

# Pyrrhic Victories: The Mirage of Winning at the Supreme Court

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*ABSTRACT: We conduct in-depth archival research of landmark constitutional criminal procedure cases and find two ways in which the declarations of the vindication of rights they contain are misleading. First, most defendants who successfully establish police violations of their constitutional rights before the highest court in the land nonetheless remain in prison for years or decades subsequently. The multitude of ways in which the state can convict the individual defendant even in the face of one or more constitutional violations means that the Supreme Court precedents that bear their names seldom translate to genuine wins for the defendants. Second, there are often overwhelming hurdles to finding out what happened, even for legal experts and even in landmark cases—suggesting that holding the state accountable in ordinary cases and for ordinary people must be close to impossible. Transcripts are unavailable, individual official discretion determines if files are accessible, files are missing, extraordinarily high fees apply even where transcripts are available, and there are numerous other sometimes insurmountable barriers to researching these topics.*

*The fact that even those who win landmark criminal procedure cases typically remain in prison has significant doctrinal implications. The modern Supreme Court weighs “costs to society” in assessing whether to apply the exclusionary rule or Miranda protections, but our findings mean that these costs are less than they appear. Further, we argue that this opaque informational legal ecosystem masks the power of prosecutors and prevents accountability and*

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*transparency, hampering the rule of law. Accordingly, this Article has implications for specific doctrines as well as the orientation of the criminal justice system more generally.*

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[T]here is a way for your name to live forever in the annals of legal history. It's called being a precedent. . . . First, have something awful happen to you, like getting arrested without being read your rights. . . . [N]ot only must it be something awful, but it has to be *uniquely* awful and constitutionally interesting. . . . Nobody said this was going to be easy. Think of yourself as a pioneer of suffering, and brace yourself for the excruciatingly slow turning of the wheels of justice.

— Stephen Colbert, *So You Want to Be a Precedent*<sup>1</sup>

## INTRODUCTION

*Miranda v. Arizona*, *United States v. Jones*, *Carpenter v. United States*, *Brown v. Illinois*, *Payton v. New York*—any lawyer or law student with any familiarity with constitutional criminal procedure knows these landmark Supreme Court precedents vindicating the rights of defendants.<sup>2</sup> But *Miranda*, *Jones*, *Carpenter*, *Brown*, and *Payton* were also people, and what few of those lawyers or law students know is that each of these defendants remained in prison after winning at the Supreme Court.<sup>3</sup>

1. Stephen Colbert, *So You Want to Be a Precedent*, in *AMERICA (THE BOOK): A CITIZEN'S GUIDE TO DEMOCRACY IN ACTION* 92, 92 (Jon Stewart, Ben Karlin & David Javerbaum eds., 2004).

2. See generally *Miranda v. Arizona*, 384 U.S. 436 (1966); *United States v. Jones*, 565 U.S. 400 (2012); *Carpenter v. United States*, 138 S. Ct. 2206 (2018); *Brown v. Illinois*, 422 U.S. 590 (1975); *Payton v. New York*, 445 U.S. 573 (1980).

3. Even *CRIMINAL PROCEDURE STORIES: AN IN-DEPTH LOOK AT LEADING CRIMINAL PROCEDURE CASES* (Carol S. Steiker ed., 2006), which shares stories behind some famous cases, tells the reader little of what happened to most of these defendants. For example, it does briefly describe what happened to Ernesto Miranda, the titular defendant in *Miranda v. Arizona*, but does not reference any of the other three defendants. See Stephen Schulhofer, *Miranda v. Arizona: A Modest but Important Legacy*, in *CRIMINAL PROCEDURE STORIES: AN IN-DEPTH LOOK AT LEADING CRIMINAL PROCEDURE CASES* 155, 155–80 (Carol S. Steiker ed., 2006). We determine that all four remained in prison after their landmark victory at the Supreme Court. See *infra* Section I.C.1.i.

When ruling that an individual's Fourth, Fifth, or Sixth Amendment rights have been violated, the Supreme Court often makes sweeping declarations of the importance of constitutional rights and restrictions on state power.<sup>4</sup> For instance: "the Fourth Amendment protects people, not places,"<sup>5</sup> securing "the privacies of life . . . against arbitrary power,"<sup>6</sup> and "plac[ing] obstacles in the way of a too permeating police surveillance."<sup>7</sup> The impression created is that rights are vindicated, defendants are set free, and the state learns a valuable lesson. A classic illustration is *Gideon v. Wainwright*, which held that under the Constitution, a criminal defendant who cannot pay for legal representation must be provided such by the state at no cost.<sup>8</sup> The story of Clarence Earl Gideon is told triumphantly in the book and subsequent movie, *Gideon's Trumpet*.<sup>9</sup> At his subsequent retrial, Gideon's court-appointed attorney, W. Fred Turner, was able to uncover facts Gideon could not when representing himself at his first trial.<sup>10</sup> This story, while both true and heartwarming, is misleading. This Article shows that, far more often, when defendants have their claims of state violations of their rights vindicated before the highest court in the land, they nonetheless remain in prison for years or decades. The only lesson the state learns is that there are multiple ways to get its man.

More common are stories like that of Ernesto Arturo Miranda, the defendant whose case, the equally famous *Miranda v. Arizona*, established that suspects subject to custodial interrogation must be notified of their rights to silence, attorney representation, and other related protections.<sup>11</sup> As we discuss further *infra*, Mr. Miranda himself was retried and sentenced to twenty to thirty years in prison, with the state relying on a different confession than the one excluded in the *Miranda* case.<sup>12</sup> We show that, even when ruling that state

4. The Court also sometimes makes similar pronouncements when excusing state action—for instance, the Court recognized that being stopped by a policeman "is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly," but nonetheless permitted it. *Terry v. Ohio*, 392 U.S. 1, 16–17 (1968).

5. *Katz v. United States*, 389 U.S. 347, 351 (1967).

6. *Boyd v. United States*, 116 U.S. 616, 630 (1886).

7. *United States v. Di Re*, 332 U.S. 581, 595 (1948); *Carpenter v. United States*, 138 S. Ct. 2206, 2214 (2018) (quoting *Di Re*, 332 U.S. at 595).

8. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) ("The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours.").

9. See generally ANTHONY LEWIS, *GIDEON'S TRUMPET: HOW ONE MAN, A POOR PRISONER, TOOK HIS CASE TO THE SUPREME COURT—AND CHANGED THE LAW OF THE UNITED STATES* (1964) (detailing the story of Clarence Earl Gideon, the petitioner in *Gideon v. Wainwright*).

10. See *id.* at 226, 232, 234–35.

11. *Miranda v. Arizona*, 384 U.S. 436, 444 (1966) ("Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.").

12. See *infra* Section I.C.1.i.

action cannot be constitutionally tolerated, the typical Supreme Court outcome looks more as it did for Ernesto Miranda than for Clarence Gideon.

