CRIMINAL PROCEDURE IN PRACTICE, THIRD EDITION

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U.S. SUPREME COURT DECISIONS

Since the publication of the third edition of the book, the Supreme Court has decided a number of cases that are pertinent to issues discussed in the text. They are all discussed below. A few are especially noteworthy, including the reaffirmation of the *McNabb-Mallory* interrogation principle (*Corley v. United States*), the school search case (*Safford United School District No. 1 v. Redding*), the *Miranda* waiver restriction (*Berghuis v. Thompkins*) and the reaffirmation and extension of the good-faith exception to the exclusionary rule (*Herring v. United States*).

Chapter Two. The Exclusion of Evidence: Its Reach, Its Limit

The Good-Faith Exception

In *Herring v. United States*, 129 S. Ct. 695 (2009), the Court held that the exclusionary rule would not apply in a situation in which police officers reasonably believed that there was a valid and outstanding arrest warrant, even though the officers were mistaken due to a government employee's negligent bookkeeping. The key was that the officers conducting the arrest (which resulted in evidence being seized) were proceeding in good faith on a reasonable belief that the warrant had in fact been issued and was still valid.

Chapter Three. The Fourth Amendment Search and Seizure Provision

Search Incident to Arrest

The issue in *Arizona v. Gant*, 129 S. Ct. 1710 (2009), was whether the exception for a search incident to arrest, in connection with the lawful stop of a vehicle, should apply after the driver was handcuffed and locked in the back of the patrol car. Considering that the officers then had to re-enter the suspect's vehicle to conduct the search, the Justices were unwilling to allow the safety rationale, which is the basis for the exception. The Court sharply limited its earlier decision of *New York v. Belton*, 453 U.S. 454 (1981), which

> has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search.

Gant, 129 S. Ct. 1710 at 1718.

> Courts that have read *Belton* expansively are at odds regarding how close in time to the arrest and how proximate to the arrestee's vehicle an officer's first contact with the arrestee must be to bring the encounter within *Belton*'s purview.

Id. at 1720.

The Court found that under the facts in *Gant,* the law enforcement action could not be justified.

> Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.

Id. at 1723–24.

Emergency Aid Exception

Police officers responding to a complaint of a disturbance were concerned about ongoing assaults inside a house. The officers opened a door and saw evidence inside. Because the officers were objectively reasonable in believing that persons inside might be in danger, the Court in *Michigan v. Fisher*, 130 S. Ct. 546 (2009), allowed a warrantless entry under the doctrine established in *Brigham City v. Stuart*. The Justices relied on the determination that there was "the need to assist persons who are seriously injured or threatened with such injury."

Stop and Frisk

After a lawful traffic stop in *Arizona v. Johnson*, 129 S. Ct. 781 (2009), a conversation with the occupants caused the officers to be concerned about the possible link of the passengers to current gang activity in the region. This concern was held to be a sufficient articulable suspicion that the individual might be armed and dangerous, allowing a frisk under *Terry v. Ohio*.

Public School Searches

In *Safford Unified School District No. 1 v. Redding*, 129 S. Ct. 2633 (2009), a thirteen-year-old eighth grader was strip searched by two female school employees in a "methodical and humiliating" fashion. A school official, enforcing the school's antidrug policies, suspected the girl of having brought prescription-strength ibuprofen pills to school. According to the student's testimony,

> [The official] 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.

Because of the intensive nature of the search, the Justices found the search unconstitutional.

> 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. 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 . . . .
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> 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 of the circumstances which justified the interference in the first place." 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."
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> Here, the content of the suspicion failed to match the degree of intrusion.

Safford, 129 S. Ct. at 2641–42 (internal citations omitted).

Chapter Four. Incriminating Statements

McNabb/Mallory Test

McNabb-Mallory was reaffirmed in *Corley v. United States*, 129 S. Ct. 1558 (2009), despite a legislative enactment that appeared to limit the rule (18 U.S.C. § 3501). The language of the Court here was quite strong.

> In a world without *McNabb-Mallory*, federal agents would be free to question suspects for extended periods before bringing them out in the open, and we have always known what custodial secrecy leads to. No one with any smattering of the history of 20th-century dictatorships needs a lecture on the subject, and we understand the need even within our own system to take care against going too far. "[C]ustodial police interrogation, by its very nature, isolates and pressures the individual. . . ."

Corley, 129 S. Ct. at 1570.

