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THE ROBERTS COURT AND CRIMINAL PROCEDURE AT AGE FIVE

Erwin Chemerinsky[†]

I. THE SHRINKING DOCKET	13
II. IT'S THE ANTHONY KENNEDY COURT	15
III. PRECEDENT.....	15
IV. A CONSERVATIVE COURT ON CRIMINAL PROCEDURE, WITH DRAMATIC EXCEPTIONS.....	21
V. THE OBAMA PRESIDENCY AND THE FUTURE	25

On Tuesday, June 29, 2010, the Supreme Court officially concluded its fifth year with John Roberts as Chief Justice, its first year with Justice Sonia Sotomayor, and its thirty-fifth and final year with Justice John Paul Stevens on the bench.¹ In this essay, I want to assess the Roberts Court's approach to criminal procedure.

I make five major points. First, the dramatic downsizing of the Court's docket has reduced the number of criminal procedure cases. Second, in the area of criminal procedure, like in all areas, it is the Anthony Kennedy Court. Third, precedent and stare decisis are given little weight by the Roberts Court; it is a Court quite willing to change the law, including dramatic changes to the law. Fourth, overall, it is a quite conservative Court in the area of criminal procedure, but there are dramatic exceptions to this conclusion. Fifth, the Obama presidency is unlikely to change the overall ideology of the Roberts Court.

I. THE SHRINKING DOCKET

In October Term 2009, the Supreme Court decided seventy-three cases after briefing and oral argument.² Compare this to the seventy-five cases

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1. See Robert Barnes, *Roberts Led Supreme Court Through Assertive Term*, WASH. POST, June 30, 2010, at A03.

2. See, e.g., *2009 Term Opinions of the Courts*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/opinions/slipopinions.aspx?Term=09> (last visited Oct. 12, 2010). There were also fourteen per curiam decisions—cases decided without briefing or oral argument and based on the petition for certiorari and the opposition to the petition for certiorari. See *id.* This is a disturbing development because the Court is deciding cases without giving lawyers any chance to argue them. There is an enormous difference between a petition for a certiorari (or an opposition) and a brief on the merits of the case.

that the Court decided the year before, the sixty-seven cases decided the term prior to that, or the sixty-eight cases the year before that.³

To put this in historical perspective, for much of the 20th century, the Court was deciding over 200 cases a year.⁴ In the 1980s, the Court was averaging over 150 decisions a year.⁵ As recently as October Term 1991, the Court issued 107 signed opinions.⁶ At his confirmation hearings in 2005, John Roberts said that he would like to see an increase in the size of the docket.⁷ Exactly the opposite has occurred. In the last year of the Rehnquist Court, October Term 2004, the Court decided seventy-eight cases.⁸ The Roberts Court has yet to equal that number.⁹

This trend has enormous implications for lawyers, judges, and the nation. More major legal questions must wait a longer time before being settled. More conflicts among the circuits and the states go a longer time before being resolved. Obtaining certiorari has always been difficult, but now it is even harder. This is true in the area of criminal procedure, as well as all other areas of law.

One of the most disturbing aspects of the smaller docket is the increase in the length of the decisions. As the number of cases has gone down, the average length of opinions has gone up. In October Term 2009, the decision in *Citizens United v. Federal Election Commission* was 183 pages long.¹⁰ But, that is nothing compared to the ruling in *McDonald v. City of Chicago*, which applied the Second Amendment to state and local governments and was 214 pages long.¹¹

One of the things I must do every summer is edit annual supplements to my constitutional law and criminal procedure casebooks.¹² There is simply no way to edit a 183-page or a 214-page opinion into an assignment manageable for law students in one night without making a hash of it. So, I

3. These statistics are based on my computation. Inevitably, there are differences in counting among those who do so. For example, Thomas Goldstein does not count *Citizens United v. Federal Election Commission*, 130 S. Ct. 876 (2010), as part of the October 2009 Term statistics, even though it was decided in January 2010, because it was argued before the start of the term. See *Case Files: Citizens United v. Federal Election Commission*, SCOTUSBLOG, <http://www.scotusblog.com/case-files/cases/citizens-united-v-federal-election-commission/> (published by Thomas Goldstein) (last visited Nov. 8, 2010). I do include it because it was decided in the midst of the term.