In this Article, we attempt—and our failures are as important as our successes, as detailed below<sup>13</sup>—to examine the landmark cases vindicating defendant rights in modern jurisprudence concerning police investigations. Most cases are remanded back down to the lower courts and, at the subsequent trials, these previously victorious defendants are unsuccessful.<sup>14</sup> Even in the few cases where the defendant ultimately succeeds, they often serve many years in prison during the process—in some cases, ruining their lives.<sup>15</sup> There are so many overlapping doctrinal elements in criminal procedure jurisprudence that, at the front end, the power of the state over the individual is strong enough to undermine rights vindication.<sup>16</sup> Even when defendants win, they do not really win. This fact has direct implications for multiple doctrines, such as the exclusionary rule and the breadth of the prophylactic *Miranda* protections, as both have been significantly cut back for being overly costly to society.<sup>17</sup> We show that the cost of these constitutional protections is much less than claimed.

This Article also shows that, at the back end, state power undermines accountability and creates obstacles for individuals investigating landmark cases. Thus, holding the state accountable in ordinary cases must be nigh on impossible. We argue the legal ecosystem is set up to mask the power of prosecutors and prevent accountability and transparency.<sup>18</sup> Our research, undertaken by a law librarian and a law professor, with the aid of other law librarians, archivists, and courthouse clerks, was repeatedly stymied by this opaque ecosystem. There were transcripts that were simply unavailable, missing files, extraordinarily high fees applicable where transcripts were available, reliance on individual discretion to make files available, and numerous other sometimes insurmountable hurdles in researching these topics.<sup>19</sup>

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13. See *infra* Part II.

14. See *infra* Part I.

15. For example, the story of Richard Brown, who never recovered from his incarceration. See *infra* Section I.B.3.ii.

16. There are numerous exceptions to the Fourth Amendment, and multiple remedial mechanisms can permit the introduction of evidence when such exceptions apply. For instance, a violation can be deemed to be attenuated from the discovery of evidence, even if the search for such evidence is a standard police procedure. *Utah v. Strieff*, 579 U.S. 232, 240 (2016) (“Officer Fackrell’s arrest of Strieff thus was a ministerial act that was independently compelled by the pre-existing warrant.”). Or it can be determined that evidence from the unlawful search would have been inevitably discovered through some legal means. *Nix v. Williams*, 467 U.S. 431, 444 (1984) (“If the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means . . . the deterrence rationale has so little basis that the evidence should be received.”).

17. See *infra* Section I.D.

18. See *infra* Part I.

19. See *infra* Part II.

This Article is significant in two ways. First, it challenges the idealized notion that the criminal justice system prioritizes rights vindication to the extent that ten<sup>20</sup>—some say one hundred<sup>21</sup>—guilty persons should go free to prevent the incarceration of just one innocent person.<sup>22</sup> That clarion call is quite misleading if the defendant typically does not go free, even when achieving such vindication. Second, this Article emphasizes that the impression such claims give, of a system biased in favor of the defendant, cannot be truly assessed if the difficulty of researching its veracity is impossible. The system is not simply opaque but unaccountable.

Part I begins with a description of how defendants in eleven landmark cases<sup>23</sup> fared after the Supreme Court vindicated their claims of state violation of their constitutional rights. It shows that most were not freed by the groundbreaking cases that bear their names. Even those who were eventually freed still spent years in prison and suffered unfortunate fates that can largely be tied back to their imprisonment. It then describes why we think these stories matter—essentially, that knowing how poorly most of the defendants fared despite their successes before the Supreme Court sheds light on how we should understand criminal procedure jurisprudence and the protective role of the Supreme Court. Part II then describes how difficult it was to investigate these cases, so much so that we were only able to present our findings for a fraction of the landmark cases we attempted to investigate. We thematically discuss the difficulties faced and describe the significance of these secondary stories—essentially, that they illustrate the lack of accountability in the criminal justice system, where the state wields enormous power not only to incarcerate individuals but to obliterate their stories. A conclusion follows.

## I. THE SORRY END TO MOST CRIMINAL PROCEDURE STORIES

We focus on investigation cases because the violation typically occurs at the very beginning of the individual's interaction with the state, and so it is an even more stark result if the person remains in prison for years after reaching the Supreme Court.<sup>24</sup>

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20. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 352 (1769) (“[F]or the law holds, that it is better that ten guilty persons escape, than that one innocent suffer.”).

21. Letter from Benjamin Franklin to Benjamin Vaughan (Mar. 14, 1785), <https://founder.s.archives.gov/documents/Franklin/01-43-02-0335> [<https://perma.cc/MJD2-SQE4>] (“That it is better 100 guilty Persons should escape, than that one innocent Person should suffer, is a Maxim that has been long & generally approv’d.”).

22. See generally Alexander Volokh, n *Guilty Men*, 146 U. PA. L. REV. 173 (1997) (explaining the variability of the numbers involved in both this and other maxims in criminal law).

23. We identified eighteen landmark constitutional criminal procedure cases. As described in detail, *infra* Part II, many cases were impossible to investigate, and so we report on eleven cases.

24. It is possible that violations occurring at the prosecution stage could be different: For instance, sentencing violations, such as *Apprendi* violations, may be more often immediately rectified—although the *Apprendi* case itself was remanded for further factual determinations. *Apprendi v. New Jersey*, 530 U.S. 466, 490, 497 (2000) (“Other than the fact of a prior

## A. FOURTH AMENDMENT SEARCH CASES

1. *Katz v. United States*

“Give me Duquesne minus 7 for a nickel,” Charles Katz said in a phone call with his bookie.<sup>25</sup> Unbeknownst to Mr. Katz, FBI agents were recording this conversation, and he would face up to two years in prison for eight counts of illegal interstate gambling.<sup>26</sup> The FBI had placed recording devices on two phone booths Katz used almost daily.<sup>27</sup> These devices could be turned on and off by nearby agents, recorded only Katz’s side of conversations, and were taped to the outside of the phone booths—all factors that, under traditional analysis, indicate the recordings did not constitute searches, as they did not constitute trespasses,<sup>28</sup> since “[t]here was no physical entrance into the area occupied by [Katz].”<sup>29</sup> The FBI used these recordings to obtain a warrant to search Katz’s apartment, where more evidence of illegal gambling was found.<sup>30</sup>

In *Katz*, the Supreme Court reversed its mode of analysis, emphasizing “that the Fourth Amendment protects people—and not simply ‘areas’—against unreasonable searches and seizures.”<sup>31</sup> The Court concluded “that the reach of [the Fourth] Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.”<sup>32</sup> Instead, “there is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy and, second, that the expectation be one that society is prepared to recognize as ‘reasonable.’”<sup>33</sup> Even though Katz’s conversation occurred in a public telephone booth, the Court deemed that a telephone booth can be

conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.”). But, likewise, some other postinvestigation violations could be even less likely to result in rights vindications: For instance, *Brady* violations are notoriously difficult to make out. See, e.g., *Obtaining Favorable Evidence from the Prosecution: Understanding the Brady Rule*, BURNHAM & GOROKHOV, PLLC, <https://www.burnhamgorokhov.com/obtaining-favorable-evidence-prosecution-understanding-brady-rule> [<https://perma.cc/8NFP-ZC7H>] (“Litigating *Brady* violations is a difficult and complex process because of the high burden on the defendant.”). Accordingly, we leave for further research whether the same analysis applies to those areas of constitutional criminal procedure.