Miranda *Warnings*

The Court in *Florida v. Powell*, 130 S. Ct. 1195 (2010) indicated that the *Miranda* warnings need not be stated verbatim or in as precise a fashion as in the original holding. There the suspect was advised that he had the "right to talk to a lawyer before answering any of the [officers']

questions" and that the right could be invoked "at anytime . . . during the interview." Judges are to look at the totality of the warnings to determine if *Miranda* has been satisfied.

Impeachment

A rule was established in the post-*Miranda* cases that allowed *Miranda*-violation statements to be used to impeach a defendant when she takes the stand at her trial and testifies in a way that is inconsistent with the earlier statement (*see Harris v. New York*, 401 U.S. 222 (1971)). The rule was extended to parallel violations of the Sixth Amendment right to counsel in *Kansas v. Ventris*, 129 S. Ct. 1841 (2009).

Questioning without the Presence of a Lawyer

Overruling its earlier decision in *Michigan v. Jackson*, 475 U.S. 625 (1986), the majority Justices in *Montejo v. Louisiana*, 129 S. Ct. 2079 (2009), held that the police can initiate questions with a represented defendant as long as the defendant has received *Miranda* warnings and has voluntarily agreed to talk to the authorities without the lawyer being present. As stated in the opinion, "[W]hen the marginal benefits of the *Jackson* rule are weighed against its substantial costs to the truth-seeking process and the criminal justice system, we readily conclude that the rule does not 'pay its way . . . .'" *Montejo*, 129 S. Ct. at 2088.

Request for Counsel, Under Miranda

In *Maryland v. Shatzer*, 130 S. Ct. 1213 (2010), an unusual situation was present. The police began an investigation of the defendant when he was already incarcerated in prison for another crime; they read to him his warnings, and the defendant declined to speak without an attorney. He was released back into the general prison population; two and a half years later the investigation was reopened and another detective visited the defendant in prison. The defendant was again given his *Miranda* warnings, waived his right to remain silent, and made incriminating statements. Looking to its holding in *Edwards v. Arizona*, the Supreme Court held that a request for counsel under *Miranda* would not last indefinitely. Instead, the Court made quite specific the time period to be involved with such a request. The request will last for a total of fourteen days. The Court found such a precise time period was needed, noting that it would be "impractical" to let lower courts decide such a time period for lawyer requests on a case-by-case basis. "It seems to us . . . 14 days . . . 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." *Shatzer*, 130 S. Ct. at 1223.

Unambiguous Invocation of Rights

The Court in *Berghuis v. Thompkins*, 130 S. Ct. 2250 (2010), considered once again the problem of the suspect who is not wholly clear in invoking the right to avoid interrogation. The Court held that unless she actually stated that she was relying on the right to silence, the police could continue to question her and later voluntary statements could be used in court. Simply remaining silent will be seen as

insufficient to conclude that the suspect has invoked the right to silence. The five Justice majority focused on the fact that the suspect had been explicitly warned in a clear fashion.

> In sum, a suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police. Thompkins did not invoke his right to remain silent and stop the questioning. Understanding his rights in full, he waived his right to remain silent by making a voluntary statement to the police.

Berghuis, 130 S. Ct. at 2264.

The dissent sharply disagreed.

> [This decision] mark[s] a substantial retreat from the protection against compelled self-incrimination that *Miranda v. Arizona* has long provided during custodial interrogation . . . . suspects must now unambiguously invoke their right to remain silent—which, counterintuitively, requires them to speak. At the same time, suspects will be legally presumed to have waived their rights even if they have given no clear expression of their intent to do so.

Id. at 2266, 2278.

Chapter Six. The Right to Counsel

Ineffective Assistance of Counsel

The Court continues to be confronted with serious ineffective assistance of counsel matters. In *Porter v. McCollum*, 130 S. Ct. 447 (2009), *Strickland* was found to be violated in a capital case where the defense counsel offered no significant mitigating evidence. Significant evidence could have been presented including information about an abusive childhood, heroic military service record, and mental health issues.

Padilla v. Kentucky, 130 S. Ct. 1473 (2010), held that constitutionally competent counsel would have advised the defendant that a conviction for drug distribution made him subject to automatic deportation. Considering the severe impact on an individual, the fact that the advice would have gone to a "collateral consequence" did not eliminate it as a basis for adherence to previous rulings on ineffective assistance of counsel.

Chapter Eight. Pretrial Matters

Discovery

The *Brady* rule of discovery, requiring certain exculpatory evidence to be turned over to the defense, was reaffirmed in *Cone v. Bell*, 129 S. Ct. 1769 (2009).