4. Erwin Chemerinsky, *An Overview of the October 2007 Supreme Court Term*, 25 *TOURO L. REV.* 541, 541 (2009).

5. See *id.*

6. See Linda Greenhouse, *Case of the Dwindling Docket Mystifies the Supreme Court*, *N.Y. TIMES*, Dec. 7, 2006, at A1.

7. *Id.*

8. *Id.*

9. See *supra* text accompanying notes 2-3.

10. See *Citizens United v. Fed. Election Comm'n*, 130 S. Ct. 876 (2010).

11. See *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3020-136 (2010).

12. See ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW* (3d ed. 2009); ERWIN CHEMERINSKY & LAURIE L. LEVENSON, *CRIMINAL PROCEDURE* (2008).

am starting a new campaign: word and page limits should be imposed on Supreme Court opinions.

II. IT'S THE ANTHONY KENNEDY COURT

Out of tradition and deference to the Chief, the Supreme Court is referred to as the Roberts Court. But, at least for lawyers who write briefs to the Court and stand before the justices, it is the Kennedy Court. In each of the five years of the Roberts Court, Kennedy has been in the majority in more 5-4 decisions than any other justice.¹³ In October Term 2009, there were seventeen 5-4 decisions, and Justice Kennedy was in the majority in thirteen. The year before, when there were twenty-three 5-4 decisions, Justice Kennedy was in the majority in eighteen.

Therefore, it is possible to get the clearest sense of the overall ideology of the Court by focusing on the 5-4 decisions where the Court is ideologically divided. During October Term 2009, there were twelve cases where the Court divided along ideological lines—with Roberts, Scalia, Thomas, and Alito on one side and Stevens, Ginsburg, Breyer, and Sotomayor on the other. Justice Kennedy sided with the conservatives in nine cases and with the liberals in three. The year before, there were sixteen cases divided along traditional ideological lines (with the four liberals being Stevens, Souter, Ginsburg, and Breyer). Justice Kennedy was with the conservatives in eleven and the liberals in five. Overall, for the five years of the Roberts Court, Justice Kennedy has sided twice as much with the conservatives than with the liberals.

As explained below, this has been true in some of the most important changes in criminal procedure during the Roberts Court: lessening the protection of the right to counsel under the Sixth Amendment; cutting back on the privilege against self-incrimination under the Fifth Amendment; and attacking the exclusionary rule under the Fourth Amendment.

III. PRECEDENT

There is a stunning lack of regard for precedent on the Roberts Court. This was particularly evident in the Court's decision in *Citizens United v. Federal Election Commission*, which declared unconstitutional a key provision of the McCain-Feingold Bipartisan Campaign Finance Reform Act of 2001 and held that corporations can spend unlimited amounts of money in independent expenditures in election campaigns.¹⁴ The Court overruled its decision from seven years earlier in *McConnell v. Federal*

13. See *supra* note 3 and accompanying text.

14. See *Citizens United*, 130 S. Ct. at 884-86.

Election Commission.¹⁵ What changed in seven years? Did the Court find some musty history of the First Amendment that led it to believe that it had made a mistake earlier? Of course not—the only difference was that Justice Sandra Day O’Connor had been in the majority in *McConnell* and she had been replaced by Justice Samuel Alito, who was the fifth vote to overrule the precedent and strike down the restriction on campaign expenditures by corporations in *Citizens United*.¹⁶

The willingness to overrule precedent is evident in the area of criminal procedure as well. In *Montejo v. Louisiana*, the Court expressly overruled *Michigan v. Jackson* in a 5-4 decision, holding that police are not barred by the Sixth Amendment right to counsel from attempting to elicit incriminating statements from a criminal defendant who has been appointed an attorney.¹⁷

Montejo was arraigned for murder in Louisiana, and an attorney was appointed for him at the arraignment.¹⁸ Subsequently, the police took him to the murder scene and asked him to write a letter of apology to the victim’s widow.¹⁹ Prosecutors attempted to use incriminating statements from the letter at the trial.²⁰ Defense counsel objected that the letter was obtained in violation of the Sixth Amendment because police elicited it without counsel’s presence.²¹

Justice Scalia, writing for the conservative majority, found that there was no Sixth Amendment violation.²² The Court concluded that the appointment of counsel under the Sixth Amendment does not preclude subsequent efforts by the police to elicit incriminating statements.²³ The Court did, however, emphasize that *Arizona v. Edwards* remains the law, and once a criminal suspect invokes the right to counsel pursuant to *Miranda v. Arizona* under the Fifth Amendment, the police cannot attempt to elicit incriminating statements without counsel’s presence.²⁴ But, for suspects who waive their right to counsel under *Miranda*, there is nothing to

15. *Id.* at 915.

