CRIMINAL INVESTIGATION
Fall 2011

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Required Texts

1. Dressler & Thomas, Criminal Procedure: Investigating Crime (4th ed. 2010)
2. Supplement (free copy on first day of class; also available on course webpage)

Recitation Requirements

Each class will be a combination of lecture, class discussion, and recitation. Voluntary participation in class discussion is encouraged, and recitation will be conducted with one seating row being on call each class period. **I reserve the right to call randomly on students who are talking to their neighbors, text messaging, surfing the internet or otherwise engaged in distracting behavior.**

Being prepared for class is essential. If your row is on-call, you must be prepared to recite on all of the principal cases as well as the notes and questions following those cases. If you cannot be present when your row is scheduled to recite, you must contact me **by email** in advance of class. **If you are absent or unprepared for class on the day your row is up for recitation, you will be on call for the subsequent two classes. There will be no exceptions to this rule.**

Even if you are not on call, you still must read each assignment in order to follow the class discussion. I reserve the right to reduce your grade for being unprepared or failing to attend.

Timeliness: No Late Entrance Without Prior Approval

This is a large class with limited seating and it is therefore very distracting when students come to class late. Class will start promptly at 1:00pm. If you (1) have a good reason for being late and (2) contact me by email at least an hour before class, I will authorize you to come in late. **If you are simply running late and have not sought prior permission, do not enter the classroom after 1:00pm because I will ask you to leave.**

Final Examination

The final examination will include both multiple choice and essay questions.

Make-Up Classes

Class will not meet on Tuesday, 10/4; Thursday, 10/13; Thursday, 10/20; and Thursday 11/3. Make-up classes will be held on the following Fridays at 1pm: September 16th, September 30th, and November 18th.

Assignments

Class 1:

- Incorporation of the Bill of Rights (pp. 39-46)
- Overview of the Fourth Amendment (pp. 62-82)

Class 2:

- What is a Search? (pp. 84-109)
- Open Fields and Curtilage (pp. 115-119)

Class 3

- Surveillance Technology (pp. 120-138)
- GPS Monitoring (Supplement pp. 67-73)

Class 4:

- Probable Cause and the Use of Informants (pp. 142-146 (majority opinion only) & pp. 150-163)

Class 5:

- Probable Cause continued (Supplement pp. 5-12)
- The Constitutional Debate Over Warrants (No reading assignment)
- Arrest Warrants (pp. 171-183)
- Executing a Search Warrant (pp. 199-211)

Class 6:

- Exigency (pp. 211-213 & Supplement pp. 13-14)
- Search Incident to Arrest (pp. 218-235)

Class 7:

- Search Incident to Arrest of Automobiles (pp. 235-259)

Class 8:

- Pretextual Stops and Arrests (pp. 259-266)
- Cars and Containers (pp. 273-277 & 280-290)

Class 9:

- Cars and Containers continued (pp. 290-298 & Supplement pp. 15-18)

Class 10:

- Plain View (pp. 298-310)
- Consent (pp. 310-321)

Class 11

- Consent continued (pp. 321-334)
- The Terry Doctrine (pp. 349-360)

Class 12

- Arrest vs. Terry Stop (pp. 376-384, 391-397)
- Reasonable Suspicion (pp. 397-401)

Class 13

- Reasonable Suspicion and Flight (pp. 406-410)
- Extending the Terry Doctrine (pp. 411-422)

Class 14

- Sobriety Checkpoints (pp. 427-440, note 3 following the main case, and Supplement pp. 19-25)

Class 15

- Border Searches (Supplement pp. 26-30)
- Strip Searches (Supplement pp. 31-43)

Class 16

- The Standing Problem (pp. 449-468)
- The Good Faith Exception (pp. 477-489)

Class 17

- Fruit of the Poisonous Tree: (pp. 494-507, note 4 on pages 508-509, and Supplement pp. 44-51)

Class 18

- Sample Fourth Amendment Essay Exam (No reading assignment, but you must study the material presented to date)

Class 19

- Voluntary Confessions (pp. 555-560)
- Miranda (pp. 581-597)

Class 20

- Miranda Custody (pp. 645-656 & Supplement pp. 59-66)
- Miranda Interrogation (pp. 656-663)

Class 21

- Invoking and Waiving Miranda (pp. 666-685)
- Public Safety Exception to Miranda (pp. 607-614)

Class 22

- Miranda and the Fruit of the Poisonous Tree (pp. 616-623, 631-641)

Class 23

- Sixth Amendment Interrogation and the Massiah Doctrine (pp. 696-716)

Class 24

- Lineups (pp. 760-785)

Class 25

- Grand Juries (Supplement pp. 52-58)

- Prosecutorial Discretion (No reading assignment)

Class 26
- The Right to Counsel (pp. 13-18, 950-972)

Class 27
- Declining the Right to Counsel (pp. 973-981)
- The Right to Effective Assistance of Counsel (pp. 989-1005, 1008-1012)

Class 28
- Discovery (Handout)
- Review

Court of Criminal Appeals of Texas,
En Banc.
Irma CARRASCO, Appellant,
v.
The STATE of Texas, Appellee.

No. 892-83.
April 30, 1986.
OPINION ON STATE'S PETITION FOR DISCRETIONARY REVIEW

CAMPBELL, Judge.

Appellant was charged with felony possession of a controlled substance, to wit, cocaine. After a pretrial motion to suppress the search was denied, appellant plead nolo contendere and stipulated to the evidence in such a manner as to preserve error. The trial court found appellant guilty and assessed her punishment at three years probated and a five hundred dollar fine.

The Fourteenth Court of Appeals reversed the trial court and remanded for a new trial. See *Carrasco v. State,* No. B14-82-861-CR (Tex.App.-Houston [14th] decided May 28, 1983). We granted the State's Petition for Discretionary Review to determine the correctness of the Court of Appeals' holding that the search of appellant's receptacle was not a valid search incident to arrest. We reverse the Court of Appeals and affirm the trial court.

The evidence reflects that in the early morning hours of March 18, 1982 the appellant was involved in a one car accident on the North Loop West freeway in Houston. When officers arrived at the scene they found appellant standing next to her Porsche. Appellant and the arresting officer differ in their rendition of the facts. According to appellant, she was sober. She claimed that a vehicle cut her off and to avoid a collision, she ran off the road and into a guardrail. According to appellant she gathered her belongings and deposited them in a shoulder bag. Testimony established that the appellant carried this shoulder bag [FN1] with her at all times. Appellant then exited her vehicle and when police arrived, the bag in question was sitting on the ground next to the vehicle. She claimed she was conversing with one officer when she noticed Officer Boy "rummaging" through her bag which was located several feet from where appellant was standing. Appellant asked Officer Boy what he was looking for; he told her to be quiet and then placed her in the police vehicle to transport her to the police station. Appellant denied that Officer Boy ever arrested her for public intoxication; she further denied that the bag in question was physically on her body when Officer Boy initiated the search in question.

FN1. The bag is larger than a normal-sized ladies purse but not large enough to constitute a suitcase; it can best be described as a "gym bag" or overnight bag. We believe under the facts of this case it makes no difference what moniker one pens on the receptacle in question.

Officer Boy testified that upon arrival, he proceeded to investigate the scene of what to him appeared to be a one vehicle accident. Once he secured the scene he engaged the appellant in conversation. From speaking with appellant, he came to the conclusion that she was intoxicated. Officer Boy testified that appellant appeared glassy eyed, her speech was slurred, slow and deliberate, and she was slow moving; however he did not detect the odor of alcohol. Furthermore, Officer Boy found no evidence that appellant had sustained a head injury. Officer Boy testified that while he was speaking with appellant, she had the bag in question slung over her shoulder. He further testified that he placed appellant under arrest for public intoxication and he then attempted to take the bag from her in order to search for intoxicants and weapons. Appellant resisted the officer's efforts to retrieve the bag, making the officer suspicious. Officer Boy then forcibly seized the bag. Upon searching it he found three translucent vials containing a white powdery substance subsequently determined to be cocaine.

Appellant claims there was no probable cause to believe that she created a danger to herself or others and therefore there was no valid arrest for public intoxication.[FN2] We disagree. Appellant had just been involved in a one car accident; she manifested symptoms of intoxication. The fact that appellant had already been involved in a car accident is sufficient probable cause to believe that she posed a danger to herself or others. *Davis v. State*, 576 S.W.2d 378 (Tex.Cr.App.1979). The officers had probable cause to arrest appellant for public intoxication.

FN2. V.T.C.A. Sec. 42.08, Penal Code, reads in part:"(a) An individual commits an offense if he appears in a public place under the influence of alcohol or any other substance, to the degree that he may endanger himself or another."

. . .

Court of Criminal Appeals of Texas,
En banc.
The STATE of Texas
v.
Leo STEELMAN and Ian Steelman, Appellees.

Nos. 1022-00, 1023-00.
Oct. 23, 2002.
OPINION

HOLCOMB, J., delivered the opinion of the Court, in which MEYERS, PRICE, JOHNSON, and COCHRAN, JJ., joined.

I

On April 21, 1998, the Abilene Police Department received an anonymous tip that drug dealing was taking place at the residence of Ian and Leo Steelman, appellees.[FN1] In response, the department dispatched three officers to the scene. Upon arrival, the officers proceeded to the front door of the residence. Before they got to the front door, however, the officers peered into the house through a crack in one of the window blinds. They observed no illegal activity. They merely saw four men sitting in a living room. The officers then proceeded to knock on the front door.

FN1. Leo Steelman is the father of Ian Steelman. Unless otherwise noted, we will henceforth refer to the Steelmans by their first names.

Ian opened the door, stepped outside, and closed the door behind him. When Ian opened the door, the officers smelled the odor of burnt marijuana. The officers asked Ian for identification. Ian informed the officers that he would have to retrieve his identification from inside the house. He then opened the door, walked back through it, and attempted to close it behind him. At that point, one of the officers placed his foot in the doorway and prevented Ian from closing the door. The officers then burst through the doorway, handcuffed all of the occupants, including Leo, and placed them all under arrest.

At that point, the officers contacted narcotics agent David Varner. Varner arrived at the scene and smelled marijuana inside the residence. After asking for, but not receiving, appellees' consent to search the residence, Varner left to obtain a search warrant. In his search warrant affidavit, Varner asserted that probable cause existed to believe that the occupants of the residence were in possession of marijuana. Approximately two hours after the officers initially entered the residence, Varner obtained a search warrant, searched the residence, and found marijuana.

On July 16, 1998, a Taylor County grand jury indicted appellees for misdemeanor possession of marijuana. *See* Tex. Health & Safety Code § 481.121(b). Appellees filed a motion to suppress the marijuana. In their motion, appellees argued that both the warrantless arrests and the search of the residence pursuant to the warrant were illegal under the Texas Constitution and state statutory law, namely Texas Code of Criminal Procedure article 14.01(b). They further argued that because the initial arrest of Ian and the subsequent arrest of Leo were illegal, any evidence acquired thereafter was tainted by that illegality and, therefore, should be suppressed under Texas Code of Criminal Procedure article 38.23. *See Irvin v. State*, 563 S.W.2d 920, 924 (Tex.Crim.App.1978) (Article 38.23 mandates the suppression of the fruits of an illegal arrest).

At the suppression hearing, the State argued that once a police officer smells burning marijuana and determines which house it is coming from, the officer has probable cause to arrest the occupants and search that house. [FN3] The trial court attempted to clarify the State's position, and the following exchange took place:

FN3. The burden was on the State to show that the arrest was within an exception to the warrant requirement. *Bell v. State*, 724 S.W.2d 780, 786 (Tex.Crim.App.1986).

COURT: You're proceeding under [the] search warrant here, aren't you?
PROSECUTOR: No, sir, this is a warrantless search.

The State then continued its argument:

So, your honor, the-I guess to summarize our position, these officers went there on a tip, went there where you or I could go, where anybody could go, knock on the door, smelled marijuana coming from the residence, *that gives them probable cause to believe that marijuana is present and the cases say that they can then search for that marijuana.*
They go inside the residence, secure the residence, make the arrest, ask for consent, do not get it, then make application for a search warrant. The affidavit speaks for itself. The officer, again, presents his probable cause to believe that the marijuana was there. He says he smelled it and I forgot how many other officers he put in his affidavit say that they smelled it there and the Justice of the Peace finds probable cause, signs the warrant and the warrant is executed and the evidence is seized.
That's our basis for the search that was conducted, Your Honor.
At that point, the trial court attempted again to clarify the State's position:

COURT: As I understand the State's argument is they say the facts of this case would justify the search without a warrant, is that correct?

PROSECUTOR: Well, your honor, that and I present the warrantless cases to get the officers in the house in the first place. I mean, I believe that that is sort of a seizure of the house.

COURT: Do you think [based on] the facts of this case they had to get a search warrant?

PROSECUTOR: Your Honor, I haven't thought about it in that light, I'll be honest with the Court. I'm going on the basis that they went inside the residence based upon the probable cause of smelling the marijuana. And I'll be honest, I haven't thought about it in the light that you are.

COURT: That's the way I understand your argument that they didn't even need a search warrant once they're there and smelled the marijuana.

Thus, it is clear that, even though appellees' argued that both the warrantless arrests and the search pursuant to the warrant were illegal, the State contended that the evidence should not be suppressed solely because the *warrantless* arrest and *warrantless* search were legal. The State, for whatever reason, choose not to rely upon the search warrant.

At the conclusion of the suppression hearing, the trial court granted appellees' motion to suppress. The trial court concluded that because the officers did not have probable cause to believe that either Ian or Leo had committed an offense in their presence, the warrantless arrests of Ian and Leo were illegal, and therefore, any evidence seized during the subsequent search of the residence was tainted and should be suppressed.[FN4] The State appealed the trial court's ruling.

FN4. The trial court made the following conclusions of law: (1) “An officer may not arrest a person without a warrant unless he observes such person is committing an offense,” and (2) “Once an officer arrests a person without a warrant or without observing an offense, any evidence obtained

should be suppressed."

On appeal, the State made two distinct arguments. The State argued first that "the odor of burning marijuana that escaped from the residence when [Ian first opened the door] provided probable cause [to believe] that the offense of possession of marijuana was being committed in the officers' presence." The State argued second, for the first time, that "even if the warrantless arrest was improper ... the search under the search warrant was proper because neither the probable cause to search, nor the marijuana evidence was the 'fruit' or product of the arrest." The Eleventh Court of Appeals disagreed with the State and upheld the trial court's ruling suppressing the marijuana. *State v. Steelman*, 16 S.W.3d 483 (Tex.App.Eastland 2000). The court of appeals reasoned (1) that the warrantless arrests of appellees were illegal because the officers did not have probable cause to believe that the appellees had committed an offense in their presence and (2) that "the issuance of the search warrant did not attenuate the taint from the [initial] illegal search and arrest." We granted the State's petition for discretionary review to determine whether the court of appeals erred. *See* Tex.R.App. Proc. 66.3(b).

In its brief to this Court, the State argues that the warrantless arrests of appellees, and the subsequent search of their residence, were reasonable under both the State and Federal Constitutions and valid under one of the warrant exceptions in the Texas Code of Criminal Procedure. However, appellees, in their motion to suppress, did not make a federal constitutional argument concerning the warrantless arrests. Instead, appellees made a state statutory argument and a state constitutional argument.[FN5] They argued that the arrests were illegal, and any fruits of the arrest were tainted, because (1) the arrests were "without a valid warrant and without probable cause," [FN6] and (2) the arrests were unreasonable under Article I, section 9 of the Texas Constitution. The trial court elected to grant the motion to suppress based upon Article 14.01(b). The trial court expressly concluded that "[a]n officer may not arrest a person without a warrant unless he observes such person is committing an offense." On appeal, the State argued that the arrests were legal under Article 14.01(b). Neither the State nor appellees, in their briefs to the court of appeals, made any mention of Article I, section 9. At that point, the parties abandoned the state constitutional argument. Therefore, as to the legality of the warrantless arrests and search, only the state statutory argument is properly before us.

FN5. Under state law, there are two primary ways to attack a warrantless arrest. An accused may make a constitutional argument under Article I, section 9 of the Texas Constitution or he may make a statutory argument under Texas Code of Criminal Procedure articles 14.01-14.05. If the accused makes a state constitutional argument, then the proper inquiry is "the reasonableness of the search or seizure under the totality of the circumstances." *Hulit v. State*, 982 S.W.2d 431, 436 (Tex.Crim.App.1998). If the accused makes a statutory argument, the proper inquiry is (1) whether there was probable cause with respect to that individual and (2) whether the arrest fell within one of the statutory exceptions. *Beverly v. State*, 792 S.W.2d 103, 104-105 (Tex.Crim.App.1990); *Lunde v. State*, 736 S.W.2d 665, 666 (Tex.Crim.App.1987) (plurality opinion).

FN6. Although appellees did not actually cite Texas Code of Criminal Procedure articles 14.01-14.05 in their motion, the language used in their motion to suppress plainly implied a statutory argument.

In its brief to this Court, the State also argues that "even if the entry and arrest are deemed illegal, the 'taint' of the entry and arrest does not reach backward to the lawfully-obtained probable cause on which the search warrant is based." Indeed, we have recognized that even if an illegal warrantless arrest taints subsequently***107*** acquired evidence, such evidence need not be

suppressed if the State can show that the taint has been attenuated (e.g. by an otherwise valid search warrant). *See* *Bell v. State*, 724 S.W.2d 780 (Tex.Crim.App.1986). However, as previously noted, the State did not present this argument to the trial court. At the suppression hearing, the State specifically limited its argument to one theory of law: that there was probable cause to justify a *warrantless* arrest and *warrantless* search. Because the State did not present its other theory (that even if the warrantless arrest was illegal, it did not taint the search pursuant to the warrant) to the trial court, the State cannot rely on that theory on appeal. *State v. Mercado*, 972 S.W.2d 75,78 (Tex.Crim.App.1998).

In sum, the only issue before us today is whether, under the applicable provisions of the Texas Code of Criminal Procedure, the officers had probable cause to (1) make a warrantless arrest of appellees and (2) to conduct a warrantless search of the Steelman residence.

III

In considering a trial court's ruling on a motion to suppress, an appellate court must uphold the trial court's ruling if it is reasonably supported by the record and is correct under any theory of law applicable to the case. *Romero v. State*, 800 S.W.2d 539, 543-544 (Tex.Crim.App.1990).

In this case, the arrest of Ian took place *after* the officers burst into his residence. But, under state law, an officer may not enter a residence to make a warrantless arrest unless "the arrest may be *lawfully made without warrant"* and the person consents or there are exigent circumstances. Tex.Code Crim. Proc. art. 14.05 (emphasis added). Before we can consider whether the officers had authority to enter the residence under Article 14.05, we must first determine whether the initial arrest of Ian could be lawfully made without a warrant.[FN7]

FN7. Both the trial court and the court of appeals concluded that the arrest was not lawfully made without a warrant because the arresting officers did not have probable cause to believe that Ian had committed an offense in their presence.

A police officer may arrest an individual without a warrant only if (1) there is probable cause with respect to that individual and (2) the arrest falls within one of the statutory exceptions. *Beverly v. State*, 792 S.W.2d 103, 104-105 (Tex.Crim.App.1990); *Lunde v. State*, 736 S.W.2d 665, 666 (Tex.Crim.App.1987) (plurality opinion). One of those exceptions, Article 14.01(b), provides that "[a] peace officer may arrest an offender without a warrant for any offense committed in his presence or within his view." In *Beverly*, this Court explained that:

"The test for probable cause for a warrantless arrest under [article 14.01(b)] is whether at that moment the facts and circumstances within the officer's knowledge and of which he had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the arrested person had committed or was committing an offense." 792 S.W.2d at 105. (Some punctuation omitted.)

An offense is deemed to have occurred within the presence or view of an officer when any of his senses afford him an awareness of its occurrence. *Clark v. State*, 117 Tex.Crim. 153, 35 S.W.2d 420, 422 (1931). However, the information afforded to the officer by his senses must give the officer reason to believe that *a particular suspect* committed the offense. *Muniz v. State*, 851 S.W.2d 238, 251 (Tex.Crim.App.1993).

Consider again the facts and circumstances before the officers that night. There is an unsubstantiated, anonymous tip that someone at the Steelman residence is dealing drugs. The officers walk up to the house, peer into the house through a small crack in the window blind, and, by their own admission, observe no criminal activity. They then knock on the door. Ian steps out and closes his door. They smell the odor of marijuana in the air but not on Ian himself.[FN8] Given those circumstances, what did the officers have probable cause to believe? Certainly they had probable cause to believe that someone, somewhere, was or had been smoking marijuana. But, did the mere smell of marijuana in the air give the officers probable cause to believe that Ian possessed marijuana? No. This Court has recognized that "odors alone do not authorize a search without a warrant." *Moulden v. State*, 576 S.W.2d 817, 819 (Tex.Crim.App.1978), quoting *Johnson v. U.S.*, 333 U.S. 10, 13, 68 S.Ct. 367, 92 L.Ed. 436 (1948).[FN9] Why, then, did the officers burst into the house? What offense, if any, did they observe Ian committing? The State argues that given the anonymous tip and the odor of burned marijuana, the officers had probable cause to believe an offense, possession of marijuana,[FN10] had been committed in their presence. We disagree.

FN8. At the suppression hearing, Officer Vines was asked if the odor of marijuana could have come from Steelman's clothes. He replied, "No, sir, it was a strong smell [that seemed to come from the inside of the residence]."

First of all, a mere anonymous tip, standing alone, does not constitute probable cause. *Ebarb v. State*, 598 S.W.2d 842, 845 (Tex.Crim.App.1980) (on motion for rehearing); *see also Glass v. State*, 681 S.W.2d 599, 601 (Tex.Crim.App.1984). In this case, the tip, that someone at the residence was dealing drugs, did not amount to anything. The tip was never substantiated, and none of the occupants were ever charged with drug dealing. *See* Tex. Health & Safety Code § 481.120.

Second, the mere odor of burning marijuana did not give the officers probable cause to believe that Ian had committed the offense of possession of marijuana in their presence. The odor of marijuana, standing alone, does not authorize a warrantless search and seizure in a home. See Johnson, 333 U.S. at 13, 68 S.Ct. 367. An arresting officer must have specific knowledge to believe that the person to be arrested has committed the offense. *Muniz*, 851 S.W.2d at 251. Professor LaFave explains:

"[T]he detection of the odor of marijuana in a certain *place* will not inevitably provide probable cause to arrest a *person* who is at that place. Illustrative is *People v. Harshbarger*, 24 Ill.App.3d 335, [321 N.E.2d 138, 140-141 (1974)], where police, upon detecting the strong smell of burning marijuana in a house, arrested all four of the men found therein, resulting in the discovery of amphetamines on the person of a guest. The court could 'find no justification for defendant's arrest at the time it was made, nor for the search of his person occurring sometime subsequent thereto at the stationhouse. The officers had never seen or heard of defendant before. He was merely one of four persons sitting in the living room of a house in which the officers thought they smelled burning marijuana. They had no idea which one of them, or for that matter, if any of them had actually been smoking marijuana. Nor did defendant by his actions, furtive or otherwise, give any indication that he may have been violating the law. In effect, defendant's arrest was prompted by a mere suspicion that someone must have been smoking marijuana because of the odor believed to be present, and therefore, the best thing to do was arrest and search everybody.' " W. LaFave, *Search and Seizure* § 3.6(b) (1996 & Supp.2002).

Similar to the situation described above, the officers in this case had no idea who was smoking or possessing marijuana, and they certainly had no particular reason to believe that Ian was smoking or possessing marijuana.

Given the evidence before it, the trial court in the instant case could have reasonably concluded that the arrest of Ian was not lawfully made without a warrant because the arresting officers did not have probable cause to believe that Ian had committed an offense in their presence. Since the

officers had no authority to make a warrantless arrest under article 14.01(b), they had no authority (under article 14.05) to enter the residence without a warrant and conduct a search, and any evidence seized as a result of those illegalities was tainted and subject to suppression. Therefore, the Court of Appeals did not err in upholding the trial court's decision to grant the appellees' motion to suppress.

We affirm the judgment of the Court of Appeals.

Court of Criminal Appeals of Texas.
Xavier Hernandez BAROCIO, Appellant,
v.
The STATE of Texas.

No. PD-1980-03.
March 9, 2005.
OPINION

HERVEY, J., delivered the opinion of the Court in which KELLER, PJ., MEYERS, WOMACK, KEASLER and COCHRAN, JJ., joined.