25. *Katz v. United States*, 369 F.2d 130, 132 (9th Cir. 1966), *rev’d*, 389 U.S. 347 (1967).

26. Matthew Lasar, *The Crooks Who Created Modern Wiretapping Law*, ARS TECHNICA (June 2, 2011, 8:47 AM), <https://arstechnica.com/tech-policy/2011/06/the-crooks-who-created-modern-wiretapping-law/2> [<https://perma.cc/K7JY-TEXY>].

27. *Katz*, 369 F.2d at 131.

28. See *Olmstead v. United States*, 277 U.S. 438, 466 (1928) (noting that, without “actual physical invasion of his house ‘or curtilage’ for the purpose of making a seizure,” the Fourth Amendment is not implicated).

29. *Katz*, 369 F.2d at 134.

30. *Id.* at 132.

31. *Katz*, 389 U.S. at 353 (“We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the ‘trespass’ doctrine there enunciated can no longer be regarded as controlling.”).

32. *Id.*

33. *Id.* at 361 (Harlan, J., concurring).

made temporarily private by “shut[ting] the door behind him, and pay[ing] the toll.”<sup>34</sup>

It is difficult to overstate the impact of *Katz*. It has been cited 46,038 times, including in 14,790 cases and 7,818 law review articles.<sup>35</sup> There is a cottage industry in criticizing its doctrinal paradoxes, including by Supreme Court Justices,<sup>36</sup> other judges,<sup>37</sup> and academics.<sup>38</sup> Yet, it remains good law, even as the Court has returned to considering trespass in addition to the reasonable expectation of privacy test that *Katz* created.<sup>39</sup> And in this instance, the case led to the reasonably prompt release of *Katz* himself. The Court issued its decision on December 18, 1967, reversing the Ninth Circuit Court of Appeals’s affirmation of *Katz*’s conviction.<sup>40</sup> When the case was remanded to the United States District Court for the Southern District of California, the United States Attorney moved to dismiss the indictment.<sup>41</sup> The \$300 fine paid by *Katz* was returned to him by check in March 1968.<sup>42</sup>

In 2009, Harvey A. Schneider, an attorney who helped argue *Katz* before the Supreme Court, wrote a law review article about his experience,<sup>43</sup> which provides insight to events after the Supreme Court’s decision:

34. *Id.* at 352 (majority opinion).

35. *Citing References for Katz v. United States*, 389 U.S. 347, WESTLAW (last visited Oct. 12, 2023). Note that this likely represents an undercount of citations to *Katz* and other cases decided prior to 1980 because Westlaw’s Journals and Law Reviews database generally has articles from the early 1980s to the present.

36. *United States v. Jones*, 565 U.S. 400, 427 (2012) (Alito, J., concurring) (“The *Katz* expectation-of-privacy test . . . involves a degree of circularity, . . . and judges are apt to confuse their own expectations of privacy with those of the hypothetical reasonable person to which the *Katz* test looks.”); Transcript of Oral Argument at 12, *City of Los Angeles v. Patel*, 576 U.S. 409 (2015) (No. 13-1175), 2015 WL 888287 (“[W]e all know it’s circular, that if we say there is a reasonable expectation, then there is.”).

37. *See, e.g.*, Richard A. Posner, *The Uncertain Protection of Privacy by the Supreme Court*, 1979 SUP. CT. REV. 173, 188 (“[I]t is circular to say that there is no invasion of privacy unless the individual whose privacy is invaded had a reasonable expectation of privacy; whether he will or will not have such an expectation will depend on what the legal rule is.”).

38. One study describes the problem of *Katzian* circularity as the rare issue over which “nearly everyone—left, right, and center—agrees.” Matthew B. Kugler & Lior Jacob Strahilevitz, *The Myth of Fourth Amendment Circularity*, 84 U. CHI. L. REV. 1747, 1748 (2017) (listing numerous judges and scholars who have described the problem).

39. *Jones*, 565 U.S. at 406 (reinvigorating trespass analysis in addition to *Katzian* expectation of privacy analysis); *see infra* Section I.A.2.

40. *Katz v. United States*, 389 U.S. 347, 359 (1967).

41. *Docket Entry*, *United States v. Katz*, No. 34715 (S.D. Cal. Mar. 7, 1968).

42. *Docket Entry*, *United States v. Katz*, No. 34715 (S.D. Cal. Mar. 26, 1968). The final item in the court record is a letter from *Katz*’s attorney, Burton Marks, directing the clerk of the court to “secure permission from the Court for authorization directing the fine money paid be returned to myself.” Letter from Burton Marks to John A. Childress, Clerk, U.S. District Court (Jan. 19, 1968).

43. *See generally* Harvey A. Schneider, *Katz v. United States: The Untold Story*, 40 MCGEORGE L. REV. 13 (2009).



When [Katz's lead attorney] Burton Marks informed Katz of the historic decision that now bears his name, his first response was not one of thanks or gratitude. Rather, he wanted to know if he could sue the telephone company for permitting the FBI agents to put the one telephone booth out of order.<sup>44</sup>

There is evidence that Charles Katz died in 1984.<sup>45</sup> If our research identified the correct person, he was seventy-one years old and lived in Miami-Dade County, Florida.<sup>46</sup> It seems likely that Katz was one of the few defendants in our sample who achieved unmitigated success before the Supreme Court. Most other defendants were not so lucky.

## 2. *United States v. Jones*

*United States v. Jones* heralds another self-reversal by the Court, this time by reinstating the trespass test as one means of establishing that a search or seizure has occurred.<sup>47</sup> The defendant in *Jones*, however, did not reap the rewards personally that Katz did.

Antoine Jones was an “owner and operator of a nightclub . . . [who] came under suspicion” from the FBI for trafficking in narcotics.<sup>48</sup> Relying on evidence gathered through mechanisms previously deemed not to be a search by the Supreme Court—notably, visual surveillance<sup>49</sup> and use of a pen register<sup>50</sup>—as well as evidence presumably gathered under a prior warrant not mentioned by the Court, including a wiretap on his cell phone, the FBI obtained a warrant to electronically track a Jeep Cherokee registered to Jones's wife.<sup>51</sup> The FBI agents installed the tracker in violation of both the timing and location requirements of the warrant—after more than the specified ten days had passed and outside of the jurisdiction of the District of

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44. *Id.* at 23.