16. *Compare id.* at 886 (reaching its holding with Justice Samuel Alito in the majority), *with McConnell v. Fed. Election Comm’n*, 540 U.S. 93, 113 (2003) (reaching its holding with Justice Sandra Day O’Connor in the majority).

17. *Montejo v. Louisiana*, 129 S. Ct. 2079, 2091 (2009).

18. *Id.* at 2082.

19. *Id.*

20. *Id.*

21. *See id.*

22. *Id.* at 2092.

23. *Id.* at 2091.

24. *Id.*; *see also Arizona v. Edwards*, 451 U.S. 477, 482 (1981) (holding that, once the accused has exercised his right to have counsel present during interrogation, police cannot attempt to elicit incriminating statements the next day, in the absence of counsel, unless the accused initiates the communication).

keep police from attempting to elicit incriminating statements even when they have an attorney.²⁵

Ironically, the Court was quite willing to cut back on *Edwards* as soon as it had the chance. In *Maryland v. Shatzer*, the Court held that the protections of *Edwards* expire after fourteen days.²⁶ Shatzer was in prison for other offenses when police questioned him about molesting his child.²⁷ Shatzer invoked his right to counsel and police properly stopped questioning him.²⁸ Three years later, Shatzer was still incarcerated and police once more sought to interrogate him about the child molestation.²⁹ Police gave Shatzer his *Miranda* warnings, Shatzer waived them and made incriminating statements.³⁰ The issue was whether his earlier invocation of his right to counsel precluded this subsequent attempt at questioning without an attorney being present.³¹

The Supreme Court ruled against Shatzer with Justice Scalia writing for a Court that was unanimous as to the result.³² Justice Scalia explained that there must be a time at which the protections of *Edwards* expire.³³ The Court concluded that fourteen days was the appropriate time period.³⁴ In other words, after a suspect invokes the right to counsel under *Miranda*, the police cannot attempt to elicit incriminating statements for fourteen days.³⁵ Although, of course, there is no fourteen-day clause in the Constitution, Justice Scalia explained that this was a place where there was a need for a bright-line rule and that it was appropriate for the Court to create one as a limit on a Court-created protection.³⁶

The fourteen-day rule is arbitrary in that it invites police circumvention because police simply will wait two weeks after a suspect invokes the right to counsel before trying again to elicit incriminating statements. Also, it is notable that Shatzer was never actually released from custody between the questioning; he was just returned to the general prison population.³⁷ The Court, though, found that this was sufficient to end the “in-custodial interrogation” and to make the resultant incriminating statements admissible.³⁸ I doubt that any prisoner on the planet would

25. See *Montejo*, 129 S. Ct. at 2085.

26. *Maryland v. Shatzer*, 130 S. Ct. 1213, 1226 (2010).

27. *Id.* at 1217.

28. *Id.*

29. See *id.* at 1218.

30. *Id.*

31. *Id.*

32. *Id.* at 1217.

33. *Id.* at 1226.

34. *Id.*

35. See *id.*

36. See *id.*

37. See *id.* at 1217.

38. *Id.*

agree that Shatzer had been released from “custody” since he remained in prison the entire time.

Another example of the Court’s willingness to depart from precedent in the area of criminal procedure was one of the most important criminal procedure decisions of October Term 2009. In *Berghuis v. Thompkins*, the Supreme Court took a major step to lessening the Constitution’s protection against self-incrimination.³⁹ The Supreme Court held that a criminal suspect’s silence, even for a period of hours, is not enough to invoke the right to remain silent.⁴⁰ Even a single word after hours of silence is enough to waive this right.⁴¹

In *Miranda v. Arizona*, the Supreme Court described the inherently coercive nature of in-custodial interrogation and held that, to lessen this coercion, suspects must be informed of their rights.⁴² Even children can recite the famous *Miranda* warnings that include informing a suspect of his or her right to remain silent.

Van Chester Thompkins was arrested by Michigan police on suspicion of having committed murder.⁴³ He was given his *Miranda* warnings and was then asked to sign a statement that he understood them.⁴⁴ He refused.⁴⁵ There is a factual dispute as to whether he orally indicated his understanding.⁴⁶

Police officers questioned Thompkins for two hours and forty-five minutes.⁴⁷ Thompkins remained almost entirely silent during this time.⁴⁸ Occasionally he would answer a question with a single word or a nod.⁴⁹ Almost three hours into the interrogation, the police officer asked Thompkins, “Do you believe in God?”⁵⁰ Thompkins said yes.⁵¹ The officer then asked Thompkins whether he prays to God—once more he said yes.⁵² The officer then asked, “Do you pray to God to forgive you for shooting that boy down?”⁵³ Thompkins again said yes.⁵⁴

This statement was admitted against Thompkins at trial and was crucial evidence in gaining his conviction.⁵⁵ The issue before the Supreme

39. See *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2273 (2010) (Sotomayor, J., dissenting).

40. *Id.* at 2268.