After the trial court denied his motion to suppress, appellant pled no contest to misdemeanor possession of marijuana. We address whether probable cause and exigent circumstances existed to justify a warrantless police entry into appellant's home, during which the police saw the marijuana in plain view.

The evidence from the suppression hearing shows that two sheriff's deputies (Wyatt and Kirsch) had probable cause to suspect a possible, ongoing burglary of appellant's home. *See* *Barocio v. State*, 117 S.W.3d 19, 21-22 (Tex.App.-Houston [14th Dist] 2003) and at 32-34 (Guzman, J., dissenting). While on patrol, these deputies noticed an illegally parked car, with its driver's door open and the keys in the ignition, in front of a home. *See* *id.* When they approached the home to investigate, they saw pry marks on the front door lock and a surveillance camera aimed at the front door. *See* *id.* The deputies knocked on the front door. *See* *id.* While waiting for someone to answer the door, they heard a lot of noise inside the home, and they smelled burnt marijuana. *See* *id.* Kirsch testified that, in his experience, it would not be unusual for burglars to smoke marijuana in a home that they were burglarizing. *See* *id.* Several minutes later, appellant opened the door, and the odor of burnt marijuana became stronger. *See* *id.* The deputies repeatedly requested appellant's identification. *See* *id.*

At this point, the testimony of the deputies conflicted. *See* *id.* Wyatt testified that appellant refused to provide identification and that he detained appellant on the porch while Kirsch entered the home to conduct a "protective sweep" and to investigate "the smell of marijuana." *See* *id.* Kirsch testified that appellant eventually indicated that his identification was inside the home. *See* *id.* Kirsch told appellant to get his identification. *See* *id.* Kirsch and Wyatt followed appellant when he went inside the home. *See* *id.* Kirsch testified that he followed appellant to investigate the marijuana odor and the possible burglary. *See* *id.* Once inside the home, the deputies saw the marijuana in plain view. *See* *id.* They eventually learned that the home belonged to appellant and that appellant was not a burglar when appellant's wife arrived and identified appellant.

. . .

We initially note that this case is distinguishable from *Steelman* because, unlike in *Steelman*, the deputies entered the home based on more than just the odor of burnt marijuana. They also had probable cause to suspect a possible, ongoing burglary and exigent circumstances allowed them to enter the home without a warrant to investigate the situation further. And, we do not agree with the decision of the Court of Appeals that police may not enter a home to investigate a possible burglary after detaining what ultimately turns out to be the sole suspect in the burglary. *See* *Barocio*, 117 S.W.3d at 24-25. We agree with the analysis of the dissenting opinion in the Court of Appeals:

Kirsch testified that he was investigating a possible burglary of appellant's home when he made the warrantless entry. The possibility that a burglary is in progress or has recently been committed may provide officers with exigent circumstances to justify a warrantless entry. (Citations and footnote

omitted). Because suspects or victims may still be in the residence, and because there is an immediate and urgent need to protect the resident and his property, the warrantless police entry may be justified as exigent depending upon the specific circumstances of the case. For example, police may properly enter to look for other perpetrators or victims. Indeed, as one federal court has observed, it would "defy reason" to force officers to leave the scene of a possible burglary-in-progress to obtain a warrant thereby "leaving the putative burglars free to complete their crime unmolested." (citation omitted).
See *Barocio*, 117 S.W.3d at 33 (Guzman, J., dissenting). This opinion is also consistent with our recent decision in *Estrada v. State*, 154 S.W.3d 604, 608-10 (Tex.Cr.App.2005) (police had probable cause to believe that criminal activity was occurring inside the defendant's home based on, among other things, the odor of marijuana emanating from the home, from the defendant and from her friends, and exigent circumstances, the need to prevent the destruction of evidence because others were present in the home, justified warrantless entry and search of home).

We sustain the State's second ground which makes it unnecessary to address the first and third grounds, which we dismiss. The judgment of the Court of Appeals is reversed and the judgment of the trial court is affirmed.

Court of Criminal Appeals of Texas,
Panel No. 1.
Bruce K. ESCO and John B. Williams, Appellants,
v.
The STATE Of Texas, Appellee.

No. 61501.
Dec. 15, 1982.
OPINION

CLINTON, Judge.

These are appeals from a judgment of conviction for aggravated robbery upon a jury finding of guilty. Sentence was assessed for each defendant at 65 years.

Appellants present three grounds of error. The sufficiency of the evidence is not challenged.

On May 7, 1978, at 2:35 a.m. a 1972 Oldsmobile Cutlass was stopped by a Department of Public Safety Trooper for a routine traffic violation at a point off Interstate 10 approximately nine miles east of Junction.[FN1] While Trooper Overstreet was writing up a traffic ticket, Deputy Chapman ran a "wanted check" on the vehicle's Texas license plate number BGZ 610. The local dispatcher responded that a request for a statewide broadcast had been issued by recent teletype, as follows:

FN1. Kimble County Deputy Sheriff Gary Chapman, who was riding with DPS Trooper Douglas Overstreet, stated that radar clocked Williams' vehicle traveling at a speed of 90 m.p.h. in a 55 m.p.h. zone.

"REQUEST FOR STATEWIDE BROADCAST

PD AUSTIN 5-7-78

ATTN. PD EL PASO

ARMED ROBBERY OCCURRED THIS CITY INVOLVING OFF-WHITE 1970 CHEV 78TX LIC/BGZ610 OCCUPIED BY 2 W/M.S. 6.00, SLENDER BUILD, FALSE BEARDS AND MAKE-UP, ARMED WITH SHOT GUN AND PISTOL. VEHICLE REGISTERED TO RUBY WILLIAMS 2500 MORELAND 6, EL PASO, TX. SHOTS WERE FIRED IN ROBBERY... NO INJURIES. PLEASE CHECK ADDRESS AND NAME YOUR FILES FOR POSSIBLE INVOLVEMENT OR STOLEN VEHICLE.

SGT D GAMBRELL/ROBBERY DETAIL

PD. AUSTIN RJC 070056 CDT"

Upon receiving this report from the dispatcher, appellants were removed from the automobile, handcuffed and read their rights.

Having thus arrested and secured appellants, the deputies searched the passenger compartment and then the trunk of the automobile. In the glove box were found a pistol, some shells for it and also shotgun shells; on the back seat were a duffel bag containing numerous rolls of quarters and a box of, among other items, fake beards and mustaches. A search of the trunk produced a briefcase

inside which was a "large" amount of currency. Those tangible materials as well as the other items were seized and later released to the Austin Police Department.

Both appellants were charged and indicted for aggravated robbery in a Safeway Store on West 35th Street in Austin.

. . .

Appellants' second and related ground of error contends that the trial court erred in admitting evidence seized as a result of the warrantless arrest.

. . .

However, we quickly observe that the search of the interior of the Williams automobile upon probable cause to believe there were fruits or instrumentalities of the robbery therein is not barred by constitutional protections against unreasonable searches and seizures. *Chambers v. Maroney*, 399 U.S. 42, 47-52, 90 S.Ct. 1975, 1979-1981, 26 L.Ed.2d 419 (1970).

The only problem that remains is the conduct of the officers in opening on the spot the latched briefcase belonging to appellant Esco found in the trunk. This Court has held that one similarly situated has a legitimate expectation of privacy in the contents of such a case.[FN6] *Araj v. State*, 592 S.W.2d 603, 604 (Tex.Cr.App.1979); see *Nastu v. State*, 589 S.W.2d 434, 440 n. 1 (Tex.Cr.App.1979), recognizing the rulings of the Supreme Court, first in *United States v. Chadwick*, 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977) and then in *Arkansas v. Sanders*, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979). We find that Esco did have a legitimate expectation of privacy in contents of his latched briefcase located in the trunk of the car. That finding, though, does not solve all of the problem.

FN6. The contents of the briefcase vindicate the general proposition that legitimate expectation of privacy attaches to that kind of container: combs, brushes, a jar of cocoa butter, women's underclothing, shaving gear, a hunting knife and miscellaneous papers belonging to appellant Esco, as well as the paper sack of currency-which currency, however, appellant Williams claimed as his own.

Trooper Overstreet testified that he and Deputy Chapman were "looking for any and all evidence of armed robbery" that might be found. Before they got to the trunk of the car the officers had systematically found and taken from the glove compartment and the interior of the car every item described in the teletyped bulletin, except a shotgun; they had also removed items not so described, *viz:* at some point not clearly specified taken from the person of Williams was $497 and from Esco $204, and from a pillowcase inside a duffle bag found on the back seat of the car many ten dollar bankrolls of quarters. [FN7] Not yet finding a shotgun, the officers reasonably could look for it in the trunk.

FN7. An inventory later compiled lumped together the dollar amount of quarters and currency not attributed specifically to either appellant as approximately $1299.

However, there was not a shotgun in the trunk-only a "sack" with a CB radio in it and Esco's attache case. When the Supreme Court ultimately rejected its "mere evidence" formulation in *Warden v. Hayden*, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782 (1967), it still insisted that "the intrusions are nevertheless made after fulfilling the probable cause and particularity requirements of the Fourth Amendment..." *id.*, at 309, 87 S.Ct. at 1651.

We are unable to find any cause to believe that the case might contain a shotgun or any other fruit or instrumentality of the robbery committed hours earlier in Austin that the officers had not already seized. We find that appellant Esco did not forfeit his expectation of privacy in contents of the attache case merely because it was found in the trunk.

Relying on a recent opinion of the Supreme Court, our dissenting Brother would have it that "the officers had developed probable cause to believe the contraband taken during the course of the robbery would be located in the automobile." But in *United States v. Ross*, 456 U.S. 798, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982), as we understand it, the Supreme Court did not undertake to authorize a general exploratory search of an automobile for whatever might turn up. Indeed, explicating the new rule adopted by a majority of the Supreme Court, Justice Stevens wrote for it:

"The scope of a warrantless search of an automobile thus is not defined by the nature of the container in which the contraband is secreted. Rather, *it is defined by the object of the search* and the *places* in which there is *probable cause to believe that it may be found.* Just as *probable cause to believe* that a stolen lawnmower may be found in a garage will not support a warrant to search an upstairs bedroom, *probable cause to believe* that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase. *Probable cause to believe* that a container placed in the trunk of a taxi contains contraband or evidence does not justify a search of the entire cab." FN8

FN8. All emphasis is mine unless otherwise indicated.

Ross, supra, 102 S.Ct. at 2172.

The officers conceded that when they got to the trunk of the car, their quest was still evidentiary in nature with no indication of what they reasonably believe remained. They had found everything mentioned in Austin's teletype but a shotgun. There was no pretension of probable cause to believe that appellant Esco's attache case contained a shotgun-indeed, to believe given its small size that the case was capable of containing one.FN9 The State has not shown the case was one of "the places in which there is probable cause to believe that [the object of the search] may be found," *Ross, ibid.*

FN9. In the record is State's Exhibit No. 52, admitted over objection consistent with reasons stated in appellants' motion to suppress under discussion. It is a photograph portraying in color all material evidentiary items taken from the car, including an open attache case, along with a shotgun that was not but was found along the roadway nearby. The shotgun is more than twice as long as the case is wide.

To the extent found above the motion to suppress should have been granted and evidence of contents of the attache case ruled out by the trial court, and ground of error two in that respect is sustained.

The judgment of conviction as to appellant Williams is affirmed, but as to appellant Esco is reversed and the cause remanded.

OPINION ON STATE'S MOTION FOR REHEARING

TEAGUE, Judge.

In reversing Esco's conviction, the majority of the panel held that because it was "unable to find any cause to believe that the [attache or brief] case might contain a shotgun or any other fruit or instrumentality of the robbery committed hours earlier in Austin that the officers had not already

seized," the opening of the case and the seizing of the contents that were inside of the case were both unlawful. We are unable to agree with this holding.

We find that the majority of the panel did not accurately apply the meaning of the legal term, "probable cause," in a flexible, common-sense manner. Recently, in *Texas v. Brown*, 460 U.S. 730, ---, 103 S.Ct. 1535, 1543, 75 L.Ed.2d 502, 514 (1983), the Supreme Court made the following observation: "[Probable cause] merely requires that the facts available to the officer would 'warrant a man of reasonable caution in the belief,' ... that certain items may be ... useful as evidence of a crime; it does not demand any showing that such a belief is correct or more likely true than false..." *Texas v. Brown*, 460 U.S. 730, ---, 103 S.Ct. 1535, 1543, 75 L.Ed.2d 502, 514 (1983).

As the majority panel opinion pointed out, when the officers opened the trunk lid to the vehicle, they had not recovered a "shotgun," but "had found everything [else that had been] mentioned in Austin's teletype ..."

We believe that it is reasonable to assume that the term "shotgun," that was used in the teletyped message, could have referred just as easily to a disassembled sawed-off shotgun as to a shotgun in its manufactured state. By statute, a sawed- off shotgun in Texas is a type of ordinance that has a barrel length of less than 18 inches. V.T.C.A., Penal Code, Section 46.01(10).

Common knowledge teaches that not only can a sawed-off shotgun be a very compact weapon, but at close range, even without carefully aiming it, it can have a devastating effect. In size, it is common knowledge that the combined stock, trigger mechanism, and modified barrel of the average sawed-off shotgun may be less than two feet in length. As to just how small it might become, history teaches us that the infamous Clyde Barrow perfected a "quick draw" with a sawed-off shotgun that was contained in a special holster sewn into his trousers. John Toland, *The Dillinger Days* (New York: Random House, 1963), at page 39.

Therefore, we find and hold from the facts of this case that the prosecution established that a reasonable person could have believed that a disassembled sawed-off shotgun might have been inside of the attache or brief case. Esco, of course, was free to establish the contrary, but he did not.

Of course, whether the officers had reasonable belief at the time they opened the attache or brief case that the case contained a disassembled shotgun cannot be answered by what they saw in the case after they opened the case, *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963); *Adams v. State*, 137 Tex.Cr.R. 43, 128 S.W.2d 41 (1939), because such must be answered through the eyes of a reasonable person based upon the facts and circumstances as they existed before the attache or brief case was opened by the officers.

Thus, the fact that a disassembled sawed-off shotgun was not found inside of the case is irrelevant to the question. Instead, the question becomes, whether there was a reasonable probability that the case might contain a disassembled sawed-off shotgun. We answer the question in the affirmative. The opening of the case and the seizure of its contents by the officers were not unlawful.

We acknowledge that neither of the officers articulated that the reason they opened the case was because they were looking for a disassembled sawed-off shotgun. However, the mere fact they did not give the right reason is not controlling. If their decision was correct on any theory of law applicable to the case, it is sufficient as a matter of law. In this instance, the officers did give the wrong reason why they opened the case, but their decision is supported by the theory of law that they had probable cause to open the case without a warrant.

The State's motion for rehearing is granted and appellant Esco's conviction is affirmed.

Court of Criminal Appeals of Texas,
En Banc.
Regina H. HOLT, Appellee,
v.
The STATE of Texas, Appellant.

No. 599-93.
June 15, 1994.

OPINION ON APPELLEE'S PETITION FOR DISCRETIONARY REVIEW

MILLER, Judge.

Appellee was charged with driving while intoxicated ("DWI") after she was arrested at a sobriety checkpoint set up by the Arlington Police Department. Appellee filed a motion to suppress evidence seized through the sobriety checkpoint, alleging that the checkpoint violated her rights under the Fourth Amendment to the United States Constitution as well as Article I, Section 9 of the Texas Constitution. Specifically, appellee claimed that the lack of a legislatively-authorized, statewide administrative scheme makes sobriety checkpoints unreasonable and, therefore, unconstitutional in Texas. The trial court granted appellee's motion to suppress evidence. The State appealed, and the Fort Worth Court of Appeals reversed the trial court, holding that legislative authorization is not required for sobriety checkpoints in Texas. *State v. Holt*, 852 S.W.2d 47 (Tex.App.-Fort Worth 1993). We granted appellee's petition for discretionary review to determine whether "a suspicionless seizure at a sobriety checkpoint without a legislatively-authorized administrative scheme is prohibited by the Fourth Amendment to the United States Constitution ... or by Article I, Section 9 of the Texas Constitution." We will reverse.

A brief discussion of the facts surrounding this roadblock is necessary. In the early morning hours of May 25, 1991, the Arlington Police Department conducted a field sobriety checkpoint within the city limits of Arlington in the 1200 block of West Division. The evidence established that the checkpoint had been set up pursuant to written guidelines and procedures established in 1988 by a committee of police officers having supervisory authority within the Arlington Police Department. The Arlington City Council had previously granted policy-making authority to the Chief of Police, who approved such guidelines. The City Council did not consider these procedures. The location of the checkpoint at issue had been selected by the sergeant in the Traffic Division, who was the supervisor of the checkpoint, and had been approved by the Traffic Division Commander. The location was selected on the basis of several significant factors that were supported by research done by officers within the Traffic Division. This particular site had been determined to be tied for third in terms of the number of DWI arrests made at the location over a certain period of time. Findings of fact by the trial judge further indicate that the date and location of the checkpoint was distributed to the media, and a related story about the checkpoint had appeared in a local newspaper the morning of the checkpoint.

It was also established that the officers at the scene, under the supervision of the Traffic Division sergeant, posted warning signs, illuminated the roadside, and directed traffic into the funnel of the checkpoint. Over a three hour period, each and every one of the 341 automobiles that approached the location was stopped. A police officer would explain the purpose of the checkpoint to the driver and engage the driver in a brief conversation while looking for signs of intoxication. If no signs of intoxication were observed, the driver was allowed to pass. If signs of intoxication were detected, the driver was asked to move his vehicle to an isolated area where an officer would administer field sobriety tests. Each car was detained for an average of 10-15 seconds at the initial stop. During this roadblock, ten DWI arrests were made.

The constitutionality of DWI roadblocks is an issue that has been gaining legal attention over the course of the past ten years. The Fourth Amendment to the United States Constitution prohibits all searches and seizures that are unreasonable. It is unquestionable that a Fourth Amendment seizure occurs when a vehicle is stopped at a roadside checkpoint. *United States v. Martinez-Fuerte*, 428

U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976). The United States Supreme Court has declared that such a suspicionless search and seizure is reasonable under the Fourth Amendment, when it has met the balancing test established in *Brown v. Texas*, 443 U.S. 47, 99 S.Ct. 2637, 61 L.Ed.2d 357 (1979).

In a DWI roadblock situation, the *Brown* test involves a balancing of the public interest in the roadblock against the individual's right to privacy in light of three factors: (1) the state's interest in preventing accidents caused by drunk drivers; (2) the effectiveness of the DWI roadblock in preventing such accidents; and (3) the level of the intrusion on an individual's right to privacy that is caused by the roadblock. In addition to *Brown*, the U.S. Supreme Court has handed down the landmark decision of *Michigan Dept. of State Police v. Sitz*, 496 U.S. 444, 110 S.Ct. 2481, 110 L.Ed.2d 412 (1990), analyzing DWI roadblocks under the *Brown* test. The issue we are truly faced with in the instant case is whether, in light of *Sitz*, DWI roadblocks are constitutional without express authorization and implementation by a statewide governing body. We hold here that *Sitz* does so require.

Much debate is given to language in *Sitz* stating that " *Brown* was not meant to transfer from politically accountable officials to the courts the decision as to which among reasonable alternative law enforcement techniques should be employed" in creating a DWI roadblock. *Id.*, at 453, 110 S.Ct. at 2487. The Court held that the choice among reasonable alternatives remains with government officials who have a unique understanding of, and responsibility for, the public resources necessary to effectuate such roadblocks. *Id.* The Supreme Court also addressed the decision of the Michigan Court of Appeals, *Sitz v. Department of State Police*, 170 Mich.App. 433, 429 N.W.2d 180 (Mich.App.1988), where that court analyzed DWI checkpoints under the *Brown* three-step test and found them to violate the Fourth Amendment. In overruling the Michigan Appellate Court, the Supreme Court placed emphasis on the fact that politically accountable officials are charged with making determinations as to the techniques to be employed when dealing with a serious public danger. This indicates to this Court that it is inappropriate to determine whether any alternative is constitutional until a politically accountable governing body at the State level has authorized these roadblocks. We can look to the background in Michigan for support for this position.

We believe that the mechanics which Michigan utilized to authorize and implement DWI roadblocks demonstrate the proper practice to follow in order to establish a constitutionally viable set of guidelines for DWI roadblocks. The facts of how the Michigan plan was first implemented are laid out in *Sitz v. Department of State Police*, *supra*, 429 N.W.2d 180, 181 (Mich.App.1988). A drunk driving task force established by the Michigan legislature and operating under the direction of the Michigan Department of State Police suggested the implementation of sobriety checkpoints on public highways as one method of combating alcohol-related traffic accidents. In his subsequent State of the State Address, the Michigan governor directed the State Police to implement a sobriety checkpoint program. A sobriety checkpoint committee was appointed and drafted guidelines for the program.

. . .

Because a governing body in Texas has not authorized a statewide procedure for DWI roadblocks, such roadblocks are unreasonable and unconstitutional under the Fourth Amendment of the U.S. Constitution unless and until a politically accountable governing body sees fit to enact constitutional guidelines regarding such roadblocks.[FN3]

FN3. Because we decide this case under the Fourth Amendment to the United States Constitution, we need not address appellee's contentions regarding Article I, Section 9 of the Texas Constitution. Had we been faced with addressing Article I, Section 9, an independent analysis would have been required. *Heitman v. State*, 815 S.W.2d 681 (Tex.Crim.App.1991).

The judgment of the court of appeals is reversed and the cause is remanded to the trial court.

Court of Criminal Appeals of Texas,
En Banc.
The STATE of Texas, Appellant,
v.
Benny Lee SKILES, Appellee.

No. 433-94.
Jan. 29, 1997.
OPINION ON STATE'S PETITION FOR DISCRETIONARY REVIEW

McCORMICK, Presiding Judge.

Appellee was arrested and charged with driving while intoxicated (DWI). Appellee filed a motion to suppress evidence obtained as the result of an unreasonable search and seizure in violation of the Fourth Amendment to the United States Constitution and Article I, Section 9 of the Texas Constitution. The trial court granted appellee's motion, finding that the actions of the police officers constituted "a roadblock." The State appealed and the Second Court of Appeals affirmed, *State v. Skiles*, 870 S.W.2d 341 (Tex.App.-Fort Worth 1994, pet. filed), holding that "the trial judge had sufficient evidence to conclude that the police action was a traffic checkpoint" in violation of appellee's Fourth Amendment rights. The Tarrant County District Attorney and the State Prosecuting Attorney (collectively, "the State") filed petitions for discretionary review raising the following grounds for review: (1) the actions of the police officers did not constitute a roadblock; and (2) the appellee was not "seized" prior to the moment the officers observed him commit a traffic violation.

I.

On Sunday, January 5, 1992, at approximately 2:00 a.m., Officer Tim Holzschuh of the Fort Worth Police Department was on duty in the Stockyards area of north Fort Worth. Officer Holzschuh was working the traffic detail, the midnight shift (10:00 p.m.-6:00 a.m.). The Stockyards area is a well-known tourist center with a high volume of traffic flow, and several nightclubs. This high concentration of traffic is exacerbated on weekends as a result of people "cruising" in circles around the Stockyards and the adjacent streets (the cruising was concentrated around North Main, Ellis, 25th, 24th, and 23rd Streets). The high volume of vehicles on the streets in this small area led to "stop and go" traffic as the streets became clogged with vehicles. This area was also considered a high-crime area, with murders, assaults, accidents, and other alcohol related incidents taking place there (especially around the area of an alley just off the 100 block of 24th Street). The heavy traffic also aggravated the crime problem, as most of the shootings in this area were "drive-by" types.

The police determined that in order to decrease the incidents of violence that were taking place in this area adjacent to the Stockyards the traffic flow needed to be increased, and therefore the cruising needed to be stopped. In order to discourage the cruisers from concentrating in the area, the police adopted a two-step approach: (1) temporarily transforming the 100 block of 24th Street from a two-way into a one-way street; and (2) establishing a visible police presence and enforcing the traffic laws by ticketing for all observed traffic violations. The Fort Worth Police also completely closed Exchange Street to all traffic.

In order to have the traffic go temporarily in only one direction, Officer Holzschuh put out traffic cones on each end of the 100 block of 24th Street (where it intersected Ellis and North Main). This shut down the westbound lane but not the eastbound lane. The result was that persons coming off Ellis had free access to 24th Street and could continue to travel eastbound, but persons coming off Main (attempting to travel west) could not enter onto 24th.