45. Death Record: Charles Katz, LEXISNEXIS, <https://www.lexisnexis.com/en-us/products/public-records.page> (on file with the *Iowa Law Review*) (choose “Death Records” from “People” dropdown; then enter “Charles” in the “First Name” field and “Katz” in the “Last Name” field; then select “Florida” from the “State” dropdown; then click “Search”).

46. *Id.*

47. *United States v. Jones*, 565 U.S. 400, 406 (2012). The majority opinion denied that this was a reversal, claiming “for most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas . . . it enumerates. *Katz* did not repudiate that understanding.” *Id.* at 406–07 (footnote omitted). *But see Katz v. United States*, 389 U.S. 347, 353 (1967) (“[T]he ‘trespass’ doctrine there enunciated can no longer be regarded as controlling.”).

48. *Jones*, 565 U.S. at 402.

49. *United States v. Knotts*, 460 U.S. 276, 281 (1983) (“A person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.”).

50. *Smith v. Maryland*, 442 U.S. 735, 736, 746 (1979) (finding that, since there is no legitimate expectation of privacy in the phone numbers a person dials, even from within their home, the “installation and use of a pen register” “was not a ‘search,’ and no warrant was required”).

51. *Jones*, 565 U.S. at 402.

Columbia.<sup>52</sup> The device produced more than two thousand pages of data over twenty-eight days of surveillance, information that the FBI relied on in obtaining a multiple-count indictment charging Jones and several alleged coconspirators with conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine, which Jones sought to suppress.<sup>53</sup>

In ruling in favor of Jones, the Court stressed that “[t]he Government physically occupied private property for the purpose of obtaining information.”<sup>54</sup> Accordingly, the Court deemed that it was unnecessary to even address the government’s arguments that Jones lacked any reasonable expectation of privacy “because Jones’s Fourth Amendment rights do not rise or fall with the *Katz* formulation.”<sup>55</sup> Even though the reasserted role of trespass was a reinstatement seemingly contrary to prior precedent,<sup>56</sup> the Court dismissed the government’s expectation-based argument without considering it because the government had not raised that argument below.<sup>57</sup> Thus, the Supreme Court seemed to be providing the maximum protection possible to Jones.

Doctrinally, *Jones* is arguably as significant as its predecessor, *Katz*. It has proportionally garnered even more citations than *Katz* has in fifty-five years: In the decade since *Jones* was decided, it has 10,038 citations, including in 2,015 cases and 2,444 law review articles.<sup>58</sup> *Jones* resuscitated the notion of trespass as being relevant to the question of whether a search has taken place—something that had laid dormant since *Katz* but has since has been accepted and built on in subsequent Supreme Court opinions as an alternative means of triggering Fourth Amendment protection.<sup>59</sup> *Jones* has significance even beyond this important development: It also began an equally significant trend of the Court recognizing that the *extent* of information in surveillance of an individual can constitute a Fourth Amendment search.<sup>60</sup>

52. *Id.* at 402–03.

53. *Id.* at 403.

54. *Id.* at 404–05.

55. *Id.* at 406.

56. *Id.* at 419 (Alito, J., concurring) (“This holding, in my judgment, is unwise. It strains the language of the Fourth Amendment; it has little if any support in current Fourth Amendment case law; and it is highly artificial.”).

57. *Id.* at 413 (majority opinion).

58. *Citing References for United States v. Jones*, 565 U.S. 400, WESTLAW (last visited Oct. 12, 2023).

59. *See, e.g.*, *Florida v. Jardines*, 569 U.S. 1, 3, 5–6 (2013) (applying *Jones* trespass analysis to entry onto the curtilage with a police dog for the purposes of investigation).

60. *See, e.g.*, Christopher Slobogin, *Making the Most of United States v. Jones in a Surveillance Society: A Statutory Implementation of Mosaic Theory*, 8 DUKE J. CONST. L. & PUB. POLY 1, 4 (2012) (“The opinions in *Jones* thus open the door to a more expansive Fourth Amendment.”); *Carpenter v. United States*, 138 S. Ct. 2206, 2217 (2018) (recognizing that historic cell site location information can be so revealing in aggregate that a warrant is required to access it in certain conditions). For further details, see *infra* Section I.A.3. Note that the Slobogin article cited here, <https://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1056&context=djclpp> [<https://perma.cc/4VJV-5XAW>], does not come up under a Westlaw search for this citation,

This means that *Jones* stands for two impactful techniques of expansion of Fourth Amendment rights. Yet, the defendant gained little in the end from this expansive new definition and application of search and seizure law.

Just two months later, on remand to the D.C. District Court, Jones moved to suppress the evidence from a stash house as the fruits of the illegal GPS search.<sup>61</sup> It took nine months for the court to deny the motion, finding that the government had already discovered the location of the stash house prior to the installation of the GPS device.<sup>62</sup> The court further held that the “inevitable discovery doctrine” applied because the government was gathering information from independent and lawful sources that confirmed the existence of the stash house.<sup>63</sup> The court also denied a motion to suppress the cell-site data, finding that the actions of law enforcement were objectively reasonable.<sup>64</sup> The state, then, had three different avenues available to have the evidence admitted, despite Jones’s success at the Supreme Court.

Less than one year after his groundbreaking precedent, Antoine Jones’s third trial began.<sup>65</sup> That case ended in a mistrial because there was a hung jury.<sup>66</sup> The government expressed its intent to retry Jones. On May 1, 2013, Jones pled guilty to a conspiracy to distribute and possess with intent to distribute five kilograms or more of cocaine. The court sentenced him to fifteen years in prison.<sup>67</sup>

Following his final conviction and sentencing, Jones moved to vacate his sentence, arguing he received ineffective assistance of counsel prior to his most recent trial, at which Jones had elected to represent himself.<sup>68</sup> The district court denied the motion.<sup>69</sup> Jones appealed but the appellate court denied Jones’s motion for a certificate of appealability on March 4, 2015.<sup>70</sup>

According to a Federal Bureau of Prisons Inmate Search performed on June 25, 2020, Antoine Jones was released from prison on February 22, 2019,

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which links to a different article. Errors of this kind in Westlaw, and the difficulties they cause for researchers, are discussed in Part II, *infra*.

61. Defendant’s Motion to Suppress Fruits of Illegal Search and Seizure and Memorandum of Points and Auths. in Support Thereof at 1–2, *United States v. Jones*, 908 F. Supp. 2d 203 (D.D.C. 2012) (No. 05-cr-00386).

62. Memorandum Op. & Ord. at 13–14, *United States v. Jones*, No. 05-cr-00386 (D.D.C. Dec. 20, 2012).

63. *Id.* at 11–12.

64. *United States v. Jones*, 908 F. Supp. 2d 203, 214–16 (D.D.C. 2012).