41. See *id.*

42. *Miranda v. Arizona*, 384 U.S. 436, 444-45 (1966).

43. *Thompkins*, 130 S. Ct. at 2257.

44. *Id.* at 2256.

45. *Id.*

46. *Id.*

47. *Id.* at 2257.

48. *Id.* at 2256.

49. *Id.* at 2256-57.

50. *Id.* at 2257 (quoting App. at 11a, 153a).

51. *Id.*

52. *Id.*

53. *Id.* (quoting App. at 153a).

54. *Id.*

55. *Id.* at 2257-58.

Court was whether this violated the privilege against self-incrimination.⁵⁶ In a 5-4 decision, the Court ruled against Thompkins and found that there was no infringement of his Fifth Amendment rights.⁵⁷ Justice Anthony Kennedy wrote for the majority, joined by Chief Justice John Roberts and Justices Antonin Scalia, Clarence Thomas, and Samuel Alito.⁵⁸

The Court concluded that a suspect's silence is not sufficient to invoke the right to remain silent.⁵⁹ Rather, the Court said that there must be an "unambiguous" invocation of this right.⁶⁰ Earlier, in *Davis v. United States*, the Supreme Court held that an invocation of the right to counsel under *Miranda* must be done in a clear and unambiguous manner.⁶¹ The Court ruled that the same is true of the right to remain silent.⁶²

The Court then found that Thompkins had validly waived his right to remain silent.⁶³ The Court said that the waiver of this right need not be explicit.⁶⁴ It said that "[a]n implicit waiver of the 'right to remain silent' is sufficient to admit a suspect's statement into evidence."⁶⁵ The Court thus upheld Thompkins's conviction.⁶⁶

Justice Sonia Sotomayor wrote a vehement dissent joined by Justices Stevens, Ginsburg, and Breyer.⁶⁷ She accused the majority of turning *Miranda* on its head and lamented the irony that silence is not sufficient to invoke the right to remain silent.⁶⁸

It is impossible to reconcile the Supreme Court's decision in *Berghuis v. Thompkins* with *Miranda v. Arizona*.⁶⁹ This is yet another example, and there have been many, of the Roberts Court's lack of concern with precedent and stare decisis. In *Miranda*, the Court said that "[i]f [an] interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination."⁷⁰ But, in *Thompkins*, the Court said that the government

56. *Id.* at 2259-60.

57. *Id.* at 2265.

58. *Id.* at 2255.

59. *Id.* at 2260.

60. *Id.*

61. *Davis v. United States*, 512 U.S. 452, 460 (1994).

62. *Thompkins*, 130 S. Ct. at 2260.

63. *Id.* at 2262.

64. *Id.*

65. *Id.* at 2261 (quoting *North Carolina v. Butler*, 441 U.S. 369, 376 (1979)).

66. *Id.* at 2265.

67. *See id.* at 2266 (Sotomayor, J., dissenting).

68. *See id.* at 2278.

69. *Compare id.* (creating a presumption that confessions are admissible after questioning so long as there has been an explicit invocation of the right to remain silent), *with Miranda v. Arizona*, 384 U.S. 436, 475 (creating a strong presumption that confessions are inadmissible if obtained after questioning).

70. *Miranda*, 384 U.S. at 475.

need not show a knowing and intelligent waiver in order to find a suspect's statements admissible.⁷¹

In *Miranda*, the Court stated the following:

Whatever the testimony of the authorities as to waiver of rights by an accused, the fact of lengthy interrogation or incommunicado incarceration before a statement is made is strong evidence that the accused did not validly waive his rights. In these circumstances the fact that the individual eventually made a statement is consistent with the conclusion that the compelling influence of the interrogation finally forced him to do so. It is inconsistent with any notion of a voluntary relinquishment of the privilege.⁷²

Under this analysis, Thompkins's incriminating statements should have been excluded.⁷³

Nor is it consistent with the right to remain silent to hold that silence is insufficient and that a defendant must specifically say that he or she is invoking the privilege against self-incrimination. Few suspects realistically will have the knowledge to recite these magic words. After *Berghuis v. Thompkins*, police can keep questioning a silent suspect for hours and hours until they finally obtain an incriminating answer.⁷⁴

Miranda created a strong presumption that confessions are inadmissible if obtained after questioning unless there has been an explicit waiver of the Fifth Amendment privilege against self-incrimination.⁷⁵ In sharp contrast, *Berghuis v. Thompkins* creates a strong presumption that confessions are admissible if obtained after questioning unless there has been an explicit invocation of the right to remain silent.⁷⁶ This really does turn *Miranda* on its head.