Five or six police officers positioned themselves along a well-lighted, forty yard stretch of 24th Street in order to watch for traffic violations. Three or four other officers were also present in that block to handle non-traffic offenses, such as fights and muggings. The blocked off area gave the officers a protected area to stand and view the traffic (the police had conducted similar operations before without the cones and had been dangerously exposed to oncoming traffic). When the officers observed a violation, they would direct the vehicle out of the flow of traffic, either to the north or south side of 24th Street, and issue a citation. No motorist was detained unless and until the officers observed the motorist commit a traffic violation. Nothing that the officers did restricted the eastbound traffic on 24th Street. The only time that the traffic was stopped was when the flow was backed up from vehicles trying to enter Main Street, or when the officers would stop the traffic in order to let pedestrians cross 24th Street. Apparently this approach worked because by 2:00 a.m., the traffic flow had dissolved from heavy to light, with the cruisers moving to streets located further south.

At approximately 2:00 a.m., Officer Holzschuh observed appellee turn off of Ellis Street onto 24th Street, traveling eastbound toward North Main. Officer Holzschuh was standing at the west end of the 100 block of 24th Street, behind the cones in the westbound lane, near Ellis Street. He also observed that appellee was not wearing a seat belt. Officer Holzschuh walked toward appellee's car as it was coming toward him, held up his hand, and yelled for him to stop. Appellee did not stop and continued driving east down 24th Street. Officer Holzschuh signaled to the other officers (also on foot patrol) further down the street to stop appellee's vehicle. The other officers attempted to stop appellee by yelling, waving their hands, and shining their flashlights at him. Appellee would not stop until finally an officer ran along side the vehicle and pounded on the trunk. He was directed to pull over to the south side curb of 24th Street. Officer Holzschuh was summoned by the other officers, and walked down 24th Street to where appellee was being detained. He determined that appellee was intoxicated and arrested him for DWI.

. . .

II.
B.

The Second Court of Appeals concluded that the police officers were conducting a sobriety checkpoint. *Skiles*, 870 S.W.2d at 343. They found that the high concentration of drinking establishments in the area and the time period that the officers were present suggested that enforcement of the DWI laws may have been the motive for their actions. *Id.* The Court stated: "[B]y blocking one lane of traffic, and positioning a number of officers along that single lane of slow moving traffic, it would not have been necessary to completely stop traffic to perform the observation functions of a *sobriety checkpoint.*" *Id.* (Emphasis added). The Court of Appeals finally held that there was sufficient evidence to conclude that the police action was a "traffic checkpoint" and affirmed the trial court's suppression order.

. . .

IV.

A thorough examination of the record reveals that there is insufficient evidence to support a legal conclusion that the actions of the police officers constituted a "roadblock" and the record is void of any evidence to determine that there was a sobriety checkpoint. The record evidence shows that the officers took no direct action requiring appellee or any other motorists to slow down or stop; the traffic conditions alone did that-the very same traffic conditions that the officers were attempting to alleviate and which would have been present even if the officers had not been there. Officer Holzschuh testified to this fact on direct examination by the prosecution:

"Q. Okay. Talking about eastbound traffic on 24th Street, is there anything that you did or that anybody else did that would restrict the flow of traffic on 24th Street?

"A. No. No.

* * *

"Q. Okay. At any time did the flow from west to east, did that stop?

"A. The only time it stopped was when the traffic backed up trying to cross Main Street.

"Q. Okay. So, nothing that you did would-would-these cones that you placed out there-

"A. No. We pulled violators out of the flow into the center of the roadway.

"Q. Okay. So, did you do anything-Did you do anything to stop that flow of traffic?

"A. No. The object was to get the traffic to flow."

On cross-examination, defense counsel attempted to get Officer Holzschuh to admit that the actions of the officers restricted the flow of traffic:

"Q. Now, Officer, you also testified that nothing you were doing was restricting traffic on 24th Street. Now that's just not a true statement, is it?

"A. No, I didn't say it exactly like that.

* * *

"Q. Because, obviously, if you've got six officers out there in 40 yards with flashlights, looking in cars, and stopping people, and pulling people over, y'all are restricting traffic, aren't you?

"A. Well, we had to."

If one were to stop reading at this point, it would appear that the officer was testifying that their mere presence restricted the traffic flow.[FN2] However, if one continues reading, in the subsequent few lines Officer Holzschuh explains his answer:

FN2. Apparently, that is exactly what the Court of Appeals did because there is no evidence in the record to support their assertion that "[t]he officer admitted that their actions necessarily did restrict traffic." *Skiles*, 870 S.W.2d at 342. The record contains no such admission.

"A. Because you've got people trying to cross the street in the alley going to their cars."

On re-direct, the prosecutor allowed Officer Holzschuh to further explain his testimony:

"Q. ... Is there anything that you did to stop the west to east traffic?

"A. Not permanent. What I mean by that is that if pedestrians were trying to cross, we would hold up traffic to let the pedestrians cross, and when I needed to take a violator out of the flow, of course, we has to slow them down and pull them over."

Defense counsel, on re-cross, attempted again and failed to have the witness admit that their actions restricted the flow of traffic:

"Q. ... I mean, you're not trying to represent to this Court that it was just a smooth flow through there and y'all aren't even getting in the way, are you?

"A. I just told you on the last question what was going on. When traffic backed up, the kids were cutting up with us."

Certainly, the trial court cannot have it both ways-if Officer Holzschuh is truthful and credible, as the trial judge explicitly found, then there is no evidence that the actions of the Fort Worth Police Department constituted a roadblock. The record shows that the only times that the traffic flow was restricted was when the traffic trying to cross Main Street backed up, when pedestrians attempting to cross 24th Street were assisted by the officers, and when observed traffic violators were themselves directed to pull over. The goal was to increase traffic flow, not to restrict it. There is no evidence that the actions of the police unlawfully slowed, stopped, or interfered with the traffic at all. The only evidence in the record is that the traffic flow was congested by the "cruisers," as it would be on any regular weekend night. Nevertheless, Officer Holzschuh further testified that by the time appellant entered onto 24th Street at 2:00 a.m., the traffic had cleared, due both to the actions of the police officers and the regular progression of the traffic.

. . .

There is nothing in the record to show that appellee's ability to travel on 24th Street was restricted in any way. Any attempt to characterize the officers' actions as some sort of ominous presence, slowing the traffic to a complete stop and thereby interfering with the drivers' liberty by merely being present is completely unsupported by the record, as are any references to sobriety checkpoints.

Neither the trial court nor the appellate court's rulings are supported by the record, nor are they within the zone of reasonable disagreement. Appellee presented no evidence, and the evidence supporting the legality of Officer Holzschuh's actions is uncontradicted, uncontroverted, and not in conflict with any other evidence. Absent a finding that the officer's testimony was not truthful, the record does not support the courts' judgments. The record clearly shows that there was no roadblock, de facto, de jure or otherwise, and a contrary finding is an abuse of discretion under both *Arcila* and *Esteves.* We hold there is no evidence to support either court's finding of the existence of a "roadblock."

United States District Court,
W.D. Texas,
Del Rio Division.
UNITED STATES of America, Plaintiff,
v.
Michael Scott McAULEY, Defendant.

No. DR-07-CR-786(1)-AML.
June 6, 2008.
ORDER

ALIA MOSES LUDLUM, District Judge.

I. FINDINGS OF FACT

On August 28, 2007, at approximately 1:49 p.m., Defendant, Michael Scott McAuley, drove a 1999 Chevy Blazer into the primary inspection station at the Del Rio, Texas Port of Entry from the Republic of Mexico. The Defendant declared he was a United States citizen. Agents ran a name check on the Defendant and received information that he was the subject of an investigation for suspected criminal acts involving child pornography in New York. There were no outstanding warrants for his arrest, nor was he considered a fugitive. The Defendant was then referred to the secondary inspection area for further review and inspection.

Immigration and Customs Enforcement ("ICE") Agent Robert Mayer, Jr. was the duty agent on August 28th. At about 2:20 p.m., Agent Mayer was notified of the Defendant's earlier arrival at the port of entry. The agent arrived at the port of entry approximately 10-15 minutes later.

Prior to his arrival at the port of entry, Agent Mayer contacted an agent in New York seeking more information on the Defendant and the child pornography investigation.[FN2] When Agent Mayer arrived at the port of entry, he saw the Defendant had computer equipment in his vehicle consisting of a zip drive, two external hard drives, and a laptop. The Defendant also had camping gear.

FN2. There was some dispute as to whether the agent in New York specifically told Agent Mayer to detain the Defendant and search his computer. Agent Mayer testified that he did not recall having this particular conversation with the New York agent, however, Agent Mayer stated that the Defendant's computer would have been searched regardless because of the information that appeared from the Defendant's name query, and that most people cannot leave the inspection area until the search of their items has been completed.

The Defendant was sitting in an office at the port of entry from 2:40 until 3:30 p.m. No formal questioning of the Defendant had taken place during this time period. The Defendant's computer and external drives were also not searched during this same time period.

Agent Mayer first conversed with the Defendant around 3:30 or 3:45 p.m. Agent Mayer testified that he had a conversation with the Defendant regarding his trip to Mexico. The Defendant stated he was on his way to California for an employment opportunity when he made a wrong turn and ended up crossing the border into Mexico. The Defendant was then asked if the computer in his possession was his personal laptop, to which the Defendant replied it was. Agent Mayer asked for, and received, verbal consent from the Defendant to search the laptop. Agent Mayer stated that he asked for consent so as not to appear as if bullying the Defendant. No threats or false promises were used to coerce the Defendant into giving consent.

ICE Agent Olsteen was also present with Agent Mayer during the questioning of the Defendant. After obtaining verbal consent to search the computer, the agents realized they did not have a written consent form with them. They called the Del Rio ICE Office to have a consent form sent to them at the port of entry via telefax. While the agents were waiting, Agent Olsteen hooked up the laptop and turned on the power. A password was needed to gain access to the computer and the Defendant was asked for the password. The Defendant voluntarily gave the agents the password, which was "1969."

Agent Olsteen proceeded to search the computer and did not find any explicit materials in the files. Agent Olsteen then began examining the external hard drives using the Defendant's laptop. Agent Mayer, in the meantime, received the consent form over the telefax machine and listed the items to be searched on the form. Agent Mayer read the consent form to the Defendant at 4:09 p.m., but the Defendant replied that he "would rather not sign the form." However, the Defendant never withdrew his verbal consent to the search of the computer and computer equipment.

As Agent Olsteen was searching an external hard drive, he discovered pornographic images depicting children and ceased his search to have the files analyzed by another agent. From the beginning of the search to the time pornographic images were uncovered, approximately 40 minutes of time had elapsed. Once the images were found by the agents, the Defendant was advised of his constitutional rights per *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). The Defendant stated he understood his rights and signed the rights form. The Defendant asked for an attorney. All questioning of the Defendant was ceased.

Agents ultimately found 101,000 still images depicting child pornography, of which 1,688 were considered hardcore pornography, on an external drive. The agents also uncovered 890 videos depicting pornographic images of children, of which 381 were considered to be hardcore pornography, on the same external drive.

The Defendant testified at the suppression hearing claiming that the day he was arrested, he had gone to Mexico around 1:30 p.m. and was there for approximately half an hour before returning to the United States. The Defendant is an electrician by trade and was traveling from New York to California under a union travel option to obtain work. The Defendant would stay at campsites during his travels, and on this particular trip, he had decided to take Highway 90 instead of Interstate Highway10 because he believed he could see the border and the border fence. The Defendant claimed to have made a wrong turn while driving, not seeing any signs advising he had crossed into Mexico, and mistakenly ended up in Mexico.[FN4] When he re-entered the United States, he was sent from primary to the secondary inspection area where he was asked to step out of his vehicle so it could be searched. The Defendant claims the agents did not search his bags at that time, but generally looked around his vehicle, which he thought was extreme considering he was a citizen returning to the country. He was then asked to wait in an office and claims he was there for well over an hour before speaking with Agent Mayer. According to the Defendant, he was asked by Agent Mayer where his parents lived, some general background information to confirm his citizenship, and about the computer found in the vehicle. The Defendant replied that he owned the computer and the vehicle, as well as the hard drives and all personal belongings in the vehicle.

FN4. The controversial border fence has not been erected in Del Rio, Texas. Additionally, the Defendant would have had to stop at a toll booth and paid a toll to cross the international bridge into Mexico.

The Defendant then testified that he never verbally consented to the search of his computer prior to giving the agents his password. He claimed he did not want his personal items searched. The Defendant contends he asked for a lawyer when he received the consent form, although he admits to giving agents his password prior to asking for an attorney. The Defendant testified that Agent Mayer informed him that he did not need a warrant to search and he did not have a choice in the matter because he was detained.[FN5]

FN5. The Court believes Agent Mayer to be a credible witness and relies on his testimony. The Court had a difficult time ascertaining the truth of the Defendant's testimony at the hearing. While the Court believes some of the Defendant's statements, the Court affords little weight to his testimony. The Court had an especially difficult time believing the Defendant made wrong turns, which inadvertently, took the Defendant to Mexico without his perceiving a border check station or signs of crossing the international boundary.

II. CONCLUSIONS OF LAW

The Court finds the Defendant has standing to contest his seizure and the seizure and search of the vehicle and its contents. The Fourth Amendment guarantees "the right of the people to be secure in their persons ... and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause ..." U.S. CONST. amend. IV. " 'Warrantless searches and seizures are per se unreasonable unless they fall within a few narrowly defined exceptions.' " *United States v. Roberts*, 274 F.3d 1007, 1011 (5th Cir.2001) (quoting *United States v. Cardenas*, 9 F.3d 1139, 1147 (5th Cir.1993)).

An international border, such as the port of entry in the present case, is one exception which requires a qualitatively different analysis under the Fourth Amendment. *United States v. Montoya de Hernandez*, 473 U.S. 531, 538, 105 S.Ct. 3304, 87 L.Ed.2d 381 (1985). The Fourth Amendment's balancing test of interests leans heavily toward the Government at international borders. *United States v. Ramsey*, 431 U.S. 606, 619, 97 S.Ct. 1972, 52 L.Ed.2d 617 (1977). "Routine searches of the persons and effects of entrants [into the United States] are not subject to any requirement of reasonable suspicion, probable cause, or warrant ..." *Id.* Pursuant to this long-standing border search doctrine, the Court finds that the search of the Defendant's vehicle and personal items was lawful pursuant to the Fourth Amendment.

The Defendant specifically contends that the search of his personal computer should be considered a non-routine search and, thus, the Government must prove the agents had reasonable suspicion or probable cause to search it. (Def. Amended Mot. to Supp., 4-5.) He also claims the images and videos found on the external drive should be suppressed as "fruits of a poisonous tree" per *Wong Sun v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963). (Def.'s Brief, 7.)

A. Legality of the Search and Seizure
1. The Border Search Doctrine

Automotive travelers and other persons entering the United States may be stopped at fixed points along the international borders without any individualized suspicion. *Montoya de Hernandez*, 473 U.S. at 538, 105 S.Ct. 3304. To protect the territorial integrity of this country, courts have made it clear that each person entering into the United States must be prepared to identify himself as entitled to enter and establish the right to bring in his effects. *Carroll v. United States*, 267 U.S. 132, 154, 45 S.Ct. 280, 69 L.Ed. 543 (1925).

The border search doctrine is one of the few exceptions that allow a warrantless search at a port of entry. "Agents may conduct a 'routine' search-one that does not seriously invade a traveler's privacy at the international border or its functional equivalent without probable cause, a warrant, or any suspicion to justify the search." *Roberts*, 274 F.3d at 1011 (internal quotations and citations omitted). The key variable used to determine whether a search is "routine" is "the invasion of the privacy and dignity of the individual." *United States v. Sandler*, 644 F.2d 1163, 1167 (5th Cir.1981). The Fifth Circuit has determined that ordinary pat-downs and frisks, removal of outer

garments and shoes, and the emptying of pockets, wallets, and purses are all routine searches, which "require no justification other than the person's decision to cross our national boundary." *Id.* at 1169.

The United States Supreme Court considered the issue of a routine border search in the context of the search of a car's fuel tank. *United States v. Flores-Montano*, 541 U.S. 149, 124 S.Ct. 1582, 158 L.Ed.2d 311 (2004). Chief Justice Rehnquist, writing for the Court, stated that "[c]omplex balancing tests to determine what is a 'routine' search of a vehicle, as opposed to a more 'intrusive' search of a person, ***have no place*** in border searches of vehicles." *Id.* at 152, 124 S.Ct. 1582 (emphasis added). He reasoned that the

Government's interests in preventing the entry of unwanted people and effects is at its zenith at the international border. Time and again, we have stated that "searches made at the border, pursuant to the longstanding right of the sovereign to protect itself by stopping and examining persons and property crossing into this country, ***are reasonable simply by virtue of the fact that they occur at the border."***

Id. at 152-53, 124 S.Ct. 1582 (quoting *Ramsey*, 431 U.S. at 616, 97 S.Ct. 1972) (emphasis added).

A non-routine search requires " 'reasonable suspicion of wrongdoing to pass constitutional muster.' " *United States v. Rivas*, 157 F.3d 364, 367 (5th Cir.1998) (quoting *Cardenas*, 9 F.3d at 1148 n. 3). "Reasonable suspicion of criminal activity must be based upon 'specific facts which, taken together with rational inferences therefrom, reasonably warrant an intrusion' " into someone's privacy. *Id.* (quoting *Cardenas*, 9 F.3d at 1153). An agent must have "a particularized and objective basis for suspecting the particular person" of smuggling contraband in order to possess the requisite reasonable suspicion for a "non-routine" search. *Montoya de Hernandez*, 473 U.S. at 541, 105 S.Ct. 3304 (internal quotations and cites omitted). The Fifth Circuit has held that body cavity searches, strip searches, and X-rays of a person are all non-routine searches. *Sandler*, 644 F.2d at 1166. Searches such as these are likely to trigger significant embarrassment for any person, and invade "the privacy and dignity of the individual." *Id.* at 1167.

The Defendant would like the Court to believe that the search of his computer was unauthorized because he maintains a higher degree of privacy in his computer, due to the personal nature of information contained therein. The Defendant claims that any search of a computer is akin to a bodily search of a person and should be categorized as a non-routine search requiring a finding of reasonable suspicion in order to conduct such a search. The Defendant would have this Court impute the same level of privacy and dignity afforded to the sovereignty of a person's being to an inanimate object like a computer. The Court finds this argument without merit. Relying on the Supreme Court's reasoning in *Flores-Montano*, this Court cannot equate the search of a computer with the search of a person. The Court finds that the search of a computer is more analogous to the search of a vehicle and/or its contents.

Travelers crossing an international border checkpoint should reasonably expect to be stopped and possibly searched with regard to any items on their person, or belongings they are transporting. Persons bringing their personal computers across our border are not exceptions to this rule simply because their computers may contain personal information. Since "a 'port of entry is not a traveler's home,' his expectation of privacy there is substantially lessened." *United States v. Ickes*, 393 F.3d 501, 506 (4th Cir.2005) (quoting *United States v. Thirty-Seven Photographs*, 402 U.S. 363, 376, 91 S.Ct. 1400, 28 L.Ed.2d 822 (1971)). Although relying on 19 U.S.C. § 1581(a), the *Ickes* court refused to find that reasonable suspicion or probable cause are a prerequisite to a search of personal computers and disks. *See Id.* at 507-08.

The Defendant believes that a search of the computer is much more intrusive than ordinary searches at ports of entry because of the type of information available on a computer. (Def. Amended Mot. to Supp., 4.) The Court is not persuaded by this contention. Incredible amounts of

personal and sensitive information are already subject to scrutiny at ports of entry in peoples' wallets, purses, locked glove boxes, and locked containers or luggage. People carry personal items such as Social Security cards; state and federal identification cards; medicines and medical records; names and addresses of family and associates; day planners with itineraries and travel documents; credit cards; check books and registries; business cards; photographs; and membership cards. All of these items are already subject to routine border searches. *See* *Cardenas*, 9 F.3d at 1148 n. 3. A computer is simply an inanimate object made up of microprocessors and wires which happens to efficiently condense and digitize the information reflected by the items listed above. The fact that a computer may take such personal information and digitize it does not alter the Court's analysis.

While the Defendant's computer was password protected, it too does not effect this Court's analysis. A password on a computer does not automatically convert a routine search into a non-routine search. A password is simply a digital lock. Locks are usually present on luggage and briefcases, yet those items are subject to "routine" searches at ports of entry all the time. *See* *Flores-Montano*, 541 U.S. at 154-55, 124 S.Ct. 1582.

In this particular case, the Defendant was transporting his personal laptop and related equipment in his vehicle across the border through an international port of entry. The agents were well within the legal parameters of the border search doctrine, which gave them the authority to search personal items in the Defendant's vehicle without reasonable suspicion, probable cause or a warrant. Although the Court believes the name check did lead agents to become suspicious [FN7] of the Defendant, agents at the port of entry had authority to search the computer and all of his belongings regardless of the status of the New York investigation. It is inconsequential if agents in New York did or did not request a search of the Defendant due to their ongoing investigation because a warrant or probable cause is not needed to search when crossing the border at a port of entry. The Defendant's claim of "surprise" should not be a basis to disallow agents from searching any items in the Defendant's vehicle. He did, after all, cross into a foreign country and attempt to re-enter the United States.

FN7. While the Court does not decide whether the agents actually had reasonable suspicion to search the computer equipment at this time because it believes reasonable suspicion is not needed in this case, the name check information coupled with the presence and amount of computer equipment the Defendant had is arguably sufficient information to determine the existence of reasonable suspicion to search.

A search of items like a computer, unlike a strip search of a person, is not per se embarrassing. Although not required, the search of the Defendant's computer and related equipment took place in a room away from the busy port of entry inspection lanes, which was free from the public's scrutiny, and that did not attract unnecessary attention to the Defendant. They were in a location out of the general public's view when the pornographic images were found on the external drive. The search was not conducted in an open and public inspection area where anyone passing by could have seen the pornographic pictures and associate those with the Defendant causing him significant embarrassment.

This Court finds that the search of one's personal computer at a port of entry is a routine search and thus, does not necessitate a finding of reasonable suspicion in order to search a computer, disks, hard drives, or any other technical devices.

Supreme Court of the United States
SAFFORD UNIFIED SCHOOL DISTRICT # 1, et al., Petitioners,
v.
April REDDING.

No. 08-479.
Argued April 21, 2009.
Decided June 25, 2009.

Justice SOUTER delivered the opinion of the Court.
The issue here is whether a 13-year-old student's Fourth Amendment right was violated when she was subjected to a search of her bra and underpants by school officials acting on reasonable suspicion that she had brought forbidden prescription and over-the-counter drugs to school. Because there were no reasons to suspect the drugs presented a danger or were concealed in her underwear, we hold that the search did violate the Constitution, but because there is reason to question the clarity with which the right was established, the official who ordered the unconstitutional search is entitled to qualified immunity from liability.

I

The events immediately prior to the search in question began in 13-year-old Savana Redding's math class at Safford Middle School one October day in 2003. The assistant principal of the school, Kerry Wilson, came into the room and asked Savana to go to his office. There, he showed her a day planner, unzipped and open flat on his desk, in which there were several knives, lighters, a permanent marker, and a cigarette. Wilson asked Savana whether the planner was hers; she said it was, but that a few days before she had lent it to her friend, Marissa Glines. Savana stated that none of the items in the planner belonged to her.

Wilson then showed Savana four white prescription-strength ibuprofen 400-mg pills, and one over-the-counter blue naproxen 200-mg pill, all used for pain and inflammation but banned under school rules without advance permission. He asked Savana if she knew anything about the pills. Savana answered that she did not. Wilson then told Savana that he had received a report that she was giving these pills to fellow students; Savana denied it and agreed to let Wilson search her belongings. Helen Romero, an administrative assistant, came into the office, and together with Wilson they searched Savana's backpack, finding nothing.

At that point, Wilson instructed Romero to take Savana to the school nurse's office to search her clothes for pills. Romero and the nurse, Peggy Schwallier, asked Savana to remove her jacket, socks, and shoes, leaving her in stretch pants and a T-shirt (both without pockets), which she was then asked to remove. Finally, Savana was told to pull her bra out and to the side and shake it, and to pull out the elastic on her underpants, thus exposing her breasts and pelvic area to some degree. No pills were found.

Savana's mother filed suit against Safford Unified School District # 1, Wilson, Romero, and Schwallier for conducting a strip search in violation of Savana's Fourth Amendment rights. The individuals (hereinafter petitioners) moved for summary judgment, raising a defense of qualified immunity. The District Court for the District of Arizona granted the motion on the ground that there was no Fourth Amendment violation, and a panel of the Ninth Circuit affirmed. 504 F.3d 828 (2007).