65. The U.S. Supreme Court was reviewing Jones’s second trial.

66. *United States v. Jones*, No. 05-cr-00386, 2014 WL 3538084, at \*1 (D.D.C. July 14, 2014); Minute Entry for Proc. Held Before Judge Ellen S. Huvelle, *United States v. Jones*, No. 05-cr-00386 (Mar. 1, 2013 D.D.C.); Jury Note as to Antoine Jones, *United States v. Jones*, No. 05-cr-00386 (Mar. 4, 2013 D.D.C.) (reading in full: “Judge Huvelle, We the jury can not come to an unanimous decision on the narcotics conspiracy charge”).

67. Judgment at 1, *Jones*, No. 05-cr-00386 (D.D.C. May 1, 2013).

68. Memorandum Op. at 1, *United States v. Jones*, No. 05-cr-00386 (D.D.C. July 14, 2014).

69. *Id.* at 2.

70. Ord. at 1, *United States v. Jones*, No. 05-cr-00386 (D.C. Cir. Mar. 4, 2015) (per curiam).

seven years and one month after his Supreme Court victory.<sup>71</sup> On August 21, 2019, Jones was found to be in compliance with supervised release.<sup>72</sup> Jones was eventually released early from his sentence, but that result seemingly had nothing to do with his success at the Supreme Court.<sup>73</sup> Thus, Antoine Jones served a multiyear sentence after the Supreme Court's declaration that Jones's rights had been violated.

### 3. *Carpenter v. United States*

Timothy Ivory Carpenter was charged for his involvement in leading a criminal conspiracy in nine armed robberies in Michigan and Ohio.<sup>74</sup> He was convicted of all but one count based on cell-site location information (“CSLI”) records that showed his phone's movements over more than 127 days, placing him at the scenes of the crimes.<sup>75</sup> Court orders for access to this historic location data had been obtained under the Stored Communications Act, which requires “‘specific and articulable facts showing that there are reasonable grounds to believe’ that the records sought ‘are relevant and material to an ongoing criminal investigation’”—a lesser standard than probable cause and with no requirement of a warrant.<sup>76</sup>

The Court described cell phone location information of this type as “detailed, encyclopedic, and effortlessly compiled,”<sup>77</sup> and determined “that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI.”<sup>78</sup> As such, accessing this information constitutes a search and police will generally need to get a warrant to obtain it.<sup>79</sup> To differentiate this conclusion from the Court's relative permissiveness in prior technology cases, the opinion stressed the “detailed and comprehensive record of the person's movements” that is conveyed to police through access to CSLI information, which in turn “provides an intimate window into a person's life.”<sup>80</sup>

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71. *Find an Inmate*, FED. BUREAU OF PRISONS, [https://www.bop.gov/mobile/find\\_inmate](https://www.bop.gov/mobile/find_inmate) [<https://perma.cc/H2Q3-Q8DZ>]. To search, look up using full name or Jones's Register Number: 18600-016.

72. Minute Entry for Re-entry Progress Hearing Held on 08/21/2019 Before Judge Ellen S. Huvelle as to Antoine Jones, *United States v. Jones*, No. 05-cr-00386 (D.D.C. Aug. 21, 2019).

73. *See* Ord. at 1–2, *Jones v. Kirchner*, No. 12-cv-01334 (D.D.C. Oct. 27, 2020) (dispensing settlement funds); Stipulation of Dismissal at 1, *Jones v. Kirchner*, No. 12-cv-01334 (D.D.C. Nov. 16, 2020) (stipulating to dismiss the case on November 16, 2020).

74. *Carpenter v. United States*, 138 S. Ct. 2206, 2212 (2018).

75. *Id.*

76. *Id.* at 2212 (quoting 18 U.S.C. § 2703(d) (2018)) (describing the standard as “a ‘gigantic’ departure from the probable cause rule”).

77. *Id.* at 2216.

78. *Id.* at 2217.

79. *Id.*

80. *Id.*

That final point, building on the notion that the extent of surveillance can be itself a constitutional violation, has led scholars<sup>81</sup> to hail *Carpenter* as “paradigm-shifting”<sup>82</sup> and “likely to guide the evolution of constitutional privacy in this country for a generation or more.”<sup>83</sup> In application, one scholar has shown that lower courts have developed *Carpenter*’s ruling to create an emergent “test with the potential to transform or even displace the *Katz* test over time.”<sup>84</sup> *Carpenter* has been cited 5,457 times including in 1,408 cases and 1,109 law review articles<sup>85</sup> in just four years, making it proportionally one of the highest-cited cases in criminal procedure jurisprudence. Yet, once again, the ruling did its eponymous defendant little good.

On June 22, 2018, the Supreme Court reversed and remanded the case against Carpenter back to the United States Court of Appeals for the Sixth Circuit.<sup>86</sup> Almost exactly a year later, in June 2019, on remand, the Sixth Circuit acknowledged the Supreme Court’s holding that the government’s collection of Carpenter’s CSLI was an unconstitutional search because the information was obtained without a warrant.<sup>87</sup> However, the court also decided that “the unconstitutionality of the Government’s search was not clear until after the Supreme Court reversed [the Sixth Circuit’s original decision affirming the district court]” and so the police error was made in good faith and evidentiary exclusion was deemed inappropriate.<sup>88</sup> Thus, the Sixth Circuit affirmed the judgment of the United States District Court for the Eastern District of Michigan.<sup>89</sup>

This case perfectly demonstrates another way a defendant can get a favorable ruling as a legal matter, but still lose as a practical matter. In a situation reminiscent of time travel movies, Carpenter created a precedent that he could not use to keep himself out of prison because it did not exist

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81. As well as public commentators, see, for example, Mark Joseph Stern, *Sotomayor, Fourth Amendment Visionary: How the Supreme Court Vindicated the Justice’s Prescient Theory of Digital Privacy*, SLATE (June 24, 2018, 5:56 PM), <https://slate.com/news-and-politics/2018/06/in-carpenter-v-united-states-the-supreme-court-vindicates-justice-sonia-sotomayors-theory-of-digital-privacy.html> [https://perma.cc/8V34-QJ6X] (describing the Court’s “forceful” opinion as “perhaps the most important Fourth Amendment decision of the 21<sup>st</sup> century so far”).

82. Matthew Tokson, *The Aftermath of Carpenter: An Empirical Study of Fourth Amendment Law*, 135 HARV. L. REV. 1790, 1792 (2022).

83. Paul Ohm, *The Many Revolutions of Carpenter*, 32 HARV. J.L. & TECH. 357, 358 (2019).

84. Tokson, *supra* note 82, at 1795.

85. *Citing References for Carpenter v. United States*, 138 S. Ct. 2206, WESTLAW (last visited Oct. 12, 2023).

86. *Carpenter v. United States*, 138 S. Ct. 2206, 2223 (2018).

87. *United States v. Carpenter*, 926 F.3d 313, 317 (6th Cir. 2019).

88. *Id.* at 314.