Ultimately, the underlying issue is whether *Miranda* matters. *Miranda* was based on great concern about the inherent coercion that exists when suspects are subjected to in-custody police interrogation.⁷⁷ The Supreme Court has explained that *Miranda* reflects our society's "preference for an accusatorial rather than an inquisitorial system of criminal justice" and a "fear that self-incriminating statements will be elicited by inhumane treatment and abuses."⁷⁸ It is based on a realization that the "privilege, while sometimes a 'shelter to the guilty,' is often 'a protection of the innocent.'"⁷⁹ In 2000, in *Dickerson v. United States*, the Court, in a 7-2

71. *Thompkins*, 130 S. Ct. at 2261.

72. *Miranda*, 384 U.S. at 476.

73. *See Thompkins*, 130 S. Ct. at 2270-71 (Sotomayor, J., dissenting).

74. *See id.* at 2274-75.

75. *See Miranda*, 384 U.S. at 475.

76. *See Thompkins*, 130 S. Ct. at 2271 (Sotomayor, J., dissenting).

77. *See Miranda*, 384 U.S. at 445.

78. *Withthow v. Williams*, 507 U.S. 680, 692 (1983).

79. *Id.* (quoting *Murphy v. Waterfront Comm'n of N.Y. Harbor*, 378 U.S. 52, 55 (1964)).

decision, reaffirmed *Miranda v. Arizona*.⁸⁰ But, the Court's decision in *Berghuis v. Thompkins* shows the hollowness of this commitment. As Justice Sotomayor observed in her dissent, "Today's decision bodes poorly for the fundamental principles that *Miranda* protects."⁸¹

IV. A CONSERVATIVE COURT ON CRIMINAL PROCEDURE, WITH DRAMATIC EXCEPTIONS

There is no doubt that overall the Roberts Court is conservative.⁸² As explained earlier, Justice Kennedy sides with the conservatives more than twice as often as with the liberals in cases where the Court is ideologically divided.⁸³

The conservatism of the Roberts Court in criminal procedure is especially evident in its significant lessening of the protections of the exclusionary rule under the Fourth Amendment. The Court initially signaled the shift in 2006 with *Hudson v. Michigan*.⁸⁴

For many years, the Supreme Court has held that the police usually must knock and announce their presence before entering a residence.⁸⁵ *Hudson* involved a situation where all of the justices, and all of the judges in the lower courts, agreed that police violated this requirement.⁸⁶ The question was whether the evidence gained had to be suppressed.⁸⁷

The Supreme Court ruled 5-4 that the exclusionary rule does not apply when police violate the Fourth Amendment's requirement for knock and announce.⁸⁸ Justice Scalia's opinion called into question the very existence of the exclusionary rule.⁸⁹ He referred to it as a "last resort" and stressed the great costs of the exclusionary rule in terms of suppressing important evidence and potentially allowing dangerous people to go free.⁹⁰ He argued that the exclusionary rule is unnecessary because of the availability of civil suits against the police and the increased professionalization of police forces.⁹¹ Justice Scalia's arguments were not about an exception to the Fourth Amendment in knock-and-announce cases; they were the arguments

80. *Dickerson v. United States*, 530 U.S. 428, 431-32 (2000).

81. *Thompkins*, 130 S. Ct. at 2273 (Sotomayor, J., dissenting).

82. See Erwin Chemerinsky, *Moving to the Right, Perhaps Sharply Right*, 12 GREEN BAG 413, 413-14 (2009).

83. See *supra* Part II.

84. *Hudson v. Michigan*, 547 U.S. 586, 602 (2006).

85. See *id.* at 589.

86. *Id.* at 602.

87. *Id.* at 590.

88. *Id.* at 602.

89. *Id.* at 599.

90. *Id.* at 591.