A closely divided Circuit sitting en banc, however, reversed. Following the two-step protocol for evaluating claims of qualified immunity, see Saucier v. Katz, 533 U.S. 194, 200, 121 S.Ct. 2151,

150 L.Ed.2d 272 (2001), the Ninth Circuit held that the strip search was unjustified under the Fourth Amendment test for searches of children by school officials set out in New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985). 531 F.3d 1071, 1081-1087 (2008). The Circuit then applied the test for qualified immunity, and found that Savana's right was clearly established at the time of the search: " '[t]hese notions of personal privacy are "clearly established" in that they inhere in all of us, particularly middle school teenagers, and are inherent in the privacy component of the Fourth Amendment's proscription against unreasonable searches.' " Id., at 1088-1089 (quoting Brannum v. Overton Cty. School Bd., 516 F.3d 489, 499 (C.A.6 2008)). The upshot was reversal of summary judgment as to Wilson, while affirming the judgments in favor of Schwallier, the school nurse, and Romero, the administrative assistant, since they had not acted as independent decisionmakers. 531 F.3d, at 1089.

We granted certiorari, 555 U.S. ----, 129 S.Ct. 987, 173 L.Ed.2d 171 (2009), and now affirm in part, reverse in part, and remand.

II

The Fourth Amendment "right of the people to be secure in their persons ... against unreasonable searches and seizures" generally requires a law enforcement officer to have probable cause for conducting a search. "Probable cause exists where 'the facts and circumstances within [an officer's] knowledge and of which [he] had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed," Brinegar v. United States, 338 U.S. 160, 175-176, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949) (quoting Carroll v. United States, 267 U.S. 132, 162, 45 S.Ct. 280, 69 L.Ed. 543 (1925)), and that evidence bearing on that offense will be found in the place to be searched.

In T.L. O., we recognized that the school setting "requires some modification of the level of suspicion of illicit activity needed to justify a search," 469 U.S., at 340, 105 S.Ct. 733, and held that for searches by school officials "a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause," id., at 341, 105 S.Ct. 733. We have thus applied a standard of reasonable suspicion to determine the legality of a school administrator's search of a student, id., at 342, 345, 105 S.Ct. 733, and have held that a school search "will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction," id., at 342, 105 S.Ct. 733.

. . .

III

A

In this case, the school's policies strictly prohibit the nonmedical use, possession, or sale of any drug on school grounds, including " '[a]ny prescription or over-the-counter drug, except those for which permission to use in school has been granted pursuant to Board policy.' " App. to Pet. for Cert. 128a.FN1 A week before Savana was searched, another student, Jordan Romero (no relation of the school's administrative assistant), told the principal and Assistant Principal Wilson that "certain students were bringing drugs and weapons on campus," and that he had been sick after taking some pills that "he got from a classmate." App. 8a. On the morning of October 8, the same boy handed Wilson a white pill that he said Marissa Glines had given him. He told Wilson that students were planning to take the pills at lunch.

FN1. When the object of a school search is the enforcement of a school rule, a valid search assumes, of course, the rule's legitimacy. But the legitimacy of the rule usually goes without saying as it does here. The Court said plainly in New Jersey v. T.L. O., 469 U.S. 325, 342, n. 9, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985), that standards of conduct for schools are for school administrators to determine without second-guessing by courts lacking the experience to appreciate what may be needed. Except in patently arbitrary instances, Fourth Amendment analysis takes the rule as a given, as it obviously should do in this case. There is no need here either to explain the imperative of keeping drugs out of schools, or to explain the reasons for the school's rule banning all drugs, no matter how benign, without advance permission. Teachers are not pharmacologists trained to identify pills and powders, and an effective drug ban has to be enforceable fast. The plenary ban makes sense, and there is no basis to claim that the search was unreasonable owing to some defect or shortcoming of the rule it was aimed at enforcing.

Wilson learned from Peggy Schwallier, the school nurse, that the pill was Ibuprofen 400 mg, available only by prescription. Wilson then called Marissa out of class. Outside the classroom, Marissa's teacher handed Wilson the day planner, found within Marissa's reach, containing various contraband items. Wilson escorted Marissa back to his office.

In the presence of Helen Romero, Wilson requested Marissa to turn out her pockets and open her wallet. Marissa produced a blue pill, several white ones, and a razor blade. Wilson asked where the blue pill came from, and Marissa answered, " 'I guess it slipped in when she gave me the IBU 400s.' " Id., at 13a. When Wilson asked whom she meant, Marissa replied, " 'Savana Redding.' " Ibid. Wilson then enquired about the day planner and its contents; Marissa denied knowing anything about them. Wilson did not ask Marissa any followup questions to determine whether there was any likelihood that Savana presently had pills: neither asking when Marissa received the pills from Savana nor where Savana might be hiding them.

Schwallier did not immediately recognize the blue pill, but information provided through a poison control hotline indicated that the pill was a 200-mg dose of an anti-inflammatory drug, generically called naproxen, available over the counter. At Wilson's direction, Marissa was then subjected to a search of her bra and underpants by Romero and Schwallier, as Savana was later on. The search revealed no additional pills.

It was at this juncture that Wilson called Savana into his office and showed her the day planner. Their conversation established that Savana and Marissa were on friendly terms: while she denied knowledge of the contraband, Savana admitted that the day planner was hers and that she had lent it to Marissa. Wilson had other reports of their friendship from staff members, who had identified Savana and Marissa as part of an unusually rowdy group at the school's opening dance in August, during which alcohol and cigarettes were found in the girls' bathroom. Wilson had reason to connect the girls with this contraband, for Wilson knew that Jordan Romero had told the principal that before the dance, he had been at a party at Savana's house where alcohol was served. Marissa's statement that the pills came from Savana was thus sufficiently plausible to warrant suspicion that Savana was involved in pill distribution.

This suspicion of Wilson's was enough to justify a search of Savana's backpack and outer clothing.FN3 If a student is reasonably suspected of giving out contraband pills, she is reasonably suspected of carrying them on her person and in the carryall that has become an item of student uniform in most places today. If Wilson's reasonable suspicion of pill distribution were not understood to support searches of outer clothes and backpack, it would not justify any search worth making. And the look into Savana's bag, in her presence and in the relative privacy of Wilson's

office, was not excessively intrusive, any more than Romero's subsequent search of her outer clothing.

FN3. There is no question here that justification for the school officials' search was required in accordance with the T.L.O. standard of reasonable suspicion, for it is common ground that Savana had a reasonable expectation of privacy covering the personal things she chose to carry in her backpack, cf. 469 U.S., at 339, and that Wilson's decision to look through it was a "search" within the meaning of the Fourth Amendment.

B

Here it is that the parties part company, with Savana's claim that extending the search at Wilson's behest to the point of making her pull out her underwear was constitutionally unreasonable. The exact label for this final step in the intrusion is not important, though strip search is a fair way to speak of it. Romero and Schwallier directed Savana to remove her clothes down to her underwear, and then "pull out" her bra and the elastic band on her underpants. Id., at 23a. Although Romero and Schwallier stated that they did not see anything when Savana followed their instructions, App. to Pet. for Cert. 135a, we would not define strip search and its Fourth Amendment consequences in a way that would guarantee litigation about who was looking and how much was seen. The very fact of Savana's pulling her underwear away from her body in the presence of the two officials who were able to see her necessarily exposed her breasts and pelvic area to some degree, and both subjective and reasonable societal expectations of personal privacy support the treatment of such a search as categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of outer clothing and belongings.

Savana's subjective expectation of privacy against such a search is inherent in her account of it as embarrassing, frightening, and humiliating. The reasonableness of her expectation (required by the Fourth Amendment standard) is indicated by the consistent experiences of other young people similarly searched, whose adolescent vulnerability intensifies the patent intrusiveness of the exposure. See Brief for National Association of Social Workers et al. as Amici Curiae 6-14; Hyman & Perone, The Other Side of School Violence: Educator Policies and Practices that may Contribute to Student Misbehavior, 36 J. School Psychology 7, 13 (1998) (strip search can "result in serious emotional damage"). The common reaction of these adolescents simply registers the obviously different meaning of a search exposing the body from the experience of nakedness or near undress in other school circumstances. Changing for gym is getting ready for play; exposing for a search is responding to an accusation reserved for suspected wrongdoers and fairly understood as so degrading that a number of communities have decided that strip searches in schools are never reasonable and have banned them no matter what the facts may be, see, e.g., New York City Dept. of Education, Reg. No. A-432, p. 2 (2005), online at http:// docs.nycenet.edu/ docushare/dsweb/Get/Document-21/A-432.pdf ("Under no circumstances shall a strip-search of a student be conducted").

The indignity of the search does not, of course, outlaw it, but it does implicate the rule of reasonableness as stated in T.L. O., that "the search as actually conducted [be] reasonably related in scope to the circumstances which justified the interference in the first place." 469 U.S., at 341, 105 S.Ct. 733 (internal quotation marks omitted). The scope will be permissible, that is, when it is "not excessively intrusive in light of the age and sex of the student and the nature of the infraction." Id., at 342, 105 S.Ct. 733.

Here, the content of the suspicion failed to match the degree of intrusion. Wilson knew beforehand that the pills were prescription-strength ibuprofen and over-the-counter naproxen, common pain

relievers equivalent to two Advil, or one Aleve. He must have been aware of the nature and limited threat of the specific drugs he was searching for, and while just about anything can be taken in quantities that will do real harm, Wilson had no reason to suspect that large amounts of the drugs were being passed around, or that individual students were receiving great numbers of pills.

Nor could Wilson have suspected that Savana was hiding common painkillers in her underwear. Petitioners suggest, as a truth universally acknowledged, that "students ... hid[e] contraband in or under their clothing," Reply Brief for Petitioners 8, and cite a smattering of cases of students with contraband in their underwear, id., at 8-9. But when the categorically extreme intrusiveness of a search down to the body of an adolescent requires some justification in suspected facts, general background possibilities fall short; a reasonable search that extensive calls for suspicion that it will pay off. But nondangerous school contraband does not raise the specter of stashes in intimate places, and there is no evidence in the record of any general practice among Safford Middle School students of hiding that sort of thing in underwear; neither Jordan nor Marissa suggested to Wilson that Savana was doing that, and the preceding search of Marissa that Wilson ordered yielded nothing. Wilson never even determined when Marissa had received the pills from Savana; if it had been a few days before, that would weigh heavily against any reasonable conclusion that Savana presently had the pills on her person, much less in her underwear.

In sum, what was missing from the suspected facts that pointed to Savana was any indication of danger to the students from the power of the drugs or their quantity, and any reason to suppose that Savana was carrying pills in her underwear. We think that the combination of these deficiencies was fatal to finding the search reasonable.

In so holding, we mean to cast no ill reflection on the assistant principal, for the record raises no doubt that his motive throughout was to eliminate drugs from his school and protect students from what Jordan Romero had gone through. Parents are known to overreact to protect their children from danger, and a school official with responsibility for safety may tend to do the same. The difference is that the Fourth Amendment places limits on the official, even with the high degree of deference that courts must pay to the educator's professional judgment.

We do mean, though, to make it clear that the T.L.O. concern to limit a school search to reasonable scope requires the support of reasonable suspicion of danger or of resort to underwear for hiding evidence of wrongdoing before a search can reasonably make the quantum leap from outer clothes and backpacks to exposure of intimate parts. The meaning of such a search, and the degradation its subject may reasonably feel, place a search that intrusive in a category of its own demanding its own specific suspicions.

. . .

V

The strip search of Savana Redding was unreasonable and a violation of the Fourth Amendment, but petitioners Wilson, Romero, and Schwallier are nevertheless protected from liability through qualified immunity. Our conclusions here do not resolve, however, the question of the liability of petitioner Safford Unified School District # 1 under Monell v. New York City Dept. of Social Servs., 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), a claim the Ninth Circuit did not address. The judgment of the Ninth Circuit is therefore affirmed in part and reversed in part, and this case is remanded for consideration of the Monell claim.

It is so ordered.

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

I agree with the Court that the judgment against the school officials with respect to qualified immunity should be reversed. See ante, at ---- - ----. Unlike the majority, however, I would hold that the search of Savana Redding did not violate the Fourth Amendment. The majority imposes a vague and amorphous standard on school administrators. It also grants judges sweeping authority to second-guess the measures that these officials take to maintain discipline in their schools and ensure the health and safety of the students in their charge. This deep intrusion into the administration of public schools exemplifies why the Court should return to the common-law doctrine of in loco parentis under which "the judiciary was reluctant to interfere in the routine business of school administration, allowing schools and teachers to set and enforce rules and to maintain order." Morse v. Frederick, 551 U.S. 393, 414, 127 S.Ct. 2618, 168 L.Ed.2d 290 (2007) (Thomas, J., concurring). But even under the prevailing Fourth Amendment test established by New Jersey v. T.L.O., 469 U.S. 325, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985), all petitioners, including the school district, are entitled to judgment as a matter of law in their favor.

I

"Although the underlying command of the Fourth Amendment is always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place." Id., at 337, 105 S.Ct. 733. Thus, although public school students retain Fourth Amendment rights under this Court's precedent, see id., at 333-337, 105 S.Ct. 733, those rights "are different ... than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children," Vernonia School Dist. 47J v. Acton, 515 U.S. 646, 656, 115 S.Ct. 2386, 132 L.Ed.2d 564 (1995); see also T.L.O., 469 U.S., at 339, 105 S.Ct. 733 (identifying "the substantial interest of teachers and administrators in maintaining discipline in the classroom and on school grounds"). For nearly 25 years this Court has understood that "[m]aintaining order in the classroom has never been easy, but in more recent years, school disorder has often taken particularly ugly forms: drug use and violent crime in the schools have become major social problems." Ibid.In schools, "[e]vents calling for discipline are frequent occurrences and sometimes require immediate, effective action." Goss v. Lopez, 419 U.S. 565, 580, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975); see also T.L. O., 469 U.S., at 340, 105 S.Ct. 733 (explaining that schools have a "legitimate need to maintain an environment in which learning can take place").

For this reason, school officials retain broad authority to protect students and preserve "order and a proper educational environment" under the Fourth Amendment. Id., at 339, 105 S.Ct. 733. This authority requires that school officials be able to engage in the "close supervision of schoolchildren, as well as ... enforc[e] rules against conduct that would be perfectly permissible if undertaken by an adult." Ibid. Seeking to reconcile the Fourth Amendment with this unique public school setting, the Court in T.L.O. held that a school search is "reasonable" if it is " 'justified at its inception' " and " 'reasonably related in scope to the circumstances which justified the interference in the first place.' " Id., at 341-342, 105 S.Ct. 733 (quoting Terry v. Ohio, 392 U.S. 1, 20, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)). The search under review easily meets this standard.

A

A "search of a student by a teacher or other school official will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the student has violated or is violating either the law or the rules of the school." T.L. O., supra, at 341-342, 105 S.Ct. 733 (footnote omitted). As the majority rightly concedes, this search was justified at its inception because there were reasonable grounds to suspect that Redding possessed medication that violated school rules. See ante, at -----. A finding of reasonable suspicion "does not deal with hard certainties, but with probabilities." United States v. Cortez, 449 U.S. 411, 418, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); see also T.L. O., supra, at 346, 105 S.Ct. 733 ("[T]he requirement of

reasonable suspicion is not a requirement of absolute certainty"). To satisfy this standard, more than a mere "hunch" of wrongdoing is required, but "considerably" less suspicion is needed than would be required to "satisf[y] a preponderance of the evidence standard." United States v. Arvizu, 534 U.S. 266, 274, 122 S.Ct. 744, 151 L.Ed.2d 740 (2002) (internal quotation marks omitted).

Furthermore, in evaluating whether there is a reasonable "particularized and objective" basis for conducting a search based on suspected wrongdoing, government officials must consider the "totality of the circumstances." Id., at 273, 122 S.Ct. 744 (internal quotation marks omitted). School officials have a specialized understanding of the school environment, the habits of the students, and the concerns of the community, which enables them to " 'formulat [e] certain common-sense conclusions about human behavior.' " United States v. Sokolow, 490 U.S. 1, 8, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989) (quoting Cortez, supra, at 418, 101 S.Ct. 690). And like police officers, school officials are "entitled to make an assessment of the situation in light of [this] specialized training and familiarity with the customs of the [school]." See Arvizu, supra, at 276, 122 S.Ct. 744.

Here, petitioners had reasonable grounds to suspect that Redding was in possession of prescription and nonprescription drugs in violation of the school's prohibition of the "non-medical use, possession, or sale of a drug" on school property or at school events. 531 F.3d 1071, 1076 (C.A.9 2008) (en banc); see also id., at 1107 (Hawkins, J., dissenting) (explaining that the school policy defined "drugs" to include " '[a]ny prescription or over-the-counter drug, except those for which permission to use in school has been granted' "). As an initial matter, school officials were aware that a few years earlier, a student had become "seriously ill" and "spent several days in intensive care" after ingesting prescription medication obtained from a classmate. App. 10a. Fourth Amendment searches do not occur in a vacuum; rather, context must inform the judicial inquiry. See Cortez, supra, at 417-418, 101 S.Ct. 690. In this instance, the suspicion of drug possession arose at a middle school that had "a history of problems with students using and distributing prohibited and illegal substances on campus." App. 7a, 10a.

The school's substance-abuse problems had not abated by the 2003-2004 school year, which is when the challenged search of Redding took place. School officials had found alcohol and cigarettes in the girls' bathroom during the first school dance of the year and noticed that a group of students including Redding and Marissa Glines smelled of alcohol. Ibid. Several weeks later, another student, Jordan Romero, reported that Redding had hosted a party before the dance where she served whiskey, vodka, and tequila. Id., at 8a, 11a. Romero had provided this report to school officials as a result of a meeting his mother scheduled with the officials after Romero "bec[a]me violent" and "sick to his stomach" one night and admitted that "he had taken some pills that he had got[ten] from a classmate." Id., at 7a-8a, 10a-11a. At that meeting, Romero admitted that "certain students were bringing drugs and weapons on campus." Id., at 8a, 11a. One week later, Romero handed the assistant principal a white pill that he said he had received from Glines. Id., at 11a. He reported "that a group of students [were] planning on taking the pills at lunch." Ibid.

School officials justifiably took quick action in light of the lunchtime deadline. The assistant principal took the pill to the school nurse who identified it as prescription-strength 400-mg Ibuprofen. Id., at 12a. A subsequent search of Glines and her belongings produced a razor blade, a Naproxen 200-mg pill, and several Ibuprofen 400-mg pills. Id., at 13a. When asked, Glines claimed that she had received the pills from Redding. Ibid. A search of Redding's planner, which Glines had borrowed, then uncovered "several knives, several lighters, a cigarette, and a permanent marker." Id., at 12a, 14a, 22a. Thus, as the majority acknowledges, ante, at 7, the totality of relevant circumstances justified a search of Redding for pills.

B

The remaining question is whether the search was reasonable in scope. Under T.L. O., "a search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the age and sex of the student and the nature of the infraction." 469 U.S., at 342, 105 S.Ct. 733. The majority concludes that the school officials' search of Redding's underwear was not " 'reasonably related in scope to the circumstances which justified the interference in the first place,' " see ante, at ---- - ----, notwithstanding the officials' reasonable suspicion that Redding "was involved in pill distribution," ante, at ----. According to the majority, to be reasonable, this school search required a showing of "danger to the students from the power of the drugs or their quantity" or a "reason to suppose that [Redding] was carrying pills in her underwear." Ante, at ----. Each of these additional requirements is an unjustifiable departure from bedrock Fourth Amendment law in the school setting, where this Court has heretofore read the Fourth Amendment to grant considerable leeway to school officials. Because the school officials searched in a location where the pills could have been hidden, the search was reasonable in scope under T.L. O.

1

The majority finds that "subjective and reasonable societal expectations of personal privacy support ... treat[ing]" this type of search, which it labels a "strip search," as "categorically distinct, requiring distinct elements of justification on the part of school authorities for going beyond a search of clothing and belongings." Ante, at ----. Thus, in the majority's view, although the school officials had reasonable suspicion to believe that Redding had the pills on her person, see ante, at ----, they needed some greater level of particularized suspicion to conduct this "strip search." There is no support for this contortion of the Fourth Amendment.

The Court has generally held that the reasonableness of a search's scope depends only on whether it is limited to the area that is capable of concealing the object of the search. See, e.g., Wyoming v. Houghton, 526 U.S. 295, 307, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999) (Police officers "may inspect passengers' belongings found in the car that are capable of concealing the object of the search"); Florida v. Jimeno, 500 U.S. 248, 251, 111 S.Ct. 1801, 114 L.Ed.2d 297 (1991) ("The scope of a search is generally defined by its expressed object"); United States v. Johns, 469 U.S. 478, 487, 105 S.Ct. 881, 83 L.Ed.2d 890 (1985) (search reasonable because "there is no plausible argument that the object of the search could not have been concealed in the packages"); United States v. Ross, 456 U.S. 798, 820, 102 S.Ct. 2157, 72 L.Ed.2d 572 (1982) ("A lawful search ... generally extends to the entire area in which the object of the search may be found").

In keeping with this longstanding rule, the "nature of the infraction" referenced in T.L.O. delineates the proper scope of a search of students in a way that is identical to that permitted for searches outside the school- i.e., the search must be limited to the areas where the object of that infraction could be concealed. See Horton v. California, 496 U.S. 128, 141, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990) ("Police with a warrant for a rifle may search only places where rifles might be" (internal quotation marks omitted)); Ross, supra, at 824, 102 S.Ct. 2157 ("[P]robable cause to believe that undocumented aliens are being transported in a van will not justify a warrantless search of a suitcase"). A search of a student therefore is permissible in scope under T.L.O. so long as it is objectively reasonable to believe that the area searched could conceal the contraband. The dissenting opinion below correctly captured this Fourth Amendment standard, noting that "if a student brought a baseball bat on campus in violation of school policy, a search of that student's shirt pocket would be patently unjustified." 531 F.3d, at 1104 (opinion of Hawkins, J.).

The analysis of whether the scope of the search here was permissible under that standard is straightforward. Indeed, the majority does not dispute that "general background possibilities" establish that students conceal "contraband in their underwear." Ante, at ----. It acknowledges that school officials had reasonable suspicion to look in Redding's backpack and outer clothing because if "Wilson's reasonable suspicion of pill distribution were not understood to support searches of outer clothes and backpack, it would not justify any search worth making." Ante, at ----. The majority nevertheless concludes that proceeding any further with the search was unreasonable. See ante, at ---- - ----; see also ante, at ---- (GINSBURG, J., concurring in part and dissenting in part) ("Any reasonable search for the pills would have ended when inspection of Redding's backpack and jacket pockets yielded nothing"). But there is no support for this conclusion. The reasonable suspicion that Redding possessed the pills for distribution purposes did not dissipate simply because the search of her backpack turned up nothing. It was eminently reasonable to conclude that the backpack was empty because Redding was secreting the pills in a place she thought no one would look. See Ross, supra, at 820, 102 S.Ct. 2157 ("Contraband goods rarely are strewn" about in plain view; "by their very nature such goods must be withheld from public view").

Redding would not have been the first person to conceal pills in her undergarments. See Hicks, Man Gets 17-Year Drug Sentence, [Corbin, KY] Times-Tribune, Oct. 7, 2008, p. 1 (Drug courier "told officials she had the [Oxycontin] pills concealed in her crotch"); Conley, Whitehaven: Traffic Stop Yields Hydrocodone Pills, [Memphis] Commercial Appeal, Aug. 3, 2007, p. B3 ("An additional 40 hydrocodone pills were found in her pants"); Caywood, Police Vehicle Chase Leads to Drug Arrests, [Worcester] Telegram & Gazette, June 7, 2008, p. A7 (25-year-old "allegedly had a cigar tube stuffed with pills tucked into the waistband of his pants"); Hubartt, 23-Year-Old Charged With Dealing Ecstasy, The [Fort Wayne] Journal Gazette, Aug. 8, 2007, p. C2 ("[W]hile he was being put into a squad car, his pants fell down and a plastic bag containing pink and orange pills fell on the ground"); Sebastian Residents Arrested in Drug Sting, Vero Beach Press Journal, Sept. 16, 2006, p. B2 (Arrestee "told them he had more pills 'down my pants' "). Nor will she be the last after today's decision, which announces the safest place to secrete contraband in school.