89. *Id.*

before he helped make it.<sup>90</sup> Yet, as shown below, the exact opposite logic can also be used to keep a defendant in prison.<sup>91</sup>

Following the Sixth Circuit's 2019 decision, Carpenter petitioned the court for rehearing. He argued that the district court erred when it sentenced him in 2013 to 1,395 month's imprisonment for his robbery convictions "without considering the 1,260-month mandatory-minimum sentence to which he was already subject," citing the Supreme Court's subsequent decision in *Dean v. United States*.<sup>92</sup> The Sixth Circuit noted that "[t]he district court presumably thought that it lacked discretion to consider Carpenter's mandatory-minimum sentence for that purpose, because the black-letter law of our circuit at that time forbade the court from doing so."<sup>93</sup> The court then acknowledged that *Dean* gave the district court discretion to consider the mandatory-minimum sentence and remanded Carpenter's case to allow for resentencing.<sup>94</sup> Thus, Carpenter got the benefit of someone else's later precedent when it came to sentencing, although he did not get the benefit of his own precedent when it came to excluding the evidence against him.

After the 2019 opinion remanding Carpenter's case for resentencing, there was a long wait before his actual resentencing. The court appointed an attorney for Carpenter on January 21, 2020.<sup>95</sup> For nearly two years, the only action in the case were status conferences at which Carpenter appeared by video conference.<sup>96</sup> On February 11, 2022, the court finally resentenced Carpenter.<sup>97</sup> The Eastern District of Michigan sentenced Carpenter to a total of 1,395 months in prison.<sup>98</sup>

On March 10, 2022, Carpenter filed a notice of appeal. But a search of the Federal Bureau of Prisons's inmate look-up shows that Timothy Ivory Carpenter is currently incarcerated at United States Prison Coleman I in

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90. See *infra* Section I.D, regarding why Mr. Gant should have the violation of his rights corrected whereas Mr. Davis, a subsequent appellant, should not.

91. See *infra* text accompanying note 405 (discussing *Davis v. United States*, 564 U.S. 229 (2011), and explaining that exclusion does not apply if relevant Supreme Court precedent changes after a violative search occurs but before exhaustion of appeals, as there would be no marginal deterrence, since police were following the law as it existed at the time).

92. *United States v. Carpenter*, 788 F. App'x 364, 364 (6th Cir. 2019) (citing *Dean v. United States*, 137 S. Ct. 1170, 1176–77 (2017)).

93. *Id.*

94. *Id.* at 365.

95. Ord. Appointing Fed. Cmty. Def. as to Timothy Carpenter, *United States v. Green*, No. 12-cr-20218 (E.D. Mich. Jan. 21, 2020).

96. *Docket*, *United States v. Green*, No. 12-cr-20218 (E.D. Mich.) (containing six records of status conferences as to Timothy Ivory Carpenter between February 2020 and June 2021).

97. Amended Judgment as to Timothy Ivory Carpenter, *United States v. Carpenter*, No. 12-cr-20218 (E.D. Mich. Mar. 11, 2022) (date of judgment as February 11, 2022).

98. Resentencing Before the Honorable Sean F. Cox, *United States v. Carpenter*, No. 12-cr-20218 (E.D. Mich. Feb. 11, 2022).

Sumterville, Florida.<sup>99</sup> His release date is listed as October 10, 2112—almost ninety years from now.<sup>100</sup>

#### 4. *Kyllo v. United States*

In 1991, federal agents used a thermal-imaging device to scan the home of Danny Lee Kyllo from a public street to detect relative amounts of heat.<sup>101</sup> The scan indicated the garage roof and a side wall were hot compared to the rest of the home and substantially warmer than neighboring homes.<sup>102</sup> Relying on this evidence, along with tips from informants and utility bills, the agents obtained a warrant to search Kyllo's home, where they found more than one hundred marijuana plants and charged Kyllo with manufacturing.<sup>103</sup>

In finding for Kyllo, the Court acknowledged that information available to the naked eye cannot constitute a search, and that the Court has at times permitted enhancement of such inspection via technology without such inspection constituting a search.<sup>104</sup> Nonetheless, the opinion differentiated any examination that reveals the interior of the home,<sup>105</sup> particularly revelation of “details of the home that would previously have been unknowable without physical intrusion.”<sup>106</sup> The Court refused to limit any restrictions on the state to revelations of “intimate” activities, ruling instead that such investigations using enhancing technology applied to the home are searches “at least where (as here) the technology in question is not in general public use” and excluded the heat evidence.<sup>107</sup>

*Kyllo* has been cited 8,914 times, including in 1,755 cases and 2,763 law review articles.<sup>108</sup> This puts it not far behind cases like *Katz* and *Jones*, which established new tests for the threshold question of whether the Fourth Amendment even applies. A summary of *Kyllo*'s doctrinal significance is provided by the U.S. Department of Justice: “This ruling suggests that law enforcement officers must assess all technological devices in their arsenal to determine the extent of their intrusive impact and the necessity of a warrant for their use.”<sup>109</sup> And for once, the decision impacted the parties to the case: The FBI reportedly turned off thousands of devices in the wake of the

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99. *Find an Inmate*, FED. BUREAU OF PRISONS, <https://www.bop.gov/inmateloc> [<https://pema.cc/HET9-M434>]. To search, look up using full name or Carpenter's Register Number: 47895-039.

100. *Id.*

101. *Kyllo v. United States*, 533 U.S. 27, 29 (2001).

102. *Id.* at 30.

103. *Id.*

104. *Id.* at 33.

105. *Id.* at 34.

106. *Id.* at 40.

107. *Id.* at 34.

108. *Citing References for Kyllo v. United States*, 533 U.S. 27, WESTLAW (last visited Oct. 12, 2023).

109. Thomas D. Colbridge, *Kyllo v. United States: Technology Versus Individual Privacy*, FBI L. ENFT BULL., Oct. 2001, at 25, 25.

decision;<sup>110</sup> and Danny Kyllo himself directly benefited from winning at the Supreme Court.

In the original case against him in the United States District Court for the District of Oregon, Kyllo had moved to suppress evidence against him that was gathered using the thermal-imaging device.<sup>111</sup> The district court had denied the motion to suppress, and the United States Court of Appeals for the Ninth Circuit affirmed that decision.<sup>112</sup> But following the Supreme Court's decision on June 11, 2001, Kyllo's case was remanded to the Ninth Circuit, which then remanded it to the District of Oregon.<sup>113</sup> The district court judge ordered the government to say how it would proceed; the government moved to dismiss the indictment, and the judge granted the motion.<sup>114</sup> That ended the case against Kyllo.