91. *Id.* at 597.

that conservatives have made for decades against the existence of the exclusionary rule.⁹²

After *Hudson*, there is no reason for police ever to meet the Fourth Amendment's requirements for knocking and announcing before entering a dwelling. Police know that there will be no consequences to violating this rule. Justice Scalia mentioned the possibility of civil suits against police officers as an alternative to suppressing the evidence.⁹³ Such suits, though, rarely will be successfully brought. It is difficult for individuals to obtain attorneys willing to bring such cases because there is little chance of enough damages to make it worth it to sue. Juries are far more likely to be sympathetic to police officers, especially when their actions succeeded in gaining evidence of illegal activities. Moreover, the Supreme Court has made it almost impossible to sue cities for such violations and has made it difficult to sue police officers by providing them immunity to many suits for civil rights violations.

In a separate opinion, Justice Kennedy said "the continued operation of the exclusionary rule . . . is not in doubt."⁹⁴ But *Hudson* made clear that there are now four votes—Scalia, Roberts, Thomas, and Alito—to completely eliminate the exclusionary rule in Fourth Amendment cases and that it will continue to exist, or exceptions to it will be created, to the extent that Justice Kennedy wants.⁹⁵

This was evident in 2009 when the Supreme Court significantly changed the law of the exclusionary rule, again in a 5-4 decision with the most conservative justices in the majority.⁹⁶ The case, *Herring v. United States*, is the most important change in the exclusionary rule since *Mapp v. Ohio* applied it to the states in 1961.⁹⁷

Police in Coffee County, Florida, learned that Bennie Dean Herring had driven there to pick up an impounded truck.⁹⁸ The officer knew Herring and decided to check to see if there were any outstanding warrants for him from other counties.⁹⁹ The officer, Mack Anderson, found an outstanding warrant from Dale County and went and arrested Herring based on it.¹⁰⁰ Herring was searched incident to his arrest and methamphetamines

92. See, e.g., Guido Calabresi, *The Exclusionary Rule*, 26 HARV. J.L. & PUB. POL'Y 111, 111 (2003) ("To conservatives, it is an absurd rule through which manifestly dangerous criminals are let out because the courts prefer technicalities to truth.").

93. See *Hudson*, 547 U.S. at 597.

94. *Id.* at 603 (Kennedy, J., concurring in part and concurring in the judgment in part).

95. See *id.* Scalia, Roberts, Thomas, and Alito all voted with the majority to not apply the exclusionary rule. See *id.*

96. See *Herring v. United States*, 129 S. Ct. 695, 698 (2009).

97. See *id.*; see also *Mapp v. Ohio*, 367 U.S. 643, 655 (1961) (holding that "evidence obtained by searches and seizures in violation of the Constitution is . . . inadmissible in state court").

98. *Herring*, 129 S. Ct. at 698.

99. *Id.*

100. *Id.*

were found in his pocket.¹⁰¹ It turns out, though, that the warrant had been lifted by the other county five months earlier; its computer system had just not been updated.¹⁰² Thus, Herring claimed that the arrest and the resulting search were illegal.¹⁰³ The issue was whether the exclusionary rule applies when police commit an illegal search based on good faith reliance on erroneous information from another jurisdiction.¹⁰⁴

Chief Justice Roberts, writing for a 5-4 majority, held that the exclusionary rule did not apply.¹⁰⁵ The Court once more said that the exclusionary rule is the “last resort” and is to be used only where its application will have significant additional deterrent effect on police misconduct.¹⁰⁶ The Court ruled that the exclusionary rule may be used only if there is an intentional or reckless violation of the Fourth Amendment or if there are systemic police department violations with regard to searches and seizures.¹⁰⁷ For the first time in history, the Court concluded that the exclusionary rule does not apply if the Fourth Amendment is violated by good faith or even negligent police actions.¹⁰⁸

The Court could have come to the same result in favor of the police in a far narrower, more minimalist holding. In an earlier case, *Arizona v. Evans*, the Court held that the exclusionary rule does not apply if police rely in good faith on erroneous information about a warrant from a court.¹⁰⁹ The Court could have simply ruled that the same exception applies when the police rely on erroneous information about a warrant from another jurisdiction. Instead, the Court issued a sweeping rule that the exclusionary rule never applies if the police violate the Fourth Amendment in good faith or through negligence.¹¹⁰

Exempting all negligent violations of the Fourth Amendment from the exclusionary rule is, in itself, a very significant undermining of this protection. The reality is that many police violations of the Fourth Amendment are the result of negligence and not “systemic error or reckless disregard of constitutional requirements.”¹¹¹

Chief Justice Roberts went even further and said that the exclusionary rule applies only where the value in deterring police misconduct outweighs the costs of releasing a potentially guilty person.¹¹² Chief Justice Roberts

101. *Id.*

102. *Id.*

103. *Id.* at 699.