2

The majority compounds its error by reading the "nature of the infraction" aspect of the T.L.O.test as a license to limit searches based on a judge's assessment of a particular school policy. According to the majority, the scope of the search was impermissible because the school official "must have been aware of the nature and limited threat of the specific drugs he was searching for" and because he "had no reason to suspect that large amounts of the drugs were being passed around, or that individual students were receiving great numbers of pills." Ante, at ---- - ----. Thus, in order to locate a rationale for finding a Fourth Amendment violation in this case, the majority retreats from its observation that the school's firm no-drug policy "makes sense, and there is no basis to claim that the search was unreasonable owing to some defect or shortcoming of the rule it was aimed at enforcing." Ante, at ----, n. 1.

Even accepting the majority's assurances that it is not attacking the rule's reasonableness, it certainly is attacking the rule's importance. This approach directly conflicts with T.L.O. in which the Court was "unwilling to adopt a standard under which the legality of a search is dependent upon a judge's evaluation of the relative importance of school rules." 469 U.S., at 342, n. 9, 105 S.Ct. 733. Indeed, the Court in T.L.O. expressly rejected the proposition that the majority seemingly endorses-that "some rules regarding student conduct are by nature too 'trivial' to justify a search based upon reasonable suspicion." Ibid.; see also id., at 343, n. 9, 105 S.Ct. 733 ("The promulgation of a rule forbidding specified conduct presumably reflects a judgment on the part of school officials that such conduct is destructive of school order or of a proper educational

environment. Absent any suggestion that the rule violates some substantive constitutional guarantee, the courts should as a general matter, defer to that judgment").

The majority's decision in this regard also departs from another basic principle of the Fourth Amendment: that law enforcement officials can enforce with the same vigor all rules and regulations irrespective of the perceived importance of any of those rules. "In a long line of cases, we have said that when an officer has probable cause to believe a person committed even a minor crime in his presence, the balancing of private and public interests is not in doubt. The arrest is constitutionally reasonable." Virginia v. Moore, 553 U.S. ----, ----, 128 S.Ct. 1598, 1604, 170 L.Ed.2d 559 (2008). The Fourth Amendment rule for searches is the same: Police officers are entitled to search regardless of the perceived triviality of the underlying law. As we have explained, requiring police to make "sensitive, case-by-case determinations of government need," Atwater v. Lago Vista, 532 U.S. 318, 347, 121 S.Ct. 1536, 149 L.Ed.2d 549 (2001), for a particular prohibition before conducting a search would "place police in an almost impossible spot," id., at 350, 121 S.Ct. 1536.

The majority has placed school officials in this "impossible spot" by questioning whether possession of Ibuprofen and Naproxen causes a severe enough threat to warrant investigation. Had the suspected infraction involved a street drug, the majority implies that it would have approved the scope of the search. See ante, at ---- (relying on the "limited threat of the specific drugs he was searching for"); ante, at ---- (relying on the limited "power of the drugs" involved). In effect, then, the majority has replaced a school rule that draws no distinction among drugs with a new one that does. As a result, a full search of a student's person for prohibited drugs will be permitted only if the Court agrees that the drug in question was sufficiently dangerous. Such a test is unworkable and unsound. School officials cannot be expected to halt searches based on the possibility that a court might later find that the particular infraction at issue is not severe enough to warrant an intrusive investigation. FN4

A rule promulgated by a school board represents the judgment of school officials that the rule is needed to maintain "school order" and "a proper educational environment." T.L. O., 469 U.S., at 343, n. 9, 105 S.Ct. 733. Teachers, administrators, and the local school board are called upon both to "protect the ... safety of students and school personnel" and "maintain an environment conducive to learning." Id., at 353, 105 S.Ct. 733 (Blackmun, J., concurring in judgment). They are tasked with "watch[ing] over a large number of students" who "are inclined to test the outer boundaries of acceptable conduct and to imitate the misbehavior of a peer if that misbehavior is not dealt with quickly." Id., at 352, 105 S.Ct. 733. In such an environment, something as simple as a "water pistol or peashooter can wreak [havoc] until it is taken away." Ibid. The danger posed by unchecked distribution and consumption of prescription pills by students certainly needs no elaboration.

Judges are not qualified to second-guess the best manner for maintaining quiet and order in the school environment. Such institutional judgments, like those concerning the selection of the best methods for "restrain[ing students] from assaulting one another, abusing drugs and alcohol, and committing other crimes," id., at 342, n. 9, 105 S.Ct. 733, "involve a host of policy choices that must be made by locally elected representatives, rather than by federal judges interpreting the basic charter of Government for the entire country." Collins v. Harker Heights, 503 U.S. 115, 129, 112 S.Ct. 1061, 117 L.Ed.2d 261 (1992); cf. Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 226, 106 S.Ct. 507, 88 L.Ed.2d 523 (1985) (observing that federal courts are not "suited to evaluat[ing] the substance of the multitude of academic decisions" or disciplinary decisions "that are made daily by faculty members of public educational institutions"). It is a mistake for judges to assume the responsibility for deciding which school rules are important enough to allow for invasive searches and which rules are not.

Even if this Court were authorized to second-guess the importance of school rules, the Court's assessment of the importance of this district's policy is flawed. It is a crime to possess or use prescription-strength Ibuprofen without a prescription. See Ariz.Rev.Stat. Ann. § 13-3406(A)(1) (West Supp.2008) ("A person shall not knowingly ... [p]ossess or use a prescription-only drug unless the person obtains the prescription-only drug pursuant to a valid prescription of a prescriber who is licensed pursuant to [state law]"). By prohibiting unauthorized prescription drugs on school grounds-and conducting a search to ensure students abide by that prohibition-the school rule here was consistent with a routine provision of the state criminal code. It hardly seems unreasonable for school officials to enforce a rule that, in effect, proscribes conduct that amounts to a crime.

Moreover, school districts have valid reasons for punishing the unauthorized possession of prescription drugs on school property as severely as the possession of street drugs; "[t]eenage abuse of over-the-counter and prescription drugs poses an increasingly alarming national crisis." Get Teens Off Drugs, The Education Digest 75 (Dec.2006). As one study noted, "more young people ages 12-17 abuse prescription drugs than any illicit drug except marijuana-more than cocaine, heroin, and methamphetamine combined." Executive Office of the President, Office of National Drug Control Policy (ONDCP), Prescription for Danger 1 (Jan.2008) (hereinafter Prescription for Danger). And according to a 2005 survey of teens, "nearly one in five (19 percent or 4.5 million) admit abusing prescription drugs in their lifetime." Columbia University, The National Center on Addiction and Substance Abuse (CASA), "You've Got Drugs!" V: Prescription Drug Pushers on the Internet 2 (July 2008); see also Dept. of Health and Human Services, National Institute on Drug Abuse, High School and Youth Trends 2 (Dec.2008) ("In 2008, 15.4 percent of 12th-graders reported using a prescription drug nonmedically within the past year").

School administrators can reasonably conclude that this high rate of drug abuse is being fueled, at least in part, by the increasing presence of prescription drugs on school campuses. See, e.g., Gibson, Grand Forks Schools See Rise In Prescription Drug Abuse, Grand Forks Herald, Nov. 16, 2008, p. 1 (explaining that "prescription drug abuse is growing into a larger problem" as students "bring them to school and sell them or just give them to their friends"). In a 2008 survey, "44 percent of teens sa[id] drugs are used, kept or sold on the grounds of their schools." CASA, National Survey of American Attitudes on Substance Abuse XIII: Teens and Parents 19 (Aug.2008) (hereinafter National Survey). The risks posed by the abuse of these drugs are every bit as serious as the dangers of using a typical street drug.

Teenagers are nevertheless apt to "believe the myth that these drugs provide a medically safe high." ONDCP, Teens and Prescription Drugs: An Analysis of Recent Trends on the Emerging Drug Threat 3 (Feb.2007) (hereinafter Teens and Prescription Drugs). But since 1999, there has "been a dramatic increase in the number of poisonings and even deaths associated with the abuse of prescription drugs." Prescription for Danger 4; see also Dept. of Health and Human Services, The NSDUH Report: Trends in Nonmedical Use of Prescription Pain Relievers: 2002 to 2007, p. 1 (Feb. 5, 2009) ("[A]pproximately 324,000 emergency department visits in 2006 involved the nonmedical use of pain relievers"); CASA, Under the Counter: The Diversion and Abuse of Controlled Prescription Drugs in the U.S., p. 25 (July 2005) ("In 2002, abuse of controlled prescription drugs was implicated in at least 23 percent of drug-related emergency department admissions and 20.4 percent of all single drug-related emergency department deaths"). At least some of these injuries and deaths are likely due to the fact that "[m]ost controlled prescription drug abusers are poly-substance abusers," id., at 3, a habit that is especially likely to result in deadly drug combinations. Furthermore, even if a child is not immediately harmed by the abuse of prescription drugs, research suggests that prescription drugs have become "gateway drugs to other substances of abuse." Id., at 4; Healy, Skipping the Street, Los Angeles Times, Sept. 15, 2008, p.

F1 (“Boomers made marijuana their ‘gateway’ ... but a younger generation finds prescription drugs an easier score”); see also National Survey 17 (noting that teens report “that prescription drugs are easier to buy than beer”).

Admittedly, the Ibuprofen and Naproxen at issue in this case are not the prescription painkillers at the forefront of the prescription-drug-abuse problem. See Prescription for Danger 3 (“Pain relievers like Vicodin and OxyContin are the prescription drugs most commonly abused by teens”). But they are not without their own dangers. As nonsteroidal anti-inflammatory drugs (NSAIDs), they pose a risk of death from overdose. The Pill Book 821, 827 (H.Silverman, ed., 13th ed.2008) (observing that Ibuprofen and Naproxen are NSAIDs and “[p]eople have died from NSAID overdoses”). Moreover, the side-effects caused by the use of NSAIDs can be magnified if they are taken in combination with other drugs. See, e.g., Reactions Weekly, p. 18 (Issue no. 1235, Jan. 17, 2009) (“A 17-year-old girl developed allergic interstitial nephritis and renal failure while receiving escitalopram and ibuprofen”); id., at 26 (Issue no. 1232, Dec. 13, 2008) (“A 16-month-old boy developed iron deficiency anaemia and hypoalbuminaemia during treatment with naproxen”); id., at 15 (Issue no. 1220, Sept. 20, 2008) (18-year-old “was diagnosed with pill-induced oesophageal perforation” after taking ibuprofen “and was admitted to the [intensive care unit]”); id., at 20 (Issue no. 1170, Sept. 22, 2007) (“A 12-year-old boy developed anaphylaxis following ingestion of ibuprofen”).

If a student with a previously unknown intolerance to Ibuprofen or Naproxen were to take either drug and become ill, the public outrage would likely be directed toward the school for failing to take steps to prevent the unmonitored use of the drug. In light of the risks involved, a school's decision to establish and enforce a school prohibition on the possession of any unauthorized drug is thus a reasonable judgment.

* * *

In determining whether the search's scope was reasonable under the Fourth Amendment, it is therefore irrelevant whether officials suspected Redding of possessing prescription-strength Ibuprofen, nonprescription-strength Naproxen, or some harder street drug. Safford prohibited its possession on school property. Reasonable suspicion that Redding was in possession of drugs in violation of these policies, therefore, justified a search extending to any area where small pills could be concealed. The search did not violate the Fourth Amendment.

II

. . .

Restoring the common-law doctrine of in loco parentis would not, however, leave public schools entirely free to impose any rule they choose. “If parents do not like the rules imposed by those schools, they can seek redress in school boards or legislatures; they can send their children to private schools or home school them; or they can simply move.” See Morse, 551 U.S., at 419, 127 S.Ct. 2618 (THOMAS, J., concurring). Indeed, parents and local government officials have proved themselves quite capable of challenging overly harsh school rules or the enforcement of sensible rules in insensible ways.

For example, one community questioned a school policy that resulted in “an 11-year-old [being] arrested, handcuffed, and taken to jail for bringing a plastic butter knife to school.” Downey, Zero Tolerance Doesn't Always Add Up, The Atlanta Journal-Constitution, Apr. 6, 2009, p. A11. In another, “[a]t least one school board member was outraged” when 14 elementary-school students

were suspended for "imitating drug activity" after they combined Kool-Aid and sugar in plastic bags. Grant, Pupils Trading Sweet Mix Get Sour Shot of Discipline, Pittsburgh Post-Gazette, May 18, 2006, p. B1. Individuals within yet another school district protested a " 'zero-tolerance' policy toward weapons" that had become "so rigid that it force[d] schools to expel any student who belongs to a military organization, a drum-and-bugle corps or any other legitimate extracurricular group and is simply transporting what amounts to harmless props." Richardson, School Gun Case Sparks Cries For "Common Sense," Washington Times, Feb. 13, 2009, p. A1.

These local efforts to change controversial school policies through democratic processes have proven successful in many cases. See, e.g., Postal, Schools' Zero Tolerance Could Lose Some Punch, Orlando Sentinel, Apr. 24, 2009, p. B3 ("State lawmakers want schools to dial back strict zero-tolerance policies so students do not end up in juvenile detention for some 'goofy thing' "); Richardson, Tolerance Waning for Zero-tolerance Rules, Washington Times, Apr. 21, 2009, p. A3 ("[A] few states have moved to relax their laws. Utah now allows students to bring asthma inhalers to school without violating the zero-tolerance policy on drugs"); see also Nussbaum, Becoming Fed Up With Zero Tolerance, New York Times, Sept. 3, 2000, Section 14, p. 1 (discussing a report that found that "widespread use of zero-tolerance discipline policies was creating as many problems as it was solving and that there were many cases around the country in which students were harshly disciplined for infractions where there was no harm intended or done").

In the end, the task of implementing and amending public school policies is beyond this Court's function. Parents, teachers, school administrators, local politicians, and state officials are all better suited than judges to determine the appropriate limits on searches conducted by school officials. Preservation of order, discipline, and safety in public schools is simply not the domain of the Constitution. And, common sense is not a judicial monopoly or a Constitutional imperative.

III

"[T]he nationwide drug epidemic makes the war against drugs a pressing concern in every school." Board of Ed. of Independent School Dist. No. 92 of Pottawatomie Cty. v. Earls, 536 U.S. 822, 834, 122 S.Ct. 2559, 153 L.Ed.2d 735 (2002). And yet the Court has limited the authority of school officials to conduct searches for the drugs that the officials believe pose a serious safety risk to their students. By doing so, the majority has confirmed that a return to the doctrine of in loco parentis is required to keep the judiciary from essentially seizing control of public schools. Only then will teachers again be able to " 'govern the[ir] pupils, quicken the slothful, spur the indolent, restrain the impetuous, and control the stubborn' " by making " 'rules, giv [ing] commands, and punish[ing] disobedience' " without interference from judges. See Morse, supra, at 414, 127 S.Ct. 2618. By deciding that it is better equipped to decide what behavior should be permitted in schools, the Court has undercut student safety and undermined the authority of school administrators and local officials. Even more troubling, it has done so in a case in which the underlying response by school administrators was reasonable and justified. I cannot join this regrettable decision. I, therefore, respectfully dissent from the Court's determination that this search violated the Fourth Amendment.

Court of Criminal Appeals of Texas,
En Banc.
Randall Anthony GARCIA, Appellant,
v.
The STATE of Texas, Appellee.

No. 945-90.
March 25, 1992.
Rehearing Denied May 20, 1992.
OPINION ON APPELLANT'S PETITION FOR DISCRETIONARY REVIEW

BENAVIDES, Judge.

Appellant seeks to set aside his Murder conviction because evidence illegally seized from his person was erroneously admitted against him at trial in violation of article 38.23 of the Code of Criminal Procedure. He claims the El Paso Court of Appeals erred to hold that the federal inevitable discovery doctrine is an exception to the Texas exclusionary rule. *See* TEX.CRIM.PROC. art. 38.23 (Vernon 1990). The instant cause is one of first impression in this Court.

Appellant and his wife were separated in 1987. Pending conclusion of their divorce action, his wife was awarded temporary custody of their young son. But, during a period of visitation, Appellant took the boy to Florida in defiance of court order. His wife complained to the authorities, and Appellant was soon arrested in Miami and extradited to Houston. After that he lost the right to visit with his son altogether and, on October 8, 1987, was formally arraigned for the felony offense of Interference with Child Custody. The next morning his wife was found dead. The obvious victim of a homicide, she had been beaten, strangled and stabbed.

Soon afterwards, Webster Police Chief Reyes Sonora arrested Appellant at his attorney's office. The police sought him out there in part because they had difficulty locating his young child for a time after discovering his wife's body. But Sonora also knew of the pending criminal charges against Appellant and was told of Appellant's violent nature by the victim's sister. Evidently, he also believed that Appellant had missed a mandatory court appearance and that a warrant had issued for his arrest in connection with the child custody charges. This information turned out to be false. Appellant was arrested even though no warrant was actually issued for him in connection with the murder of his wife until about nine hours after Sonora arrested him in fact.

Meanwhile two photographs were taken of him by the police, each portraying a bruise on his abdomen. At trial, the State contended that the victim inflicted this injury during a struggle with Appellant, and medical testimony tended to support such conclusion. Appellant challenged admissibility of these pictures, together with the accompanying medical testimony, upon the ground that they were fruits of an illegal arrest. His objections were overruled, and in short order the jury convicted him of Murder. His punishment was assessed by the trial judge at confinement in the penitentiary for forty years.

On appeal appellant renewed his complaint that the pictures were the fruits of an illegal arrest made without "warrant and without probable cause." Appellant conceded that a proper basis for the seizure would have existed when a warrant was later issued for his arrest, but that it did not exist when the photographs were taken. The Court of Appeals did not decide the question of probable cause at the time of arrest. Rather, it determined that the evidence would inevitably have been discovered anyway, and affirmed the conviction. *Garcia v. State*, No. 08-89-00242-CR (Tex.App.-El Paso, delivered July 25, 1990) (unpublished opinion). We granted review to decide whether the doctrine of inevitable discovery is an exception to the Texas statutory exclusionary rule.

. . .

This inevitable discovery doctrine is a species of harmless error rule which holds that constitutional violations in the seizure of evidence are inconsequential for purposes of admissibility, not when the outcome of trial was probably unaffected by the illegality, but rather when the outcome of police investigation was probably unaffected by it. *Nix*, 467 U.S. at 443 n. 4, 104 S.Ct. at 2509 n. 4. The rule has been applied in Texas only to federal suppression questions under the exclusionary rule articulated by the United States Supreme Court. Thus, to the extent that Texas law provides an independent basis for the exclusion of evidence, the inevitable discovery exception approved by the United States Supreme Court is simply irrelevant.

This is not to say that the federal exclusionary rule is inapplicable in Texas. Clearly, it does apply here just as it does throughout the United States. *Mapp v. Ohio*, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961). But it need only be implemented by the States insofar as they do not prescribe stricter exclusionary rules themselves.

The people of Texas, acting through their elected representatives, have decided that

[n]o evidence obtained by an officer or other person in violation of any provisions of the Constitution or laws of the State of Texas, or of the Constitution or laws of the United States of America, shall be admitted in evidence against the accused on the trial of any criminal case.

Art. 38.23, V.A.C.C.P. This statute, on its face, absolutely requires the exclusion of all evidence seized in violation of the Fourth Amendment, and because the federal inevitable discovery doctrine is not an exception to core prohibitions of the Fourth Amendment, but only an exception to the federal exclusionary rule, the mandate of article 38.23 to exclude any evidence obtained in violation of the United States Constitution does not, even by necessary implication, require a decision about whether questioned evidence would inevitably have been discovered anyway. The Court of Appeals therefore erred to hold otherwise.

Our principal task in construing the statute is to discover its place in the Texas scheme of criminal jurisprudence. Because article 38.23 is an enactment of our legislature, it represents the democratic will of Texans, not merely an evidentiary adjustment made by the courts to remedy violations of the law. As always, in the case of legislation, courts may interpret, but they may not amend. For this reason, while we are at liberty to impose exceptions upon court-made exclusionary rules, we may not create exceptions to statutory exclusionary rules. Unless a statute itself can fairly be read to include exceptions, no exceptions may be imported by judicial fiat.

Article 38.23 does expressly contain an exception for the good faith reliance of law enforcement officers upon warrants issued by neutral magistrates.[FN2] On its face, however, it contains no others. The State suggests that other exceptions, especially those imposed by the United States Supreme Court on the federal exclusionary rule, should nevertheless be "found" implicit in the statute. Without question, it is often the case that statutes imply more than they say, especially if read together with other laws on the same subject or in such a way as harmonize the law with constitutional requirements. But courts must take the greatest care not to invent a statute of which the legislature gave the public no notice.

. . .

Except under unusual circumstances, therefore, it is best to effectuate the legislative intent evidenced by the plain language of statutes. *Camacho v. State*, 765 S.W.2d 431, 433 (Tex.Crim.App.1989); *see also Patterson v. State*, 769 S.W.2d 938, 940 (Tex.Crim.App.1989). Otherwise, courts risk invading the legislature's province by reading into the law that which is clearly not there. *Ex Parte Halsted*, 147 Tex.Crim. 453, 458, 182 S.W.2d 479, 482 (1944); *see also Miles v. State*, 157 Tex.Crim. 188, 190, 247 S.W.2d 898, 899 (1952). Accordingly, established rules of statutory construction generally require that, where an express exception exists in a statute,

the statute must apply in all cases not excepted. *Ex Parte McIver*, 586 S.W.2d 851, 856 (Tex.Crim.App. [Panel Op.] 1979); *see also State v. Richards*, 157 Tex. 166, 168, 301 S.W.2d 597, 600 (1957). Because we "find" no inevitable discovery exception in article 38.23, we are thus unwilling, as the lower court should have been, to create one by judicial fiat. Certainly, the Legislature has the prerogative to amend Article 38.23 to enact the specific exception to its rule if it chooses. Until that time, however, we must enforce the statute as written, excluding all illegally obtained evidence, with the single exception as set out in the statute.

The judgment of the Court of Appeals is reversed and the cause remanded there for further consideration not inconsistent with this opinion.

MILLER, Judge, concurring.

The majority today proffers an opinion which, ironically, does precisely that which it ostensibly seeks to prevent: it substitutes the unfettered philosophy of the judiciary for the true intent of the Legislature. Simultaneously it renders stare decisis meaningless as a court is once again myopically led down the path of hypertechnicality so decried by those outside the judiciary. In so doing, it ignores the reality of our function within a tripartite form of government. While it is not the role of the judicial branch to either engage in "superlegislating", as the term has come to be known, or to be hypersensitive to the will of a crime-tired and punishment-seeking public; it is this Court's role to construe our Code of Criminal Procedure in a manner that simultaneously balances the protection of the defendant and the interests of justice in contemporary society. A properly balanced analysis requires us to interpret the intent of our Legislature; in this case such analysis calls for a continuation of the application of the "inevitable discovery" doctrine in search and seizure law.

Admittedly, Article 38.23 does not specifically carve an exception known as "inevitable discovery" in the manner which the subsequent statutory addition of the "good faith" exception did. The term "inevitable discovery" in fact came in to fashion some time after the adoption of the 1965 Code. But the mere absence of the term from the Code does not serve to emasculate a doctrine that previously existed in the common law [FN3]. This Court has indicated that the concept of the doctrine existed long before the United States Supreme Court adopted and applied the term "inevitable discovery" in *Nix v. Williams*, 467 U.S. 431, 104 S.Ct. 2501, 81 L.Ed.2d 377 (1984). *E.g. Miller v. State*, 667 S.W.2d 773, 778 (Tex.Crim.App.1984) (rationale of doctrine used although term inevitable discovery not used); *Vanderbilt v. State*, 629 S.W.2d 709, 722 (Tex.Crim.App.1981), *cert. den.,* 456 U.S. 910, 102 S.Ct. 1760, 72 L.Ed.2d 169 (1982) (same); *See* Judge Marvin O. Teague, *Applications of the Exclusionary Rule,* 23 S.TEX.L.J. 633, 648 (1982) (holding in *Vanderbilt* implies approval of Inevitable Discovery Doctrine).

As we noted in our opinion in *Garza v. State:*

As pointed out by former Presiding Judge Onion in an earlier work, this Court has never held that Article 38.23 ... absolutely prevents the application of the several exceptions to the application of the exclusionary rule that have evolved over the years. In *Vanderbilt* [*supra*], this Court noted that the "[t]hree commonly advanced exceptions to the exclusionary rule include the 'independent source,' 'inevitable discovery,' and 'attenuation' doctrines." With respect to the doctrine of inevitable discovery, the United States Supreme Court adopted and explained the inevitable discovery concept in *Nix* [*supra*]:

"If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means ... then the deterrence rationale has so little basis that the evidence should be received." [Citations omitted].