Danny Kyllo's case was one of the few complete successes for defendants in our study of landmark criminal procedure cases. But it did take considerable time: In the words of Kyllo himself, "I now have a clean record with no felony on it. The 10 year fight was all worth it and I turned a negative into a positive."<sup>115</sup>

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To summarize the subsequent history of our search cases, only Charles Katz and Danny Lee Kyllo actually gained from their Supreme Court wins, and for Kyllo, that gain was only realized after a decade of being under indictment or conviction. *Carpenter* is remarkable as a precedent friendly to criminal defendants in the Roberts Court, but Timothy Carpenter could not use the precedent because it did not exist at the time of his case. *Jones* is also a precedent friendly to criminal defendants, but Antoine Jones served years in prison and was only ultimately released from jail for reasons that did not have anything to do with the rule declared in *Jones*. And yet, we see next that this poor ratio of success is exceptionally high compared to the rest of constitutional criminal procedure jurisprudence.

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110. Julia Angwin, *FBI Turns Off Thousands of GPS Devices After Supreme Court Ruling*, WALL ST. J. (Feb. 25, 2012, 3:36 PM), <https://www.wsj.com/articles/BL-DGB-24008> (on file with the *Iowa Law Review*).

111. *Kyllo*, 533 U.S. at 30.

112. *Id.*

113. *United States v. Kyllo*, 258 F.3d 1004, 1004 (9th Cir. 2001) (mem.).

114. See *Docket Entry 209*, *United States v. Kyllo*, No. 92-cr-00051 (D. Or. Sept. 5, 2001); *Docket Entry 210*, *United States v. Kyllo*, No. 92-cr-00051 (D. Or. Sept. 25, 2001); *Docket Entry 211*, *United States v. Kyllo*, No. 92-cr-00051 (D. Or. Sept. 27, 2001).

115. *Court Info, Clean Record*, DANNY LEE KYLLO'S HOMEPAGE, <http://dannyleekyllo.com/court.html> [<https://perma.cc/C5UH-6GJN>].



*B. EXCEPTIONS TO THE PROBABLE CAUSE OR WARRANT REQUIREMENT CASES*

## 1. Search Incident to Arrest

*i. Arizona v. Gant*

Prior to *Arizona v. Gant*, the Supreme Court had held that, for the purposes of defining the “one lunge area” within which a search incident to arrest is permitted when lacking probable cause and a warrant,<sup>116</sup> the entire passenger compartment of an automobile is presumed to be within reach,<sup>117</sup> including containers that could not hold a weapon.<sup>118</sup> This applied even if the arrestee was not in the car at the time of the arrest<sup>119</sup> and was presumed to apply even if the arrestee was handcuffed in the back of a squad car.<sup>120</sup> This broad rule was deemed justified based on “the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within” reach of arrestees.<sup>121</sup>

Rodney Joseph Gant “was arrested for driving with a suspended license, handcuffed, and locked in the back of a patrol car, police officers searched his car and discovered cocaine in the pocket of a jacket on the backseat.”<sup>122</sup> Importantly, the arrest occurred approximately ten-to-twelve feet away from the car that Gant had been recently driving, which he had parked at the end of the driveway and approached the arresting officers on foot, who then immediately arrested and handcuffed him.<sup>123</sup> The case thus presented factual circumstances that directly challenged the presumption that an arrestee could possibly reach within the passenger compartment of a car, being both distant from it and physically incapacitated from reaching anything.

The Court ruled that “police [may] search a vehicle incident to a recent occupant’s arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.”<sup>124</sup> Further,

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116. *Chimel v. California*, 395 U.S. 752, 763 (1969) (indicating that upon arrest, a search is permissible of the arrestee’s person and the area within their immediate control, which includes “the area from within which he might gain possession of a weapon or destructible evidence”).

117. *New York v. Belton*, 453 U.S. 454, 460 (1981) (holding that a policeman may search the passenger compartment of the automobile when incident to a contemporaneous lawful custodial arrest of an occupant of the automobile).

118. *Id.* (reasoning “if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach”).

119. *Thornton v. United States*, 541 U.S. 615, 623–24 (2004) (“So long as an arrestee is the sort of ‘recent occupant’ of a vehicle such as petitioner was here, officers may search that vehicle incident to the arrest.”).

120. *Belton*, 453 U.S. at 468 (Brennan, J., dissenting) (“Under the approach taken today, the result would presumably be the same even if Officer Nicot had handcuffed Belton and his companions in the patrol car before placing them under arrest.”).

121. *Id.* at 460 (majority opinion).

122. *Arizona v. Gant*, 556 U.S. 332, 335 (2009).

123. *Id.* at 336.

124. *Id.* at 343.

the Court added in a footnote: “Because officers have many means of ensuring the safe arrest of vehicle occupants, it will be the rare case in which an officer is unable to fully effectuate an arrest so that a real possibility of access to the arrestee’s vehicle remains.”<sup>125</sup> Accordingly, the Court arguably reversed the prior factual presumption. This strong protective stance of defendant’s rights, however, took a long time to filter down to Rodney Gant himself.

The procedural history of Gant’s case gives a foretaste of the complexity and research difficulties we describe in Part II. Gant’s case went up to the Supreme Court twice. In 2000, he was convicted of possession of a narcotic drug for sale and possession of drug paraphernalia.<sup>126</sup> Gant appealed his convictions and, on March 29, 2002, the Court of Appeals of Arizona reversed them,<sup>127</sup> a decision upheld by the Arizona State Supreme Court.<sup>128</sup>

In 2003, the U.S. Supreme Court granted the state’s petition for certiorari and then vacated the appellate court’s decision and remanded the case back to the Court of Appeals of Arizona.<sup>129</sup> On remand from that first Supreme Court case, the Superior Court of Pima County held an evidentiary hearing on the legality of a warrantless search of Gant’s vehicle when he was handcuffed in the patrol car.<sup>130</sup> The Superior Court found no violation.<sup>131</sup> The Court of Appeals of Arizona reversed that decision and the Supreme Court of Arizona affirmed the Court of Appeals.<sup>132</sup> Finally, on April 21, 2009, in the second U.S. Supreme Court decision on Gant’s case, the Court affirmed the Arizona Supreme Court’s decision finding a violation of Gant’s rights under the new understanding of the limits on the search incident to arrest exception.<sup>133</sup> Following the U.S. Supreme Court’s 2009 decision, the Arizona Supreme Court issued a mandate remanding the case to the Superior Court of Pima County on October 16, 2009.<sup>134</sup>

The history of Rodney Gant’s case after it was returned to the Pima County Superior Court in 2009 is difficult to unpack, something we discuss further in Part II, but it seems clear that Gant was not retried. It appears that Mr. Gant is one of the few defendants who meaningfully gained from winning at the Supreme Court. But the fact that it is so hard to determine if Gant did go free illustrates the significance of what we discuss in Part II: the lack of accountability in the system. For, if it is not even possible to tell that the

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125. *Id.* at 343 n.4.

126. *Id.* at 336–37.

127. *State v. Gant*, 43 P.3d 188, 194 (Ariz. Ct. App. 2002), *vacated*, 540 U.S. 963 (2003).

128. *State v. Gant*, 162 P.3d 640, 646 (Ariz. 2007), *aff’d*, 556 U.S. 332 (2009).

129. *Arizona v. Gant*, 540 U.S. 963, 963 (2003).