Chapter Nine. The Trial

Public Trials

In *Presley v. Georgia*, 130 S. Ct. 721 (2010), the trial court excluded the public from the voir dire of prospective jurors. Relying on its holding in *Waller v. Georgia*, the Justices found that the Sixth Amendment right to an open criminal proceeding extended to pretrial matters such as *voir dire*. Particular observers (the defendant's family members) could not be routinely excluded, as trial courts are obliged to make efforts to accommodate public attendance.

Unanimous Jury Verdicts

In *Renico v. Lett*, 130 S. Ct. 1855 (2010), the trial judge declared a mistrial in a murder case after the jury had deliberated a total of four hours. The trial judge had asked the jurors whether they believed they were "hopelessly deadlocked," and the foreperson indicated that they were. While the case arose on a challenge to habeas corpus rulings, the language of the opinion as to the deference to be given the trial judge in managing a jury verdict is especially worth noting.

> The reasons for "allowing a trial judge to exercise broad discretion" are "especially compelling" in cases involving a potentially deadlocked jury. There, the justification for deference is that "the trial court is in the best position to access all of the factors which must be considered in making a necessarily discretionary determination whether the jury will be able to reach a just verdict if it continues to deliberate." In the absence of such deference, trial judges might otherwise employ "coercive means to break the apparent deadlock," thereby creating a "significant risk that a verdict may result from pressures inherent in the situation rather than the considered judgment of all the factors."
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> And we have never required a trial judge, before declaring a mistrial based on jury deadlock, to force the jury to deliberate for a minimum period of time, to question the jurors individually, to consult with (or obtain a consent of) either prosecutor or defense counsel, to issue a supplemental jury instruction, or consider any other means of breaking the impasse.

Renico, 130 S. Ct. at 1863–64.

Confrontation

The Supreme Court reaffirmed—and extended—its *Crawford* holding in *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009). There the Sixth Amendment right to confrontation was applied in criminal cases where crime laboratory reports were being used against defendants and where the analysts who created the reports were not being made available for cross-examination at trial. Even though con-

cerns were raised as to the difficulty of producing those analysts in routine sorts of cases, the Court was not moved and required the appearance of them.

> The confrontation clause may make the prosecution of criminals more burdensome, but that is equally true of the right to trial by jury and the privilege against self-incrimination. . . . [Th]e sky will not fall after today's decision . . . .

Melendez-Diaz, 129 S. Ct. at 2540.

Chapter Ten. Sentencing

The Supreme Court continues to be occupied by cases concerning trial judges' exercise of discretion in light of Sentencing Guidelines materials on point. *See, e.g.*, *Dillon v. United States*, ___S. Ct. ___ (2010) (sentencing under revised Guidelines); *Moore v. United States*, 129 S. Ct. 4 (2008) (act of discretion, stressing disparity of drug offenses); *Spears v. United States*, 129 S. Ct. 840 (2009) (treating the disparity with various drug offenses); *Nelson v. United States*, 129 S. Ct. 890 (2009) (reasonable sentences under the Guidelines).

Eighth Amendment Limitations

The juvenile offender in *Graham v. Florida*, 130 S. Ct. 2011 (2010), raised the question of whether minors who do not kill, intend to kill, or foresee that life will be taken could be sentenced to life without parole, "the second most severe penalty permitted by law." Finding a violation of the Cruel and Unusual Punishment Clause, the Court did not forbid states from ordering a lengthy period of incarceration perhaps resulting in defendants remaining behind bars for life. It did, however, prohibit the states from making such a judgment at the outset of the proceedings.

> There is a line between homicide and other serious violent offenses against the individual. Serious nonhomicide crimes may be devastating in their harm . . . but "in terms of moral depravity and of the injury to the person and the public," . . . they cannot be compared to murder and their "severity and irrevocability."
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> Terrence Grahams' sentence guarantees he will die in prison without any meaningful opportunity to obtain release, no matter what he might do to demonstrate that the bad acts he committed as a teenager are not representative of his true character, even if he spends the next half century attempting to atone for his crimes and learn from his mistakes. The State has denied him any chances to later demonstrate that he is fit to rejoin society based solely on a nonhomicide crime that he committed while he was a child in the eyes of the law. This the Eighth Amendment does not permit.

Graham, 130 S. Ct. at 2027, 2033 (internal citations omitted).