This court has previously applied the principle of inevitable discovery to testimony of witnesses whose discovery was imminent absent illegal state action. See *Vanderbilt*, supra at 722; *Wicker* [*supra*] (Victim's body would have been recovered regardless of the information furnished by defendant's second oral statement); *Dickey* [*supra*] ("Where evidence is obtained after a defendant's constitutional rights have been violated, if the prosecution can establish information by a preponderance of the evidence that the information ultimately or inevitably would have been discovered *by lawful means,* then the deterrence rationale has so little basis that the evidence should have been received.") [Emphasis in original]; *Bell* [*supra*] (Evidence admissible under the rationale of inevitable discovery). In none of the above cases, or any others we have researched, did Article 38.23, supra, proscribe the admission of previously tainted evidence in light of the recognized exception to the rule.

771 S.W.2d 549, 550-551 n. 1 (Tex.Crim.App.1989) (plurality). Thus, the inevitable discovery principle, regardless of its name, had existed for years prior to the 1988 implementation of Subsection b, and, at the time of Subsection b's addition, no other changes to the predecessor Article 727a were made. I conclude that the Legislature did not intend to change the manner in which Texas courts have traditionally dealt with this issue, *Green*, 615 S.W.2d at 711-713, and in fact ratified our prior decisions.

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Court of Appeals of Texas,
Houston (14th Dist.).
Wesley Lanier RICHARDS, Appellant
v.
The STATE of Texas, Appellee.

No. 14-03-00194-CR.
Sept. 28, 2004.
Rehearing Overruled Dec. 23, 2004.
Discretionary Review Refused June 8, 2005.
EN BANC OPINION

WANDA McKEE FOWLER, Justice.

Appellant pleaded no contest to misdemeanor possession of a controlled substance and the trial court assessed punishment at six months' deferred adjudication. In six issues, appellant contends the trial court erred in denying his motion to suppress evidence because (1) he should have been given alternatives to having his car impounded, (2) the applicable written guidelines of the Houston Police Department are unconstitutionally vague, (3) the police officers unconstitutionally acted in bad faith by impounding his car, and (4) the search of his car was unconstitutional because it was not conducted pursuant to any established inventory guidelines. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On November 10, 2001, Houston Police Department Officers Terry Shane Seagler and David Myers were working on a special assignment of guarding the mayor's house on Potomac. The officers were in plain clothes and in an unmarked pickup truck. Officer Seagler observed appellant's car approaching and saw a passenger, Steve Douglas, throw a pumpkin at a parked car. The pumpkin damaged the parked car's trunk and left tail light.

The officers pursued appellant and observed him run a stop sign, fail to signal a turn, speed, and run a stop light. The officers caught up with appellant and Officer Seagler identified himself as a police officer. Appellant then stopped his car on Russet, a dead-end street. The officers requested backup and interviewed appellant, Douglas, and two additional juvenile passengers.

Officers David Giannavola and Joseph Antonio Mora, Jr. independently arrived in response to the request for backup. The officers determined that Officers Seagler and Myers would complete the report and file charges, and Officers Giannavola and Mora would transport appellant and Douglas to jail. Officers Seagler and Myers returned to the scene on Potomac.

Officer Mora arrested appellant for traffic violations, arrested Douglas for criminal mischief, and took the juveniles into custody for curfew violations. Officer Mora observed that appellant's car was illegally parked because it was not within eighteen inches of the curb. He decided to impound and tow the car and called a wrecker to the scene.

Before appellant's car was towed, Officer Mora conducted an inventory. He unlocked the car's trunk with the key and found a closed red backpack. He opened the backpack and found marijuana and what was later determined to be peyote. Appellant indicated the backpack was his and Officer Mora arrested him for possession of marijuana.

Appellant was initially charged with misdemeanor possession of marijuana. He moved to suppress the evidence obtained through the inventory of his car and a suppression hearing was conducted. The State dropped the misdemeanor charge in favor of proceeding on a felony charge of possession of peyote.

Appellant again moved to suppress the evidence obtained through the inventory of his car. Because the relevant facts had not changed, the parties agreed to have the motion decided on the

basis of the transcript from the prior misdemeanor hearing. The trial court denied appellant's motion to suppress.

ANALYSIS

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III. Alternatives to Impoundment

In his first three issues, appellant contends the trial court erred in denying his motion to suppress because he was not given alternatives to having his car impounded. The three specific alternatives appellant argues he was not given were (1) leaving his car legally parked at the scene, (2) releasing his car to one of the passengers, and (3) leaving the car at the nearby home of one of the passengers.

To ensure the validity of its impoundments, the Houston Police Department has established a written policy for its officers to follow when the owner is taken into custody. That policy provides the following:

Prisoners are responsible for the disposition of their vehicles unless such vehicles are subject to seizure or needed as evidence. Prisoners will choose one of the following alternatives for the disposition of their vehicles:

a. *Release to Another Party.* The vehicle may be released to a third person. Officers must ensure the third person has a valid driver's license and insurance before being allowed to operate the vehicle.

b. *Leave Vehicle Parked.* Vehicles may be left at the scene if they are legally parked. If the vehicle is to be left on private property, permission should be obtained from the property's owner or manager.

c. *Prisoner-Requested Tow.* The vehicle may be towed at the prisoner's expense.

HOUSTON POLICE DEPARTMENT, GENERAL ORDER no. 600-10, § 7 (Nov. 19, 1999). The first two alternatives are also required by common law. *See, e.g.,* Stephen v. State, 677 S.W.2d 42, 44 n. 1 (Tex.Crim.App.1984) (stating the police should respect a prisoner's wish to leave his car with a companion who had a valid driver's license); *Josey v. State*, 981 S.W.2d 831, 842-43 (Tex.App.-Houston [14th Dist.] 1998, pet. ref'd) (examining the availability of both options); *Smith v. State*, 759 S.W.2d 163, 167 (Tex.App.-Houston [14th Dist.] 1988, pet. ref'd) (holding that the prisoner should have been allowed to choose whether to leave his car parked in a public parking lot). Appellant was thus entitled to either of them regardless of police procedure. *See* Stephen, 677 S.W.2d at 44 n. 1 (holding that a policy that only allowed release to relatives was "much too narrow"). The third alternative, a prisoner-requested tow, was not argued to the attention of the trial court, so we will not consider it here. *See* TEX.R.APP. P. 33.1(a).

The policy states that a police-authorized tow is permissible when "the prisoner is not present or is medically incapable of or unwilling to select from [these] alternatives."GENERAL ORDER no. 600-10, § 7. The policy does not address a situation when none of the alternatives are available, presumably because whenever a police-authorized tow is possible a prisoner-requested tow will also be possible. However, we hold that a police-authorized tow is also permissible when a prisoner is incapable, for other than medical reasons, of selecting from these alternatives.

First, appellant argues he should have been permitted to leave his car legally parked at the scene. Two officers testified that the car was not legally parked because it was more than eighteen inches from the curb. Although appellant contends the car could have been moved several inches closer to the curb and thus legally parked, the police were not required to offer this option. *See Josey v. State*, 981 S.W.2d 831, 843 (Tex.App.-Houston [14th Dist.] 1998, pet. ref'd). In *Josey*, the defendant's car could have been moved so that it was safely parked on the grass by the side of the

road, but at the time of the impoundment the officers did not know who owned the car and thus could not determine if the owner would have preferred to leave the car parked there as an alternative to impoundment. *Id.* Similarly, the officers here did not know who owned the car driven by appellant. The evidence in the record indicates that the car had been rented, but there is no evidence that the officers knew at the time of impoundment that the car had been rented to appellant, or even whether it was in fact rented to appellant. Therefore, there was no "objectively demonstrable evidence that [the alternative], did, in fact, exist." *Id.* (quoting *Mayberry v. State*, 830 S.W.2d 176, 180 (Tex.App.-Dallas 1992, pet ref'd)).

Second, appellant argues he should have been allowed to release the car to one of his passengers. The two passengers other than appellant and Douglas, who was under arrest for criminal mischief, were both juveniles. Although there was conflicting testimony as to whether appellant was pulled over after midnight or shortly before midnight, the judge was to determine the weight to give conflicting testimony. We cannot say that it was an abuse of discretion for the trial court to determine that the impoundment occurred after midnight and that the juvenile passengers were unable to take possession of the car due to the midnight curfew. Additionally, there is again no evidence that the officers knew at the time of impoundment that the car had been rented to appellant.[FN5] *Josey*, 981 S.W.2d at 843.

FN5. Nor is there any evidence that the rental agreement would have permitted the car being released to one of the juvenile passengers.

Third, appellant argues that he should have been allowed to leave the car at the nearby home of one of the passengers. However, parking the car at a nearby home is neither an option under the police policy or the common law. *See* GENERAL ORDER no. 600-10, § 7; *Mayberry v. State*, 830 S.W.2d 176, 180 (Tex.App.-Dallas 1992, pet. ref'd) ("It was not incumbent upon the officers to locate the occupant of the house to determine whether appellant's car could remain in the driveway."). Further, the police were not required to allow either appellant or the passenger to move the car to the nearby home for the same reasons the first two alternatives were not available.

Because none of the alternatives argued at the trial court by appellant were available, the impoundment of his car was permissible. We overrule appellant's first three issues.

V. Bad Faith

In his fifth issue, appellant contends the officers impounded his car in bad faith. Appellant alleges the arresting officers demonstrated bad behavior in (1) directing appellant to stop the car, (2) instructing appellant to move the car to the opposite side of the street, (3) blocking the car and forcing appellant to stop when he was moving it to the opposite side of the street, (4) criticizing appellant's parking as not being "technically legal," (5) failing to present appellant with the alternatives provided by the department policy, (6) ignoring the alternative of leaving the car at the passenger's house, (7) refusing to allow the car to be moved in order to be legally parked, (8) holding the passengers during the investigation and thereby denying appellant the opportunity to release the car to one of them, and (9) towing the car to the scene of the incident.

As we have already held, however, the alternatives of releasing the car to a passenger and allowing the car to be left legally parked were unavailable. The officers could not have acted in bad faith in failing to offer unavailable options. Although there is some evidence the officers did not offer the alternatives because they were unaware of the policy, such ignorance would not rise to the level of bad faith. We overrule appellant's fifth issue.

VI. Guidelines

In his sixth issue, appellant contends the inventory search of the car's trunk and the backpack were not conducted pursuant to any established department guidelines. The department policy provides,

Whenever a prisoner authorizes a nonconsent tow, the officer will personally conduct an inventory of the vehicle and will complete the *Towed Vehicle Disposition Record* form. A detailed inventory list will be written on the form. Officers must be specific in identifying inventoried items. General terms such as *miscellaneous property* will not be used.

GENERAL ORDER no. 600-10, § 7. The policy does not specifically provide whether officers are authorized to search locked trunks or closed backpacks.

Either standardized criteria or established routine must regulate the opening of closed containers during an inventory search. *Florida v. Wells*, 495 U.S. 1, 4, 110 S.Ct. 1632, 109 L.Ed.2d 1 (1990); *Moberg v. State*, 810 S.W.2d 190, 195 (Tex.Crim.App.1991) (quoting *Wells*). The criteria or routine regulating inventory searches must be designed to produce an inventory and not serve as "a ruse for a general rummaging in order to discover incriminating evidence." *Wells*, 495 U.S. at 4, 110 S.Ct. 1632; *see also Moberg*, 810 S.W.2d at 196.

The officer performing the inventory testified that, although there was no written guideline, he was trained to inventory any container he had access to, including a locked trunk if he has the key for it.[FN7] Thus, although there is apparently no written policy governing inventory searches of closed containers, there is evidence of an established routine governing the opening of closed containers. The trial court therefore did not abuse its discretion in finding that the inventory search was permissible.

FN7. The officer's testimony was,

Q: Do you have any guidelines for the trunk?

A: Yes. If the ignition key goes with the vehicle, if it opens the trunk, I inventory that. Any access I inventory.

Q: Excuse me-

Court: Hold on. I get to talk. And you don't get the interrupt me. That's a guideline?

A: That's how I was trained.

Further, there is no evidence that the search was a ruse to discover incriminating evidence; searching the locked trunk and backpack furthered the purpose of allowing inventory searches. "[I]nventory procedures serve to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger." *Colorado v. Bertine*, 479 U.S. 367, 372, 107 S.Ct. 738, 93 L.Ed.2d 739 (1987). The opening and inventory of easily-accessible containers serves both to protect the owner's property and to insure against false claims. *See Illinois v. Lafayette*, 462 U.S. 640, 647-48, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983) (holding the opening and inventory of a shoulder bag was reasonable despite the possible alternative of securing the bag as a whole). We overrule appellant's sixth issue.

We affirm the judgment of the trial court.

United States v. Williams
504 U.S. 36 (1992)

Justice SCALIA delivered the opinion of the Court.

The question presented in this case is whether a district court may dismiss an otherwise valid indictment because the Government failed to disclose to the grand jury "substantial exculpatory evidence" in its possession.

I

On May 4, 1988, respondent John H. Williams, Jr., a Tulsa, Oklahoma, investor, was indicted by a federal grand jury on seven counts of "knowingly mak[ing] [a] false statement or report ... for the purpose of influencing ... the action [of a federally insured financial institution]," in violation of 18 U.S.C. § 1014 (1988 ed., Supp. II).

Shortly after arraignment, the District Court granted Williams' motion for disclosure of all exculpatory portions of the grand jury transcripts. See *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Upon reviewing this material, Williams demanded that the District Court dismiss the indictment, alleging that the Government had failed to fulfill its obligation . . . to present "substantial exculpatory evidence" to the grand jury . . . [This evidence] he contended, belied an intent to mislead the banks, and thus directly negated an essential element of the charged offense.

[The District Court found] that the withheld evidence was "relevant to an essential element of the crime charged," created " 'a reasonable doubt about [respondent's] guilt,' and thus "render[ed] the grand jury's decision to indict gravely suspect." Upon the Government's appeal, the Court of Appeals affirmed the District Court's order, [finding] that the Government's behavior " 'substantially influence[d]' " the grand jury's decision to indict, or at the very least raised a " 'grave doubt that the decision to indict was free from such substantial influence.' ". . .

III

Respondent does not contend that the Fifth Amendment itself obliges the prosecutor to disclose substantial exculpatory evidence in his possession to the grand jury. Instead, building on our statement that the federal courts "may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress," *United States v. Hasting*, 461 U.S. 499, 505, 103 S.Ct. 1974, 1978, 76 L.Ed.2d 96 (1983), he argues that imposition of the Tenth Circuit's disclosure rule is supported by the courts' "supervisory power." We think not. *Hasting*, and the cases that rely upon the principle it expresses, deal strictly with the courts' power to control their *own* procedures. See, *e.g.*, *Jencks v. United States*, 353 U.S. 657, 667-668, 77 S.Ct. 1007, 1013, 1 L.Ed.2d 1103 (1957); *McNabb v. United States*, 318 U.S. 332, 63 S.Ct. 608, 87 L.Ed. 819 (1943). That power has been applied not only to improve the truth-finding process of the trial, see, *e.g.*, *Mesarosh v. United States*, 352 U.S. 1, 9-14, 77 S.Ct. 1, 5-8, 1 L.Ed.2d 1 (1956), but also to prevent parties from reaping benefit or incurring harm from violations of substantive or procedural rules (imposed by the Constitution or laws) governing matters apart from the trial itself, see, *e.g.*, *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914). Thus, *Bank of Nova Scotia v. United States*, 487 U.S. 250, 108 S.Ct. 2369, 101 L.Ed.2d 228 (1988), makes clear that the supervisory power can be used to dismiss an indictment because of misconduct before the grand jury, at least where that misconduct amounts to a violation of one of those "few, clear rules which were carefully drafted and approved by this Court and by Congress to ensure the integrity of the grand jury's functions," *United States v. Mechanik*, 475 U.S. 66, 74, 106 S.Ct. 938, 943, 89 L.Ed.2d 50 (1986) (O'CONNOR, J., concurring in judgment).

We did not hold in *Bank of Nova Scotia*, however, that the courts' supervisory power could be used, not merely as a means of enforcing or vindicating legally compelled standards of prosecutorial conduct before the grand jury, but as a means of *prescribing* those standards of prosecutorial conduct in the first instance-just as it may be used as a means of establishing standards of prosecutorial conduct before the courts themselves. It is this latter exercise that respondent demands. Because the grand jury is an institution separate from the courts, over whose functioning the courts do not preside, we think it clear that, as a general matter at least, no such "supervisory" judicial authority exists, and that the disclosure rule applied here exceeded the Tenth Circuit's authority.

A

"[R]ooted in long centuries of Anglo-American history," *Hannah v. Larche*, 363 U.S. 420, 490, 80 S.Ct. 1502, 1544, 4 L.Ed.2d 1307 (1960) (Frankfurter, J., concurring in result), the grand jury is mentioned in the Bill of Rights, but not in the body of the Constitution. It has not been textually assigned, therefore, to any of the branches described in the first three Articles. It " 'is a constitutional fixture in its own right.' " *United States v. Chanen*, 549 F.2d 1306, 1312 (CA9 1977) (quoting *Nixon v. Sirica*, 159 U.S.App.D.C. 58, 70, n. 54, 487 F.2d 700, 712, n. 54 (1973)), cert. denied, 434 U.S. 825, 98 S.Ct. 72, 54 L.Ed.2d 83 (1977). In fact the whole theory of its function is that it belongs to no branch of the institutional Government, serving as a kind of buffer or referee between the Government and the people. See *Stirone v. United States*, 361 U.S. 212, 218, 80 S.Ct. 270, 273, 4 L.Ed.2d 252 (1960); *Hale v. Henkel*, 201 U.S. 43, 61, 26 S.Ct. 370, 373, 50 L.Ed. 652 (1906); G. Edwards, The Grand Jury 28-32 (1906). Although the grand jury normally operates, of course, in the courthouse and under judicial auspices, its institutional relationship with the Judicial Branch has traditionally been, so to speak, at arm's length. Judges' direct involvement in the functioning of the grand jury has generally been confined to the constitutive one of calling the grand jurors together and administering their oaths of office. See *United States v. Calandra*, 414 U.S. 338, 343, 94 S.Ct. 613, 617, 38 L.Ed.2d 561 (1974); Fed.Rule Crim.Proc. 6(a).

The grand jury's functional independence from the Judicial Branch is evident both in the scope of its power to investigate criminal wrongdoing and in the manner in which that power is exercised. "Unlike [a] [c]ourt, whose jurisdiction is predicated upon a specific case or controversy, the grand jury 'can investigate merely on suspicion that the law is being violated, or even because it wants assurance that it is not.' " *United States v. R. Enterprises, Inc.*, 498 U.S. 292, 297, 111 S.Ct. 722, 726, 112 L.Ed.2d 795 (1991) (quoting *United States v. Morton Salt Co.*, 338 U.S. 632, 642-643, 70 S.Ct. 357, 364, 94 L.Ed. 401 (1950)). It need not identify the offender it suspects, or even "the precise nature of the offense" it is investigating. *Blair v. United States*, 250 U.S. 273, 282, 39 S.Ct. 468, 471, 63 L.Ed. 979 (1919). The grand jury requires no authorization from its constituting court to initiate an investigation, see *Hale, supra*, 201 U.S., at 59-60, 65, 26 S.Ct., at 373, 375, nor does the prosecutor require leave of court to seek a grand jury indictment. And in its day-to-day functioning, the grand jury generally operates without the interference of a presiding judge. See *Calandra, supra*, 414 U.S., at 343, 94 S.Ct., at 617. It swears in its own witnesses, Fed.Rule Crim.Proc. 6(c), and deliberates in total secrecy, see *United States v. Sells Engineering, Inc.*, 463 U.S. 418, 424-425, 103 S.Ct. 3133, 3138, 77 L.Ed.2d 743 (1983).

True, the grand jury cannot compel the appearance of witnesses and the production of evidence, and must appeal to the court when such compulsion is required. See, *e.g.*, *Brown v. United States*, 359 U.S. 41, 49, 79 S.Ct. 539, 545, 3 L.Ed.2d 609 (1959). And the court will refuse to lend its assistance when the compulsion the grand jury seeks would override rights accorded by the Constitution, see, *e.g.*, *Gravel v. United States*, 408 U.S. 606, 92 S.Ct. 2614, 33 L.Ed.2d 583 (1972) (grand jury subpoena effectively qualified by order limiting questioning so as to preserve Speech or Debate Clause immunity), or even testimonial

privileges recognized by the common law, see *In re Grand Jury Investigation of Hugle*, 754 F.2d 863 (CA9 1985) (opinion of Kennedy, J.) (same with respect to privilege for confidential marital communications). Even in this setting, however, we have insisted that the grand jury remain "free to pursue its investigationsunhindered by external influence or supervision so long as it does not trench upon the legitimate rights of any witness called before it." *United States v. Dionisio*, 410 U.S. 1, 17-18, 93 S.Ct. 764, 773, 35 L.Ed.2d 67 (1973). Recognizing this tradition of independence, we have said that the Fifth Amendment's "constitutional guarantee *presupposes* an investigative body 'acting independently of either prosecuting attorney *or judge* '...." *Id.*, at 16, 93 S.Ct., at 773 (emphasis added) (quoting *Stirone*, *supra*, 361 U.S., at 218, 80 S.Ct., at 273).

No doubt in view of the grand jury proceeding's status as other than a constituent element of a "criminal prosecutio[n]," U.S. Const., Amdt. 6, we have said that certain constitutional protections afforded defendants in criminal proceedings have no application before that body. The Double Jeopardy Clause of the Fifth Amendment does not bar a grand jury from returning an indictment when a prior grand jury has refused to do so. See *Ex parte United States*, 287 U.S. 241, 250-251, 53 S.Ct. 129, 132, 77 L.Ed. 283 (1932); *United States v. Thompson*, 251 U.S. 407, 413-415, 40 S.Ct. 289, 292, 64 L.Ed. 333 (1920). We have twice suggested, though not held, that the Sixth Amendment right to counsel does not attach when an individual is summoned to appear before a grand jury, even if he is the subject of the investigation. See *United States v. Mandujano*, 425 U.S. 564, 581, 96 S.Ct. 1768, 1778, 48 L.Ed.2d 212 (1976) (plurality opinion); *In re Groban*, 352 U.S. 330, 333, 77 S.Ct. 510, 513, 1 L.Ed.2d 376 (1957); see also Fed.Rule Crim.Proc. 6(d). And although "the grand jury may not force a witness to answer questions in violation of [the Fifth Amendment's] constitutional guarantee" against self-incrimination, *Calandra*, *supra*, 414 U.S., at 346, 94 S.Ct., at 619 (citing *Kastigar v. United States*, 406 U.S. 441, 92 S.Ct. 1653, 32 L.Ed.2d 212 (1972)), our cases suggest that an indictment obtained through the use of evidence previously obtained in violation of the privilege against self-incrimination "is nevertheless valid." *Calandra*, *supra*, 414 U.S., at 346, 94 S.Ct., at 619; see *Lawn v. United States*, 355 U.S. 339, 348-350, 78 S.Ct. 311, 317-318, 2 L.Ed.2d 321 (1958); *United States v. Blue*, 384 U.S. 251, 255, n. 3, 86 S.Ct. 1416, 1419, n. 3, 16 L.Ed.2d 510 (1966).

Given the grand jury's operational separateness from its constituting court, it should come as no surprise that we have been reluctant to invoke the judicial supervisory power as a basis for prescribing modes of grand jury procedure. Over the years, we have received many requests to exercise supervision over the grand jury's evidence-taking process, but we have refused them all, including some more appealing than the one presented today. In *United States v. Calandra*, *supra*, a grand jury witness faced questions that were allegedly based upon physical evidence the Government had obtained through a violation of the Fourth Amendment; we rejected the proposal that the exclusionary rule be extended to grand jury proceedings, because of "the potential injury to the historic role and functions of the grand jury." 414 U.S., at 349, 94 S.Ct., at 620. In *Costello v. United States*, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1956), we declined to enforce the hearsay rule in grand jury proceedings, since that "would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules." *Id.*, at 364, 76 S.Ct., at 409.

