but not the trunk). See also *Thornton v. United States*, 541 U.S. 615 (2004) (holding that *Belton* applied to situations where the suspect gets out of a car before the officer has made contact with the suspect).

that the new rules had no rational limitation to vehicle searches. He argued, in effect:
Why does the rule not apply to all arrestees?
Why is the reason to believe standard sufficient to justify a search?

5. Student Searches: *Safford School District v. Redding*, 129 S. Ct. 2633 (2009)

- § 3.3. The reasonable expectation of privacy test
- § 3.3.3.2. Situations where the Court has found reduced expectations of privacy
- § 3.3.4. Measuring expectations of privacy and techniques to create the hierarchy
- § 7.3. Physical invasions; two-sided nature of search analysis
- § 8.4. {intrusive searches incident to arrest} Scope: arrestee's body
- § 11.3.4.4.2.2. Special needs

Middle school official caught a student with prescription-strength ibuprofen pills, which was a violation of school rules. Relying on that student's uncorroborated statement that 13-year-old Savana Redding gave her the pills, school officials required Redding to remove her outer clothing and briefly pull away her underwear. Nothing was found. Redding's mother sued the school, alleging that school officials had violated Redding's Fourth Amendment rights.

In an 8-1 vote, the Supreme Court agreed with Redding that the Fourth Amendment had been violated. Writing for the Court, Justice Souter purported to apply the framework established in *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), to the search. First, the Court concluded that there was reasonable suspicion that Redding "was involved in pill distribution." Second, the Court examined the scope of the search. It initially found that the authorities were justified in searching Redding's backpack and outer clothing but that strip searches were a "category of its own demanding its own specific suspicions." Because the authorities did not have individualized suspicion that Redding was hiding the "common pain killers in her underwear," the authorities violated the Fourth Amendment by conducting such an intrusive search. Nonetheless, Justice Souter concluded that the school officials were entitled to qualified immunity because the circuits had been split on the question of when a strip search was justified. Justices Ginsburg and Stevens dissented on the question of qualified immunity. Justice Thomas, concurring and dissenting, argued that the search was not unreasonable and offered a broad view of school officials' authority.

6. *Virginia v. Harris*, --- S.Ct. ----, 2009 WL 3348727 (Oct. 20, 2009). Chief Justice Roberts, with whom Justice Scalia joins, dissenting from denial of certiorari.

Treatise References:

- § 11.3.2. Model#2: individualized suspicion
 - § 11.3.2.1.2. Articulate suspicion
 - § 11.3.2.2. Types and sources of information
 - § 11.3.2.3. Informants
- § 11.3.4.4.2.2. Special needs

Citing the dangers posed by drunk driving and the frequency of reports such conduct to the police, the Chief Justice argued that the Court should grant certiorari to determine whether an anonymous tip that Harris was driving while intoxicated was sufficient to justify a stop. Harris had

been convicted of driving while intoxicated but the Virginia Supreme Court overturned the conviction, concluding that, because the officer had failed to independently verify that Harris was driving dangerously, the stop violated the Fourth Amendment.

The Chief Justice asserted: “I am not sure that the Fourth Amendment requires such independent corroboration before the police can act, at least in the special context of anonymous tips reporting drunk driving.” He noted that, as a general rule, the Court has held “that anonymous tips, in the absence of additional corroboration, typically lack the ‘indicia of reliability’ needed to justify a stop under the reasonable suspicion standard.” But he believed that “Fourth Amendment analysis might be different in other situations,” including “in quarters where the reasonable expectation of Fourth Amendment privacy is diminished.” He noted that the “Court has in fact recognized that the dangers posed by drunk drivers are unique, frequently upholding anti-drunk-driving policies that might be constitutionally problematic in other, less exigent circumstances.” Roberts also pointed to a conflict in federal and state courts over the question:

The majority of courts examining the question have upheld investigative stops of allegedly drunk or erratic drivers, even when the police did not personally witness any traffic violations before conducting the stops. These courts have typically distinguished [the] general rule based on some combination of (1) the especially grave and imminent dangers posed by drunk driving; (2) the enhanced reliability of tips alleging illegal activity in public, to which the tipster was presumably an eyewitness; (3) the fact that traffic stops are typically less invasive than searches or seizures of individuals on foot; and (4) the diminished expectation of privacy enjoyed by individuals driving their cars on public roads. A minority of jurisdictions, meanwhile, take the same position as the Virginia Supreme Court, requiring that officers first confirm an anonymous tip of drunk or erratic driving through their own independent observation.