104. *Id.*

105. *Id.*

106. *Id.* at 700.

107. *Id.* at 703-04.

108. *See id.* at 698.

109. *Arizona v. Evans*, 514 U.S. 1, 2 (1995).

110. *Herring*, 129 S. Ct. at 701.

111. *Id.* at 704.

112. *Id.*

concluded that “[t]o trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system.”¹¹³

In other words, the Court has created a major new exception to the exclusionary rule. Instead of the rule being presumptively applicable for almost all Fourth Amendment violations, the law now mandates that it will apply only if it would deter the specific police misconduct at issue and only if, on balance, the deterrence gained outweighs the costs of possibly guilty people going free.¹¹⁴

There are significant problems with this erosion of the exclusionary rule. As Justice Ginsburg noted in her dissent, “[t]he exclusionary rule, it bears emphasis, is often the only remedy effective to redress a Fourth Amendment violation.”¹¹⁵ Rarely will a victim of a Fourth Amendment violation, such as the one in *Herring*, be able to successfully sue the officers for money damages.

Without the exclusionary rule, there is nothing to deter police misconduct.¹¹⁶ In the context of *Herring*, without the exclusionary rule, there would be no reason at all for police to check to make sure that the warrant for *Herring* was valid.¹¹⁷ Police are very savvy about this, and they will quickly learn when they can violate the Fourth Amendment with impunity and no real consequences.

Moreover, Chief Justice Roberts’s opinion errs in focusing on the exclusionary rule solely in terms of police deterrence. As Justice Ginsburg explains in her dissenting opinion:

But the rule also serves other important purposes: It “enabl[es] the judiciary to avoid the taint of partnership in official lawlessness,” and it “assur[es] the people—all potential victims of unlawful government conduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government.”¹¹⁸

To be sure, *Herring v. United States* does not eliminate the exclusionary rule. But, it does erode it, and it makes clear that there is a majority on the Court that wants to go very far in limiting it.¹¹⁹ The exclusionary rule is not new. The conservative members of the Court have always vocally opposed it, and now they have a majority on the Supreme Court that will

113. *Id.* at 702.

114. *See id.* at 704.

115. *Id.* at 707 (Ginsburg, J., dissenting).

116. *See id.*

117. *See id.*

118. *Id.* (quoting *United States v. Calandra*, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting)).

119. *See id.* at 704 (majority opinion).

significantly undermine it. *Herring v. United States* is an unfortunate, significant step in that direction.

Why does this matter? All of our privacy, not just the privacy of those who have committed crimes, is protected by the Fourth Amendment, which limits when the police can engage in searches or arrests. Without the Fourth Amendment, there is nothing to keep the police from stopping and searching any person, or searching anyone's home, anytime they want. This surely would mean more effective law enforcement, but at a huge cost in terms of privacy. The primary incentive for the police to comply with the Fourth Amendment is their knowledge that violations will be counter-productive because illegally obtained evidence will be suppressed. The Roberts Court's dramatic erosion of the exclusionary rule in its first few years thus puts the privacy rights of all of us in jeopardy.

Yet, it would be a mistake to see the Roberts Court as conservative in all areas of criminal procedure. In October Term 2009, the Court held that it is cruel and unusual punishment to impose a sentence of life without the possibility of parole for a non-homicide crime committed by a juvenile.¹²⁰ Also in that term, in three separate cases, the Court found ineffective assistance of counsel.¹²¹

The most significant area in which the Roberts Court has ruled in favor of criminal defendants is under the Confrontation Clause of the Sixth Amendment.¹²² In *Crawford v. Washington*, the Rehnquist Court overruled precedent and held that a prosecutor may not use testimonial statements against a criminal defendant, even if they are reliable, unless there has been the opportunity for cross-examination.¹²³ Since then, the Roberts Court has expanded the protections of *Crawford*, holding that a defendant does not forfeit its safeguards even if he is responsible for the witness's absence and that *Crawford* applies to laboratory analysts' reports such as those about the nature and amount of drugs.¹²⁴ Justice Scalia wrote the majority for all of these decisions, expanding the rights of criminal defendants under the Confrontation Clause of the Sixth Amendment.¹²⁵

V. THE OBAMA PRESIDENCY AND THE FUTURE

In his first two years, President Obama has had the chance to fill two vacancies on the Court.¹²⁶ In 2009, David Souter announced his resignation

120. *Graham v. Florida*, 130 S. Ct. 2011, 2030 (2010).