These authorities suggest that any power federal courts may have to fashion, on their own initiative, rules of grand jury procedure is a very limited one, not remotely comparable to the power they maintain over their own proceedings. See *United States v. Chanen*, 549 F.2d, at 1313. It certainly would not permit judicial reshaping of the grand jury institution, substantially altering the traditional relationships between the prosecutor, the constituting court, and the grand jury itself. Cf., *e.g.*, *United States v. Payner*, 447 U.S. 727, 736, 100 S.Ct. 2439, 2447, 65 L.Ed.2d 468 (1980) (supervisory power may not be applied to permit defendant to invoke third party's Fourth Amendment rights); see generally Beale,

Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts, 84 Colum.L.Rev. 1433, 1490-1494, 1522 (1984). As we proceed to discuss, that would be the consequence of the proposed rule here.

B

Respondent argues that the Court of Appeals' rule can be justified as a sort of Fifth Amendment "common law," a necessary means of assuring the constitutional right to the judgment "of an independent and informed grand jury," *Wood v. Georgia*, 370 U.S. 375, 390, 82 S.Ct. 1364, 1373, 8 L.Ed.2d 569 (1962). Brief for Respondent 27. Respondent makes a generalized appeal to functional notions: Judicial supervision of the quantity and quality of the evidence relied upon by the grand jury plainly facilitates, he says, the grand jury's performance of its twin historical responsibilities, *i.e.*, bringing to trial those who may be justly accused and shielding the innocent from unfounded accusation and prosecution. See, *e.g.*, *Stirone v. United States*, 361 U.S., at 218, n. 3, 80 S.Ct., at 273, n. 3. We do not agree. The rule would neither preserve nor enhance the traditional functioning of the institution that the Fifth Amendment demands. To the contrary, requiring the prosecutor to present exculpatory as well as inculpatory evidence would alter the grand jury's historical role, transforming it from an accusatory to an adjudicatory body.

It is axiomatic that the grand jury sits not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge. See *United States v. Calandra*, 414 U.S., at 343, 94 S.Ct., at 617. That has always been so; and to make the assessment it has always been thought sufficient to hear only the prosecutor's side. As Blackstone described the prevailing practice in 18th-century England, the grand jury was "only to hear evidence on behalf of the prosecution[,] for the finding of an indictment is only in the nature of an enquiry or accusation, which is afterwards to be tried and determined." 4 W. Blackstone, Commentaries 300 (1769); see also 2 M. Hale, Pleas of the Crown 157 (1st Am. ed. 1847). So also in the United States. According to the description of an early American court, three years before the Fifth Amendment was ratified, it is the grand jury's function not "to enquire ... upon what foundation [the charge may be] denied," or otherwise to try the suspect's defenses, but only to examine "upon what foundation [the charge] is made" by the prosecutor. *Respublica v. Shaffer*, 1 U.S. (1 Dall.) 236, 1 L.Ed. 116 (O.T.Phila.1788); see also F. Wharton, Criminal Pleading and Practice § 360, pp. 248-249 (8th ed. 1880). As a consequence, neither in this country nor in England has the suspect under investigation by the grand jury ever been thought to have a right to testify or to have exculpatory evidence presented. See 2 Hale, *supra*, at 157; *United States ex rel. McCann v. Thompson*, 144 F.2d 604, 605-606 (CA2), cert. denied, 323 U.S. 790, 65 S.Ct. 313, 89 L.Ed. 630 (1944).

Imposing upon the prosecutor a legal obligation to present exculpatory evidence in his possession would be incompatible with this system. If a "balanced" assessment of the entire matter is the objective, surely the first thing to be done-rather than requiring the prosecutor to say what he knows in defense of the target of the investigation-is to entitle the target to tender his own defense. To require the former while denying (as we do) the latter would be quite absurd. It would also be quite pointless, since it would merely invite the target to circumnavigate the system by delivering his exculpatory evidence to the prosecutor, whereupon it would *have* to be passed on to the grand jury-unless the prosecutor is willing to take the chance that a court will not deem the evidence important enough to qualify for mandatory disclosure. See, *e.g.*, *United States v. Law Firm of Zimmerman & Schwartz, P.C.*, 738 F.Supp. 407, 411 (Colo.1990) (duty to disclose exculpatory evidence held satisfied when prosecution tendered to the grand jury defense-provided exhibits, testimony, and explanations of the governing law), aff'd *sub nom.* *United States v. Brown*, 943 F.2d 1246, 1257 (CA10 1991).

Respondent acknowledges (as he must) that the "common law" of the grand jury is not violated if the *grand jury itself* chooses to hear no more evidence than that which suffices to

convince it an indictment is proper. Cf. *Thompson*, *supra*, at 607. Thus, had the Government offered to familiarize the grand jury in this case with the five boxes of financial statements and deposition testimony alleged to contain exculpatory information, and had the grand jury rejected the offer as pointless, respondent would presumably agree that the resulting indictment would have been valid. Respondent insists, however, that courts must require the modern prosecutor to alert the grand jury to the nature and extent of the available exculpatory evidence, because otherwise the grand jury "merely functions as an arm of the prosecution." Brief for Respondent 27. We reject the attempt to convert a nonexistent duty of the grand jury itself into an obligation of the prosecutor. The authority of the prosecutor to seek an indictment has long been understood to be "coterminous with the authority of the grand jury to entertain [the prosecutor's] charges." *United States v. Thompson*, 251 U.S., at 414, 40 S.Ct., at 292. If the grand jury has no obligation to consider all "substantial exculpatory" evidence, we do not understand how the prosecutor can be said to have a binding obligation to present it.

. . .

[R]espondent argues that a rule requiring the prosecutor to disclose exculpatory evidence to the grand jury would, by removing from the docket unjustified prosecutions, save valuable judicial time. That depends, we suppose, upon what the ratio would turn out to be between unjustified prosecutions eliminated and grand jury indictments challenged-for the latter as well as the former consume "valuable judicial time." We need not pursue the matter; if there is an advantage to the proposal, Congress is free to prescribe it. For the reasons set forth above, however, we conclude that courts have no authority to prescribe such a duty pursuant to their inherent supervisory authority over their own proceedings. The judgment of the Court of Appeals is accordingly reversed, and the cause is remanded for further proceedings consistent with this opinion.

So ordered.

Justice STEVENS, with whom Justice BLACKMUN and Justice O'CONNOR join, and with whom Justice THOMAS joins as to Parts II and III, dissenting.

Like the Hydra slain by Hercules, prosecutorial misconduct has many heads. Some are cataloged in Justice Sutherland's classic opinion for the Court in *Berger v. United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935) . . .

Justice Sutherland's identification of the basic reason why that sort of misconduct is intolerable merits repetition:

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor-indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one." *Berger v. United States*, 295 U.S., at 88, 55 S.Ct. at 633.

It is equally clear that the prosecutor has the same duty to refrain from improper methods calculated to produce a wrongful indictment. Indeed, the prosecutor's duty to protect the fundamental fairness of judicial proceedings assumes special importance when he is presenting evidence to a grand jury. As the Court of Appeals for the Third Circuit recognized, "the costs of continued unchecked prosecutorial misconduct" before the grand jury are particularly substantial because there

"the prosecutor operates without the check of a judge or a trained legal adversary, and virtually immune from public scrutiny. The prosecutor's abuse of his special relationship to the grand jury poses an enormous risk to defendants as well. For while in theory a trial provides the defendant with a full opportunity to contest and disprove the charges against him, in practice, the handing up of an indictment will often have a devastating personal and professional impact that a later dismissal or acquittal can never undo. Where the potential for abuse is so great, and the consequences of a mistaken indictment so serious, the ethical responsibilities of the prosecutor, and the obligation of the judiciary to protect against even the appearance of unfairness, are correspondingly heightened." *United States v. Serubo*, 604 F.2d 807, 817 (CA3 1979).

In an opinion that I find difficult to comprehend, the Court today repudiates the assumptions underlying these cases and seems to suggest that the court has no authority to supervise the conduct of the prosecutor in grand jury proceedings so long as he follows the dictates of the Constitution, applicable statutes, and Rule 6 of the Federal Rules of Criminal Procedure. The Court purports to support this conclusion by invoking the doctrine of separation of powers and citing a string of cases in which we have declined to impose categorical restraints on the grand jury. Needless to say, the Court's reasoning is unpersuasive.

Although the grand jury has not been "textually assigned" to "any of the branches described in the first three Articles" of the Constitution, *ante,* at 1742, it is not an autonomous body completely beyond the reach of the other branches. Throughout its life, from the moment it is convened until it is discharged, the grand jury is subject to the control of the court. As Judge Learned Hand recognized over 60 years ago, "a grand jury is neither an officer nor an agent of the United States, but a part of the court." *Falter v. United States*, 23 F.2d 420, 425 (CA2), cert. denied, 277 U.S. 590, 48 S.Ct. 528, 72 L.Ed. 1003 (1928).

This Court has, of course, long recognized that the grand jury has wide latitude to investigate violations of federal law as it deems appropriate and need not obtain permission from either the court or the prosecutor. See, *e.g., id.*, at 343, 94 S.Ct., at 617; *Costello v. United States*, 350 U.S. 359, 362, 76 S.Ct. 406, 408, 100 L.Ed. 397 (1956); *Hale v. Henkel*, 201 U.S. 43, 65, 26 S.Ct. 370, 375, 50 L.Ed. 652 (1906). Correspondingly, we have acknowledged that "its operation generally is unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials." *Calandra*, 414 U.S., at 343, 94 S.Ct., at 617. But this is because Congress and the Court have generally thought it best not to impose procedural restraints on the grand jury; it is not because they lack all power to do so. . . .

Although the Court recognizes that it may invoke its supervisory authority to fashion and enforce privilege rules applicable in grand jury proceedings, *ibid.*, and suggests that it may also invoke its supervisory authority to fashion other limited rules of grand jury procedure, *ante,* at 1743, it concludes that it has no authority to *prescribe* "standards of prosecutorial conduct before the grand jury," *ante,* at 1742, because that would alter the grand jury's historic role as an independent, inquisitorial institution. I disagree. . . .

Unlike the Court, I am unwilling to hold that countless forms of prosecutorial misconduct must be tolerated-no matter how prejudicial they may be, or how seriously they may distort the legitimate function of the grand jury-simply because they are not proscribed by Rule 6 of

the Federal Rules of Criminal Procedure or a statute that is applicable in grand jury proceedings. Such a sharp break with the traditional role of the federal judiciary is unprecedented, unwarranted, and unwise. Unrestrained prosecutorial misconduct in grand jury proceedings is inconsistent with the administration of justice in the federal courts and should be redressed in appropriate cases by the dismissal of indictments obtained by improper methods.

What, then, is the proper disposition of this case? I agree with the Government that the prosecutor is not required to place all exculpatory evidence before the grand jury. A grand jury proceeding is an *ex parte* investigatory proceeding to determine whether there is probable cause to believe a violation of the criminal laws has occurred, not a trial. Requiring the prosecutor to ferret out and present all evidence that could be used at trial to create a reasonable doubt as to the defendant's guilt would be inconsistent with the purpose of the grand jury proceeding and would place significant burdens on the investigation. But that does not mean that the prosecutor may mislead the grand jury into believing that there is probable cause to indict by withholding clear evidence to the contrary. I thus agree with the Department of Justice that "when a prosecutor conducting a grand jury inquiry is personally aware of substantial evidence which directly negates the guilt of a subject of the investigation, the prosecutor must present or otherwise disclose such evidence to the grand jury before seeking an indictment against such a person." U.S. Dept. of Justice, United States Attorneys' Manual ¶ 9-11.233, p. 88 (1988). . . .

Justice SCALIA delivered the opinion of the Court.
We consider whether a break in custody ends the presumption of involuntariness established in *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

I

In August 2003, a social worker assigned to the Child Advocacy Center in the Criminal Investigation Division of the Hagerstown Police Department referred to the department allegations that respondent Michael Shatzer, Sr., had sexually abused his 3-year-old son. At that time, Shatzer was incarcerated at the Maryland Correctional Institution-Hagerstown, serving a sentence for an unrelated child-sexual-abuse offense. Detective Shane Blankenship was assigned to the investigation and interviewed Shatzer at the correctional institution on August 7, 2003. Before asking any questions, Blankenship reviewed Shatzer's *Miranda* rights with him, and obtained a written waiver of those rights. When Blankenship explained that he was there to question Shatzer about sexually abusing his son, Shatzer expressed confusion-he had thought Blankenship was an attorney there to discuss the prior crime for which he was incarcerated. Blankenship clarified the purpose of his visit, and Shatzer declined to speak without an attorney. Accordingly, Blankenship ended the interview, and Shatzer was released back into the general prison population. Shortly thereafter, Blankenship closed the investigation.

Two years and six months later, the same social worker referred more specific allegations to the department about the same incident involving Shatzer. Detective Paul Hoover, from the same division, was assigned to the investigation. He and the social worker interviewed the victim, then eight years old, who described the incident in more detail. With this new information in hand, on March 2, 2006, they went to the Roxbury Correctional Institute, to which Shatzer had since been transferred, and interviewed Shatzer in a maintenance room outfitted with a desk and three chairs. Hoover explained that he wanted to ask Shatzer about the alleged incident involving Shatzer's son. Shatzer was surprised because he thought that the investigation had been closed, but Hoover explained they had opened a new file. Hoover then read Shatzer his *Miranda* rights and obtained a written waiver on a standard department form.

Hoover interrogated Shatzer about the incident for approximately 30 minutes. Shatzer denied ordering his son to perform fellatio on him, but admitted to masturbating in front of his son from a distance of less than three feet. Before the interview ended, Shatzer agreed to Hoover's request that he submit to a polygraph examination. At no point during the interrogation did Shatzer request to speak with an attorney or refer to his prior refusal to answer questions without one.

Five days later, on March 7, 2006, Hoover and another detective met with Shatzer at the correctional facility to administer the polygraph examination. After reading Shatzer his *Miranda* rights and obtaining a written waiver, the other detective administered the test and concluded that Shatzer had failed. When the detectives then questioned Shatzer, he became upset, started to cry, and incriminated himself by saying, " 'I didn't force him. I didn't force him.' " 405 Md. 585, 590, 954 A.2d 1118, 1121 (2008). After making this inculpatory statement, Shatzer requested an attorney, and Hoover promptly ended the interrogation.

The State's Attorney for Washington County charged Shatzer with second-degree sexual offense, sexual child abuse, second-degree assault, and contributing to conditions rendering a child in need of assistance. Shatzer moved to suppress his March 2006 statements pursuant to *Edwards*. The trial court held a suppression hearing and later denied Shatzer's motion. The *Edwards* protections did not apply, it reasoned, because Shatzer had experienced a break in custody for *Miranda* purposes between the 2003 and 2006 interrogations. No. 21-K-06-37799 (Cir. Ct. Washington Cty., Md., Sept. 14, 2006), App. 55. Shatzer pleaded not guilty, waived his right to a jury trial, and proceeded to a bench trial based on an agreed statement of facts. In accordance with the agreement, the State described the interview with the victim and Shatzer's 2006 statements to the detectives. Based on the proffered testimony of the victim and the "admission of the defendant as to the act of masturbation," the trial court found Shatzer guilty of sexual child abuse of his son. No. 21-K-06-37799 (Cir. Ct. Washington Cty., Md., Sept. 21, 2006), *id.*, at 70, 79.

Over the dissent of two judges, the Court of Appeals of Maryland reversed and remanded. The court held that "the passage of time *alone* is insufficient to [end] the protections afforded by *Edwards*," and that, assuming, *arguendo*, a break-in-custody exception to *Edwards* existed, Shatzer's release back into the general prison population between interrogations did not constitute a break in custody. 405 Md., at 606-607, 954 A.2d, at 1131. We granted certiorari, 555 U.S. ----, 129 S.Ct. 1043, 173 L.Ed.2d 468 (2009).

II

To counteract the coercive pressure, *Miranda* announced that police officers must warn a suspect prior to questioning that he has a right to remain silent, and a right to the presence of an attorney. *Id.*, at 444, 86 S.Ct. 1602. After the warnings are given, if the suspect indicates that he wishes to remain silent, the interrogation must cease. *Id.*, at 473-474, 86 S.Ct. 1602. Similarly, if the suspect states that he wants an attorney, the interrogation must cease until an attorney is present. *Id.*, at 474, 86 S.Ct. 1602. Critically, however, a suspect can waive these rights. *Id.*, at 475, 86 S.Ct. 1602. To establish a valid waiver, the State must show that the waiver was knowing, intelligent, and voluntary under the "high standar[d] of proof for the waiver of constitutional rights [set forth in] *Johnson v. Zerbst*, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)." *Id.*, at 475, 86 S.Ct. 1602.

In *Edwards*, the Court determined that *Zerbst* 's traditional standard for waiver was not sufficient to protect a suspect's right to have counsel present at a subsequent interrogation if he had previously requested counsel; "additional safeguards" were necessary. 451 U.S., at 484, 101 S.Ct. 1880. The Court therefore superimposed a "second layer of prophylaxis," *McNeil v. Wisconsin*, 501 U.S. 171, 176, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991). *Edwards* held:

"[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights.... [He] is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." 451 U.S., at 484-485, 101 S.Ct. 1880.

The rationale of *Edwards* is that once a suspect indicates that "he is not capable of undergoing [custodial] questioning without advice of counsel," "any subsequent waiver that has come at the authorities' behest, and not at the suspect's own instigation, is itself the product of the 'inherently compelling pressures' and not the purely voluntary choice of the suspect." *Arizona v. Roberson,* 486 U.S. 675, 681, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988). Under this rule, a voluntary *Miranda* waiver is sufficient at the time of an initial attempted interrogation to protect a suspect's right to have counsel present, but it is not sufficient at the time of subsequent attempts if the suspect initially requested the presence of counsel. The implicit assumption, of course, is that the subsequent requests for interrogation pose a significantly greater risk of coercion. That increased risk results not only from the police's persistence in trying to get the suspect to talk, but also from the continued pressure that begins when the individual is taken into custody as a suspect and sought to be interrogated-pressure likely to "increase as custody is prolonged," *Minnick v. Mississippi,* 498 U.S. 146, 153, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990). The *Edwards* presumption of involuntariness ensures that police will not take advantage of the mounting coercive pressures of "prolonged police custody," *Roberson,* 486 U.S., at 686, 108 S.Ct. 2093, by repeatedly attempting to question a suspect who previously requested counsel until the suspect is "badgered into submission," *id.,* at 690, 108 S.Ct. 2093 (KENNEDY, J., dissenting).

We have frequently emphasized that the *Edwards* rule is not a constitutional mandate, but judicially prescribed prophylaxis. See, *e.g., Montejo v. Louisiana,* 556 U.S. ----, ----, 129 S.Ct. 2079, 2085-86, 173 L.Ed.2d 955 (2009); *Michigan v. Harvey,* 494 U.S. 344, 349, 110 S.Ct. 1176, 108 L.Ed.2d 293 (1990); *Solem v. Stumes,* 465 U.S. 638, 644, n. 4, 104 S.Ct. 1338, 79 L.Ed.2d 579 (1984). Because *Edwards* is "our rule, not a constitutional command," "it is our obligation to justify its expansion." *Roberson, supra,* at 688, 108 S.Ct. 2093 (KENNEDY, J., dissenting). Lower courts have uniformly held that a break in custody ends the *Edwards* presumption, see, *e.g., People v. Storm,* 28 Cal.4th 1007, 1023-1024, and n. 6, 124 Cal.Rptr.2d 110, 52 P.3d 52, 61-62, and n. 6 (2002) (collecting state and federal cases), but we have previously addressed the issue only in dicta, see *McNeil, supra,* at 177, 111 S.Ct. 2204 (*Edwards* applies "assuming there has been no break in custody").

A judicially crafted rule is "justified only by reference to its prophylactic purpose," *Davis v. United States,* 512 U.S. 452, 458, 114 S.Ct. 2350, 129 L.Ed.2d 362 (1994) (internal quotation marks omitted), and applies only where its benefits outweigh its costs, *Montejo, supra,* at ----, 129 S.Ct., at 2089. We begin with the benefits. *Edwards* ' presumption of involuntariness has the incidental effect of "conserv[ing] judicial resources which would otherwise be expended in making difficult determinations of voluntariness." *Minnick, supra,* at 151, 111 S.Ct. 486. Its fundamental purpose, however, is to "[p]reserv[e] the integrity of an accused's choice to communicate with police only through counsel," *Patterson v. Illinois,* 487 U.S. 285, 291, 108 S.Ct. 2389, 101 L.Ed.2d 261 (1988), by "prevent[ing] police from badgering a defendant into waiving his previously asserted *Miranda* rights," *Harvey, supra,* at 350, 110 S.Ct. 1176. Thus, the benefits of the rule are measured by the number of coerced confessions it suppresses that otherwise would have been admitted. See *Montejo, supra,* at ----, 129 S.Ct., at 2089.

It is easy to believe that a suspect may be coerced or badgered into abandoning his earlier

refusal to be questioned without counsel in the paradigm *Edwards* case. That is a case in which the suspect has been arrested for a particular crime and is held in uninterrupted pretrial custody while that crime is being actively investigated. After the initial interrogation, and up to and including the second one, he remains cut off from his normal life and companions, "thrust into" and isolated in an "unfamiliar," "police-dominated atmosphere," *Miranda*, 384 U.S., at 456-457, 86 S.Ct. 1602, where his captors "appear to control [his] fate," *Illinois v. Perkins*, 496 U.S. 292, 297, 110 S.Ct. 2394, 110 L.Ed.2d 243 (1990). That was the situation confronted by the suspects in *Edwards*, *Roberson*, and *Minnick*, the three cases in which we have held the *Edwards* rule applicable. Edwards was arrested pursuant to a warrant and taken to a police station, where he was interrogated until he requested counsel. *Edwards*, 451 U.S., at 478-479, 101 S.Ct. 1880. The officer ended the interrogation and took him to the county jail, but at 9:15 the next morning, two of the officer's colleagues reinterrogated Edwards at the jail. *Id.*, at 479, 101 S.Ct. 1880. Roberson was arrested "at the scene of a just-completed burglary" and interrogated there until he requested a lawyer. *Roberson*, 486 U.S., at 678, 108 S.Ct. 2093. A different officer interrogated him three days later while he "was still in custody pursuant to the arrest." *Ibid.* Minnick was arrested by local police and taken to the San Diego jail, where two FBI agents interrogated him the next morning until he requested counsel. *Minnick*, 498 U.S., at 148-149, 111 S.Ct. 486. Two days later a Mississippi Deputy Sheriff reinterrogated him at the jail. *Id.*, at 149, 111 S.Ct. 486. None of these suspects regained a sense of control or normalcy after they were initially taken into custody for the crime under investigation.

When, unlike what happened in these three cases, a suspect has been released from his pretrial custody and has returned to his normal life for some time before the later attempted interrogation, there is little reason to think that his change of heart regarding interrogation without counsel has been coerced. He has no longer been isolated. He has likely been able to seek advice from an attorney, family members, and friends. And he knows from his earlier experience that he need only demand counsel to bring the interrogation to a halt; and that investigative custody does not last indefinitely. In these circumstances, it is far fetched to think that a police officer's asking the suspect whether he would like to waive his *Miranda* rights will any more "wear down the accused," *Smith v. Illinois*, 469 U.S. 91, 98, 105 S.Ct. 490, 83 L.Ed.2d 488 (1984) *(per curiam)*, than did the first such request at the original attempted interrogation-which is of course not deemed coercive. His change of heart is less likely attributable to "badgering" than it is to the fact that further deliberation in familiar surroundings has caused him to believe (rightly or wrongly) that cooperating with the investigation is in his interest. Uncritical extension of *Edwards* to this situation would not significantly increase the number of genuinely coerced confessions excluded. The "justification for a conclusive presumption disappears when application of the presumption will not reach the correct result most of the time." *Coleman v. Thompson*, 501 U.S. 722, 737, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991).

At the same time that extending the *Edwards* rule yields diminished benefits, extending the rule also increases its costs: the in-fact voluntary confessions it excludes from trial, and the voluntary confessions it deters law enforcement officers from even trying to obtain. Voluntary confessions are not merely "a proper element in law enforcement," *Miranda, supra*, at 478, 86 S.Ct. 1602, they are an "unmitigated good," *McNeil*, 501

U.S., at 181, 111 S.Ct. 2204, " 'essential to society's compelling interest in finding, convicting, and punishing those who violate the law,' " *ibid.* (quoting *Moran v. Burbine,* 475 U.S. 412, 426, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986)).

The only logical endpoint of *Edwards* disability is termination of *Miranda* custody and any of its lingering effects. Without that limitation-and barring some purely arbitrary time-limit -every *Edwards* prohibition of custodial interrogation of a particular suspect would be eternal. The prohibition applies, of course, when the subsequent interrogation pertains to a different crime, *Roberson, supra,* when it is conducted by a different law enforcement authority, *Minnick,* 498 U.S. 146, 111 S.Ct. 486, 112 L.Ed.2d 489, and even when the suspect has met with an attorney after the first interrogation, *ibid.* And it not only prevents questioning *ex ante*; it would render invalid *ex post,* confessions invited and obtained from suspects who (unbeknownst to the interrogators) have acquired *Edwards* immunity previously in connection with any offense in any jurisdiction. In a country that harbors a large number of repeat offenders, FN6 this consequence is disastrous.

> FN6. According to a recent study, 67.5% of prisoners released from 15 States in 1994 were rearrested within three years. See Dept. of Justice, Bureau of Justice Statistics, Special Report, Recidivism of Prisoners Released in 1994.

We conclude that such an extension of *Edwards* is not justified; we have opened its "protective umbrella," *Solem,* 465 U.S., at 644, n. 4, 104 S.Ct. 1338, far enough. The protections offered by *Miranda,* which we have deemed sufficient to ensure that the police respect the suspect's desire to have an attorney present the first time police interrogate him, adequately ensure that result when a suspect who initially requested counsel is reinterrogated after a break in custody that is of sufficient duration to dissipate its coercive effects.

If Shatzer's return to the general prison population qualified as a break in custody (a question we address in Part III, *infra*), there is no doubt that it lasted long enough (2 1/2 years) to meet that durational requirement. But what about a break that has lasted only one year? Or only one week? It is impractical to leave the answer to that question for clarification in future case-by-case adjudication; law enforcement officers need to know, with certainty and beforehand, when renewed interrogation is lawful. And while it is certainly unusual for this Court to set forth precise time limits governing police action, it is not unheard-of. In *County of Riverside v. McLaughlin,* 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991), we specified 48 hours as the time within which the police must comply with the requirement of *Gerstein v. Pugh,* 420 U.S. 103, 95 S.Ct. 854, 43 L.Ed.2d 54 (1975), that a person arrested without a warrant be brought before a magistrate to establish probable cause for continued detention.

Like *McLaughlin,* this is a case in which the requisite police action (there, presentation to a magistrate; here, abstention from further interrogation) has not been prescribed by statute but has been established by opinion of this Court. We think it appropriate to specify a period of time to avoid the consequence that continuation of the *Edwards* presumption "will not reach the correct result most of the time." *Coleman, supra,* at 737, 111 S.Ct. 2546. It seems to us that period is 14 days. That provides plenty of time for the suspect to get reacclimated to his normal life, to consult with friends and counsel, and to

shake off any residual coercive effects of his prior custody.

The 14-day limitation meets Shatzer's concern that a break-in-custody rule lends itself to police abuse. He envisions that once a suspect invokes his *Miranda* right to counsel, the police will release the suspect briefly (to end the *Edwards* presumption) and then promptly bring him back into custody for reinterrogation. But once the suspect has been out of custody long enough (14 days) to eliminate its coercive effect, there will be nothing to gain by such gamesmanship-nothing, that is, except the entirely appropriate gain of being able to interrogate a suspect who has made a valid waiver of his *Miranda* rights.

III

The facts of this case present an additional issue. No one questions that Shatzer was in custody for *Miranda* purposes during the interviews with Detective Blankenship in 2003 and Detective Hoover in 2006. Likewise, no one questions that Shatzer triggered the *Edwards* protections when, according to Detective Blankenship's notes of the 2003 interview, he stated that " 'he would not talk about this case without having an attorney present,' " 405 Md., at 589, 954 A.2d, at 1120. After the 2003 interview, Shatzer was released back into the general prison population where he was serving an unrelated sentence. The issue is whether that constitutes a break in *Miranda* custody.

We have never decided whether incarceration constitutes custody for *Miranda* purposes, and have indeed explicitly declined to address the issue. See *Perkins,* 496 U.S., at 299, 110 S.Ct. 2394. See also *Bradley v. Ohio,* 497 U.S. 1011, 1013, 110 S.Ct. 3258, 111 L.Ed.2d 768 (1990) (Marshall, J., dissenting from denial of certiorari). Whether it does depends upon whether it exerts the coercive pressure that *Miranda* was designed to guard against-the "danger of coercion [that] results from the *interaction* of custody and official interrogation." *Perkins, supra,* at 297, 110 S.Ct. 2394 (emphasis added). To determine whether a suspect was in *Miranda* custody we have asked whether "there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *New York v. Quarles,* 467 U.S. 649, 655, 104 S.Ct. 2626, 81 L.Ed.2d 550 (1984); see also *Stansbury v. California,* 511 U.S. 318, 322, 114 S.Ct. 1526, 128 L.Ed.2d 293 (1994) *(per curiam).* This test, no doubt, is satisfied by all forms of incarceration. Our cases make clear, however, that the freedom-of-movement test identifies only a necessary and not a sufficient condition for *Miranda* custody. We have declined to accord it "talismanic power," because *Miranda* is to be enforced "only in those types of situations in which the concerns that powered the decision are implicated." *Berkemer v. McCarty,* 468 U.S. 420, 437, 104 S.Ct. 3138, 82 L.Ed.2d 317 (1984). Thus, the temporary and relatively nonthreatening detention involved in a traffic stop or *Terry* stop, see *Terry v. Ohio,* 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968), does not constitute *Miranda* custody. *McCarty, supra,* at 439-440, 104 S.Ct. 3138. See also *Perkins, supra,* at 296, 110 S.Ct. 2394.

Here, we are addressing the interim period during which a suspect was not interrogated, but was subject to a baseline set of restraints imposed pursuant to a prior conviction. Without minimizing the harsh realities of incarceration, we think lawful imprisonment imposed upon conviction of a crime does not create the coercive pressures identified in *Miranda*.

Interrogated suspects who have previously been convicted of crime live in prison. When they are released back into the general prison population, they return to their accustomed surroundings and daily routine-they regain the degree of control they had over their lives prior to the interrogation. Sentenced prisoners, in contrast to the *Miranda* paradigm, are not isolated with their accusers. They live among other inmates, guards, and workers, and often can receive visitors and communicate with people on the outside by mail or telephone.

Their detention, moreover, is relatively disconnected from their prior unwillingness to cooperate in an investigation. The former interrogator has no power to increase the duration of incarceration, which was determined at sentencing. And even where the possibility of parole exists, the former interrogator has no apparent power to decrease the time served. This is in stark contrast to the circumstances faced by the defendants in *Edwards, Roberson,* and *Minnick,* whose continued detention as suspects rested with those controlling their interrogation, and who confronted the uncertainties of what final charges they would face, whether they would be convicted, and what sentence they would receive.

IV

Because Shatzer experienced a break in *Miranda* custody lasting more than two weeks between the first and second attempts at interrogation, *Edwards* does not mandate suppression of his March 2006 statements. Accordingly, we reverse the judgment of the Court of Appeals of Maryland, and remand the case for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice STEVENS, concurring in the judgment,

While I agree that the presumption from *Edwards v. Arizona,* 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981), is not "eternal," *ante,* at 1222, and does not mandate suppression of Shatzer's statement made after a 2 1/2-year break in custody, I do not agree with the Court's newly announced rule: that *Edwards always* ceases to apply when there is a 14-day break in custody, *ante,* at 1223.

In conducting its "cost-benefit" analysis, the Court demeans *Edwards* as a " 'second layer' " of "judicially prescribed prophylaxis," *ante,* at 1219, 1220, 1223, n. 7; see also *ante,* at 1220 (describing *Edwards* as " 'our rule, not a constitutional command' " (quoting *Arizona v. Roberson,* 486 U.S. 675, 688, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988) (KENNEDY, J., dissenting))). The source of the holdings in the long line of cases that includes both *Edwards* and *Miranda,* however, is the Fifth Amendment's protection against compelled self-incrimination applied to the "compulsion inherent in custodial" interrogation, *Miranda v. Arizona,* 384 U.S. 436, 458, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and the "significan[ce]" of "the assertion of the right to counsel," *Edwards,* 451 U.S., at 485, 101 S.Ct. 1880. The Court's analysis today is insufficiently sensitive to the concerns that motivated the *Edwards* line of cases.

I

The most troubling aspect of the Court's time-based rule is that it disregards the compulsion caused by a second (or third, or fourth) interrogation of an indigent suspect who was told that if he requests a lawyer, one will be provided for him. When police tell an indigent suspect that he has the right to an attorney, that he is not required to speak without an attorney present, and that an attorney will be provided to him at no cost before questioning, the police have made a significant promise. If they cease questioning and then reinterrogate the suspect 14 days later without providing him with a lawyer, the suspect is likely to feel that the police lied to him and that he really does not have any right to a lawyer.

. . .

Instead of deferring to these well-settled understandings of the *Edwards* rule, the Court engages in its own speculation that a 14-day break in custody eliminates the compulsion that animated *Edwards.* But its opinion gives no strong basis for believing that this is the case. A 14-day break in custody does not eliminate the rationale for the initial *Edwards* rule: The detainee has been told that he may remain silent and speak only through a lawyer and that if he cannot afford an attorney, one will be provided for him. He has asked for a lawyer. He does not have one. He is in custody. And police are still questioning him. A 14-day break in custody does not change the fact that custodial interrogation is inherently compelling. It is unlikely to change the fact that a detainee "considers himself unable to deal with the pressures of custodial interrogation without legal assistance." *Roberson,* 486 U.S., at 683, 108 S.Ct. 2093. And in some instances, a 14-day break in custody may make matters worse "[w]hen a suspect understands his (expressed) wishes to have been ignored" and thus "may well see further objection as futile and confession (true or not) as the only way to end his interrogation." *Davis,* 512 U.S., at 472-473, 114 S.Ct. 2350 (Souter, J., concurring in judgment).

United States v. Maynard (D.C. Cir. Aug. 6, 2010)

GINSBURG, Circuit Judge:

The appellants, Antoine Jones and Lawrence Maynard, appeal their convictions after a joint trial for conspiracy to distribute and to possess with intent to distribute five kilograms or more of cocaine and 50 grams or more of cocaine base, in violation of 21 U.S.C. §§ 841 and 846. Maynard also challenges the sentence imposed by the district court. Because the appellants' convictions arise from the same underlying facts and they make several overlapping arguments, we consolidated their appeals. For the reasons that follow, we reverse Jones's and affirm Maynard's convictions.

I. Background

Jones owned and Maynard managed the ―Levels‖ nightclub in the District of Columbia. In 2004 an FBI- Metropolitan Police Department Safe Streets Task Force began investigating the two for narcotics violations. The investigation culminated in searches and arrests on October 24, 2005. We discuss that investigation and the drug distribution operation it uncovered in greater detail where relevant to the appellants' arguments on appeal.

On October 25 Jones and several alleged co-conspirators were charged with, among other things, conspiracy to distribute and to possess with intent to distribute cocaine and cocaine base. Maynard, who was added as a defendant in superseding indictments filed in March and June 2006, pled guilty in June 2006.

In October 2006 Jones and a number of his co-defendants went to trial. The jury acquitted the co-defendants on all counts but one; it could not reach a verdict on the remaining count, which was eventually dismissed. The jury acquitted Jones on a number of counts but could not reach a verdict on the conspiracy charge, as to which the court declared a mistrial. Soon thereafter the district court allowed Maynard to withdraw his guilty plea.

In March 2007 the Government filed another superseding indictment charging Jones, Maynard, and a few co-defendants with a single count of conspiracy to distribute and to possess with intent to distribute five or more kilograms of cocaine and 50 or more grams of cocaine base. A joint trial of Jones and Maynard began in November 2007 and ended in January 2008, when the jury found them both guilty.

III. Analysis: Evidence Obtained from GPS Device

Jones argues his conviction should be overturned because the police violated the Fourth Amendment prohibition of unreasonable searches‖ by tracking his movements 24 hours a day for four weeks with a GPS device they had installed on his Jeep without a valid warrant.* We consider first whether that use of the device was a search and then, having concluded it was, consider whether it was reasonable and whether any error was harmless.

A. Was Use of GPS a Search?

For his part, Jones argues the use of the GPS device violated his ―reasonable expectation of privacy,‖ United States v. Katz, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring), and was therefore a search subject to the reasonableness requirement of the Fourth Amendment. Of course, the Government agrees the Katz test applies here, but it argues we need not consider whether Jones's expectation of privacy was reasonable because that question was answered in United States v. Knotts, 460 U.S. 276 (1983), in which the Supreme Court held the use of a beeper device to aid in tracking a suspect to his drug lab was not a search. As explained below, we hold Knotts does not govern this case and the police action was a search because it defeated Jones's reasonable expectation of privacy. We then turn to the Government's claim our holding necessarily implicates prolonged visual surveillance.

1. Knotts is not controlling

The Government argues this case falls squarely within the holding in Knotts that ―[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.‖ 460 U.S. at 281. In that case the police had planted a beeper in a five-gallon container of chemicals before it was purchased by one of Knotts's co-conspirators; monitoring the progress of the car carrying the beeper, the police followed the container as it was driven from the ―place of purchase, in Minneapolis, Minnesota, to [Knotts's] secluded cabin near Shell Lake, Wisconsin,‖ 460 U.S. at 277, a trip of about 100 miles. Because the co-conspirator, by driving on public roads, ―voluntarily conveyed to anyone who wanted to look his progress and route, he could not reasonably expect privacy in ―the fact of his final destination.‖ Id. at 281.

The Court explicitly distinguished between the limited information discovered by use of the beeper — movements during a discrete journey — and more comprehensive or sustained monitoring of the sort at issue in this case. Id. at 283 (noting ―limited use which the government made of the signals from this particular beeper‖); see also id. at 284–85 (―nothing in this record indicates that the beeper signal was received or relied upon after it had indicated that the [container] had ended its automotive journey at rest on respondent's premises in rural Wisconsin‖). Most important for the present case, the Court specifically reserved the question whether a warrant would be required in a case involving ―twenty-four hour surveillance,‖ stating

if 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. Id. at 283–84.

Although the Government, focusing upon the term ―dragnet,‖ suggests Knotts reserved the Fourth Amendment question that would be raised by mass surveillance, not the question raised by prolonged surveillance of a single individual, that is not what happened. In reserving the ―dragnet‖ question, the Court was not only addressing but in part actually quoting the defendant's argument that, if a warrant is not required, then prolonged ―twenty-four hour surveillance of any citizen of this country will be possible,

without judicial knowledge or supervision.‖ Id. at 283.* The Court avoided the question whether prolonged ―twenty-four hour surveillance‖ was a search by limiting its holding to the facts of the case before it, as to which it stated ―the reality hardly suggests abuse.‖ Id. at 283

In short, Knotts held only that ―[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another,‖ id. at 281, not that such a person has no reasonable expectation of privacy in his movements whatsoever, world without end, as the Government would have it. The Fifth Circuit likewise has recognized the limited scope of the holding in Knotts, see United States v. Butts, 729 F.2d 1514, 1518 n.4 (1984) (―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‖), as has the New York Court of Appeals, see People v. Weaver, 12 N.Y.3d 433, 440–44 (2009) (Knotts involved a ―single trip‖ and Court ―pointedly acknowledged and reserved for another day the question of whether a Fourth Amendment issue would be posed if ‗twenty-four hour surveillance of any citizen of this country [were] possible'‖). See also Renee McDonald Hutchins, Tied Up in Knotts? GPS Technology and the Fourth Amendment, 419 UCLA L. Rev. 409, 457 (2007) (―According to the [Supreme] Court, its decision [in Knotts] should not be read to sanction ‗twenty-four hour surveillance of any citizen of this country.'‖ (quoting Knotts, 460 U.S. at 284)).

Two circuits, relying upon Knotts, have held the use of a GPS tracking device to monitor an individual's movements in his vehicle over a prolonged period is not a search, United States v. Pineda-Moreno, 591 F.3d 1212 (9th Cir. 2010); United States v. Garcia, 474 F.3d 994 (7th Cir. 2007), but in neither case did the appellant argue that Knotts by its terms does not control whether prolonged surveillance is a search, as Jones argues here. Indeed, in Garcia the appellant explicitly conceded the point. . . Thus prompted, the Seventh Circuit read Knotts as blessing all tracking of a vehicle on public streets and addressed only whether installing the device in the vehicle converted the subsequent tracking into a search. Garcia, 474 F.3d at 996. The court viewed use of a GPS device as being more akin to hypothetical practices it assumed are not searches, such as tracking a car ―by means of cameras mounted on lampposts or satellite imaging,‖ than it is to practices the Supreme Court has held are searches, such as attaching a listening device to a person's phone. Id. at 997. For that reason it held installation of the GPS device was not a search. . .

2. Were Jones's locations exposed to the public?

Two considerations persuade us the information the police discovered in this case — the totality of Jones's movements over the course of a month — was not exposed to the public: First, unlike one's movements during a single journey, the whole of one's movements over the course of a month is not actually exposed to the public because the likelihood anyone will observe all those movements is effectively nil. Second, the whole of one's movements is not exposed constructively even though each individual movement is exposed, because that whole reveals more — sometimes a great deal more — than does the sum of its parts.

a. Actually exposed?

. . .

(i). Precedent

The Government argues Jones's movements over the course of a month were actually exposed to the public because the police lawfully could have followed Jones everywhere he went on public roads over the course of a month. The Government implicitly poses the wrong question, however.

In considering whether something is ―exposed‖ to the public as that term was used in Katz we ask not what another person can physically and may lawfully do but rather what a reasonable person expects another might actually do. See California v. Greenwood, 486 U.S. 35, 40 (1988) (―It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animals, children, scavengers, snoops, and other members of the public‖); California v. Ciraolo, 476 U.S. 207, 213, 214 (1986) (―in an age where private and commercial flight in the public airways is routine,‖ defendant did not have a reasonable expectation of privacy in location that ―[a]ny member of the public flying in this airspace who glanced down could have seen‖); Florida v. Riley, 488 U.S. 445, 450 (1989) (―Here, the inspection was made from a helicopter, but as is the case with fixed-wing planes, ‗private and commercial flight [by helicopter] in the public airways is routine' in this country, and there is no indication that such flights are unheard of in Pasco County, Florida‖ (quoting Ciraolo)). Indeed, in Riley, Justice O'Connor, whose concurrence was necessary to the judgment, pointed out:

> Ciraolo's expectation of privacy was unreasonable not because the airplane was operating where it had a ―right to be,‖ but because public air travel at 1,000 feet is a sufficiently routine part of modern life that it is unreasonable for persons on the ground to expect that their curtilage will not be observed from the air at that altitude.
>
> ....
>
> If the public rarely, if ever, travels overhead at such altitudes, the observation cannot be said to be from a vantage point generally used by the public and Riley cannot be said to have ―knowingly expose[d]‖ his greenhouse to public view.

488 U.S. at 453, 455 . . .

The Supreme Court re-affirmed this approach in Bond v. United States, 529 U.S. 334 (2000). There a passenger on a bus traveling to Arkansas from California had placed his soft luggage in the overhead storage area above his seat. During a routine stop at an off-border immigration checkpoint in Sierra Blanca, Texas, a Border Patrol agent squeezed the luggage in order to determine whether it contained drugs and thus detected a brick of

what turned out to be methamphetamine. The defendant argued the agent had defeated his reasonable expectation of privacy, and the Government argued his expectation his bag would not be squeezed was unreasonable because he had exposed it to the public. The Court responded:

> [A] bus passenger clearly expects that his bag may be handled. He does not expect that other passengers or bus employees will, as a matter of course, feel the bag in an exploratory manner. But this is exactly what the agent did here. We therefore hold that the agent's physical manipulation of petitioner's bag violated the Fourth Amendment.

Id. at 338–39. The Court focused not upon what other passengers could have done or what a bus company employee might have done, but rather upon what a reasonable bus passenger expects others he may encounter, i.e., fellow passengers or bus company employees, might actually do. A similar focus can be seen in Kyllo, in which the Court held use of a thermal imaging device defeats the subject's reasonable expectation of privacy, ―at least where ... the technology in question is not in general public use.‖ 533 U.S. at 34.

. . .

(ii). Application

Applying the foregoing analysis to the present facts, we hold the whole of a person's movements over the course of a month is not actually exposed to the public because the likelihood a stranger would observe all those movements is not just remote, it is essentially nil. It is one thing for a passerby to observe or even to follow someone during a single journey as he goes to the market or returns home from work. It is another thing entirely for that stranger to pick up the scent again the next day and the day after that, week in and week out, dogging his prey until he has identified all the places, people, amusements, and chores that make up that person's hitherto private routine.

b. Constructively exposed?

The Government does not separately raise, but we would be remiss if we did not address, the possibility that although the whole of Jones's movements during the month for which the police monitored him was not actually exposed to the public, it was constructively exposed because each of his individual movements during that time was itself in public view. When it comes to privacy, however, precedent suggests that the whole may be more revealing than the parts. Applying that precedent to the circumstances of this case, we hold the information the police discovered using the GPS device was not constructively exposed.

. . .

(ii). Application

The whole of one‘s movements over the course of a month is not constructively exposed to the public because, like a rap sheet, that whole reveals far more than the individual movements it comprises. The difference is not one of degree but of kind, for no single journey reveals the habits and patterns that mark the distinction between a day in the life and a way of life, nor the departure from a routine that, like the dog that did not bark in the Sherlock Holmes story, may reveal even more.

As with the ―mosaic theory often invoked by the Government in cases involving national security information, ―What may seem trivial to the uninformed, may appear of great moment to one who has a broad view of the scene. CIA v. Sims, 471 U.S. 159, 178 (1985) (internal quotation marks deleted); see J. Roderick MacArthur Found. v. F.B.I., 102 F.3d 600, 604 (D.C. Cir. 1996). Prolonged surveillance reveals types of information not revealed by short-term surveillance, such as what a person does repeatedly, what he does not do, and what he does ensemble. These types of information can each reveal more about a person than does any individual trip viewed in isolation. Repeated visits to a church, a gym, a bar, or a bookie tell a story not told by any single visit, as does one‘s not visiting any of these places over the course of a month. The sequence of a person‘s movements can reveal still more; a single trip to a gynecologist‘s office tells little about a woman, but that trip followed a few weeks later by a visit to a baby supply store tells a different story.* A person who knows all of another‘s travels can deduce whether he is a weekly church goer, a heavy drinker, a regular at the gym, an unfaithful husband, an outpatient receiving medical treatment, an associate of particular individuals or political groups — and not just one such fact about a person, but all such facts.

. . .

A reasonable person does not expect anyone to monitor and retain a record of every time he drives his car, including his origin, route, destination, and each place he stops and how long he stays there; rather, he expects each of those movements to remain ―disconnected and anonymous,‖ Nader v. Gen. Motors Corp., 25 N.Y.2d 560, 572 (1970) (Breitel, J., concurring). In this way the extended recordation of a person‘s movements is, like the ―manipulation of a bus passenger‘s carry-on‖ canvas bag in Bond, not what we expect anyone to do, and it reveals more than we expect anyone to know. 529 U.S. at 339.

3. Was Jones‘s expectation of privacy reasonable?

. . .

The Government suggests Jones‘s expectation of privacy in his movements was unreasonable because those movements took place in his vehicle, on a public way, rather than inside his home. That the police tracked Jones‘s movements in his Jeep rather than in his home is certainly relevant to the reasonableness of his expectation of privacy . . .

. . .

Continuous human surveillance for a week would require all the time and expense of several police officers, while comparable photographic surveillance would require a net of video cameras so dense and so widespread as to catch a person's every movement, plus the manpower to piece the photographs together. Of course, as this case and some of the GPS cases in other courts illustrate, . . . prolonged GPS monitoring is not similarly constrained. On the contrary, the marginal cost of an additional day — or week, or month — of GPS monitoring is effectively zero. Nor, apparently, is the fixed cost of installing a GPS device significant; the Los Angeles Police Department can now affix a GPS device to a passing car simply by launching a GPS-enabled dart.* For these practical reasons, and not by virtue of its sophistication or novelty, the advent of GPS technology has occasioned a heretofore unknown type of intrusion into an ordinarily and hitherto private enclave.

. . .

This case does not require us to, and therefore we do not, decide whether a hypothetical instance of prolonged visual surveillance would be a search subject to the warrant requirement of the Fourth Amendment . . .

Jones's conviction is reversed because it was obtained with evidence procured in violation of the Fourth Amendment.