121. *See, e.g., Padilla v. Kentucky*, 130 S. Ct. 1473, 1498-87 (2010); *Sears v. Upton*, 130 S. Ct. 3259, 3267 (2010); *Porter v. McCullum*, 130 S. Ct. 447, 452-53 (2009).

122. *See, e.g., Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527, 2532 (2009).

123. *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004).

124. *See Melendez-Diaz*, 129 S. Ct. at 2542; *Giles v. California*, 128 S. Ct. 2678, 2693 (2008).

125. *See Melendez-Diaz*, 129 S. Ct. at 2530; *Giles*, 128 S. Ct. at 2681; *Crawford*, 541 U.S. at 37.

126. *See Peter Baker & Jeff Zeleny, Obama Picks Kagan as Justice Nominee*, N.Y. TIMES, May 10, 2010, at A1.

at the relatively young age (for a justice) of sixty-nine years old.¹²⁷ He was replaced by Second Circuit Judge Sonia Sotomayor.¹²⁸ In her first term on the Court, she was as consistently liberal as any justice, including in the area of criminal procedure.¹²⁹ Overall, she agreed with both Justice Ginsburg and Justice Breyer in 90% of the cases.¹³⁰

In 2010, in fact on the day of the symposium at Texas Tech University School of Law, Justice Stevens announced his resignation.¹³¹ The conventional wisdom is that his replacement, Elena Kagan, will vote in most cases the same way that Stevens would have decided. There is really no basis for this prediction in criminal procedure cases, however, since Kagan had never been a judge before going to the Supreme Court and her academic writings did not touch on this area. Many speculate that Justice Ruth Bader Ginsburg might retire during the first Obama term.¹³² In 2010, she turned seventy-seven and is now the oldest member of the Court.¹³³ But, an Obama replacement is likely to be ideologically similar to Ginsburg.

The other side of the ideological aisle is unlikely, absent unforeseen circumstances, to provide a vacancy to Obama. John Roberts turned fifty-five years old in 2010.¹³⁴ If he remains on the Court until he is ninety years old, Justice Stevens's age at retirement, Roberts will be Chief Justice until the year 2045. Samuel Alito turned sixty on April 1, 2010.¹³⁵ Clarence Thomas has been on the Supreme Court since 1991, but he is only sixty-two years old.¹³⁶ Both Antonin Scalia and Anthony Kennedy turned seventy-four in 2010.¹³⁷ It seems that the best predictor of a long life span is a seat on the United States Supreme Court. The result is that Obama, even if he serves two terms, is unlikely to replace Roberts, Scalia, Kennedy, Thomas, or Alito. This means that he will be unable, at least in the short-term, to change the overall ideological composition of the Court.

My bottom line, then, in looking at the Roberts Court, now and for the foreseeable future, is that it is overall a Court for conservatives to rejoice

127. Adam Liptak, *Souter's Exit Opens Door for a More Influential Justice*, N.Y. TIMES, May 8, 2009, at A14.

128. Jonathan Weisman, *Hispanic Picked for Top Court*, WALL ST. J., May 26, 2009, at A1.

129. See Adam Liptak, *A Year Later, "Roberts Court" Has Emerged*, PITTSBURG POST-GAZETTE, July 4, 2010, at A6.

130. See *id.*

131. See Sheryl Gay Stolberg & Charlie Savage, *Stevens's Retirement is a Political Test for Obama*, N.Y. TIMES, Apr. 10, 2010, at A1.

132. See Paul Bedard, *Ginsburg Retirement Would Give Obama Another Nominee*, U.S. NEWS & WORLD REPORT, July 20, 2010, available at 2010 WLNR 14541086.

133. See Joan Biskupic, *Reshaped Supreme Court Charts New Era*, USA TODAY, Oct. 1, 2010, at 4A.

134. See *id.*

135. See *Biographies of Current Justices of the Supreme Court*, SUPREME COURT OF THE UNITED STATES, <http://www.supremecourt.gov/about/biographies.aspx> (last visited Oct. 10, 2010).

136. See *id.*

137. See *id.*

over. Justice Kennedy sides with the conservatives more than twice as often as with the liberals. As for liberals, perhaps they should be glad that the Court is deciding only about seventy-three or sixty-seven cases a year.