130. *Gant*, 162 P.3d at 641–42, *aff’d*, 556 U.S. 332 (2009).

131. *Id.* at 641.

132. *Id.* at 641, 646.

133. *Arizona v. Gant*, 556 U.S. 332, 351 (2009).

134. Mandate Remanding to the Superior Ct., *Arizona v. Gant*, No. cr-06-0385 (Ariz. Oct. 16, 2009); *Docket Entry* 31, *Arizona v. Gant*, No. cr-06-0385 (Ariz. Oct. 16, 2009).

defendant in a landmark case was freed as a result of the precedent that bears his name, especially when that same remedy was denied to a person who had been treated in exactly the same way by the state but, by happenstance, had not been the chosen vehicle for the case,<sup>135</sup> as described in Section I.D, then there really is no way of knowing if the Supreme Court is really remedying any constitutional wrong.

Further, it is worth noting that, despite its seemingly broad significance in reversing the presumption of items necessarily being within the one lunge area of an arrestee—and *Gant* has been cited 13,114 times, including in 4,544 cases and 863 law review articles<sup>136</sup>—*Gant v. Arizona* has had minimal impact in preventing such searches.<sup>137</sup> Subsequent defendants are finding little protection under *Gant* because courts have combined the inevitable discovery exception and the inventory search exception to rule that evidence found unlawfully in searches of cars incident to arrest, like that of *Gant*,<sup>138</sup> would nonetheless inevitably have been discovered through an inventory search.<sup>139</sup> Remarkably, this has been applied even when officers fail to impound the car, with courts applying inevitable discovery principles to presume that officers *would have* impounded under different circumstances,<sup>140</sup> and even where officers fail to follow police procedures in police manuals on impounding a vehicle, or even where such procedures are not specified.<sup>141</sup>

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135. *Davis v. United States*, 564 U.S. 229, 244, 249–50 (2011).

136. *Citing References for Arizona v. Gant*, 556 U.S. 332, WESTLAW (last visited Oct. 12, 2023).

137. A 2018 study explored the effect of *Gant* on the rates of different categories of police searches by examining millions of individual traffic stops in two states. See generally Ethan D. Boldt & Michael C. Gizzi, *The Implementation of Supreme Court Precedent: The Impact of Arizona v. Gant on Police Searches*, 6 J.L. & CTS. 355 (2018). It found that vehicle searches incident to arrest drastically and immediately plummeted after the Court announced *Gant*—decreasing by roughly forty percent in Illinois and sixty percent in North Carolina within just one week of the Court's decision. *Id.* at 367–69. Every other alternative search category held steady following the decision, suggesting that the drop in searches incident to arrest was not a result of some exogenous change, such as fewer drivers suddenly being on the road due to a pandemic. See *id.* at 371–73. Only one alternative search category stood in stark contrast. In Illinois, a category labeled as “Other” that likely proxied inventory searches more than doubled in the week following *Gant* and has maintained the same outsized pace in the years since. *Id.* These data suggest that inventory searches largely replaced searches incident to arrest as a justification for searches of automobiles during traffic stops. *Id.* at 375.

138. Also, as discussed in Section I.D, the ruling did not even apply to a defendant whose circumstances perfectly mirrored those of Mr. *Gant* and preceded his arrest.

139. Tonja Jacobi & Elliot Louthen, *The Corrosive Effect of Inevitable Discovery*, 171 U. PA. L. REV. 1, 44 (2022) (“[I]nventories occur every time anyone is processed after arrest and every time a car is impounded. Additionally, the exception works in conjunction with inevitable discovery to effectively make much of the detail of all of those other exceptions largely irrelevant.”).

140. *Id.* at 63 (finding that an officer's testimony that “it was standard practice to impound the vehicle [when] there was ‘no one there to claim’ it” was sufficient in lieu of guidelines (quoting Brief for the United States at 17, *United States v. Bullette*, 854 F.3d 261 (4th Cir. 2017) (No. 15-4408))).

141. *Id.* at 59 (“The panel also deferred to the police department's impoundment policy, explaining that the requisite “‘standard criteria’ need not be detailed criteria,” meaning the

ii. *Riley v. California*

*Riley v. California* consolidated two cases before the Supreme Court. In *Riley v. California*, the Supreme Court of San Diego County, affirmed by the California Court of Appeal, had permitted a warrantless, comprehensive search of a “smart phone” as a legitimate search incident to arrest.<sup>142</sup> In *United States v. Wurie*, evidence resulting from a limited search of a “flip phone” with a narrow range of features was excluded by the United States Circuit Court of Appeals for the First Circuit, reversing the original admission by the United States District Court for the District of Massachusetts.<sup>143</sup>

The Facts: David Leon Riley

The state’s evidence against David Riley began with a stop for driving with expired registration tags, whereupon the officer discovered Riley was driving on a suspended license, for which he was arrested.<sup>144</sup> Incident to the arrest, an officer searched Riley’s phone, which had “a broad range of other functions based on advanced computing capability, large storage capacity, and Internet connectivity.”<sup>145</sup> Information on the phone revealed Riley’s involvement with gang members and photographs of Riley with a car that officers suspected had been involved in a recent gang shooting.<sup>146</sup> Riley was ultimately charged with “firing at an occupied vehicle, assault with a semiautomatic firearm, and attempted murder” in relation to that shooting; he was convicted on three counts and received an enhanced sentence of fifteen years to life in prison.<sup>147</sup>

The Facts: Brima Wurie

During a routine surveillance, a police officer observed Brima Wurie make an apparent drug sale from a car.<sup>148</sup> Following his arrest, officers seized two cell phones, the relevant one of which had a limited range of features.<sup>149</sup> Officers noticed that the phone was repeatedly receiving calls from a source identified as “my house” on the phone’s external screen; they opened the phone and saw a photograph of a woman and a baby set as the phone’s wallpaper.<sup>150</sup> They pressed one button on the phone to access its call log, then another button to determine the phone number associated with the “my

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‘officer’s testimony, along with reasonable inferences from that testimony,’ provided sufficient standardization for the inventory.” (quoting *United States v. Johnson*, 777 F.3d 1270, 1277–78 (11th Cir. 2015)).

142. *Riley v. California*, 573 U.S. 373, 379–80 (2014).

143. *Id.* at 380–81.

144. *Id.* at 378.

145. *Id.* at 378–79.

146. *Id.* at 379–80.

147. *Id.*

148. *Id.* at 380.

149. *Id.*

150. *Id.*

house” label, which they traced to an apartment building.<sup>151</sup> Upon confirming Wurie’s apparent residence at the address, they secured the apartment while obtaining a search warrant and thereupon found 215 grams of crack cocaine, marijuana, drug paraphernalia, a firearm, ammunition, and cash.<sup>152</sup> Wurie was charged with distributing and possessing crack cocaine with intent to distribute, and being a felon in possession of a firearm and ammunition; he was convicted on all three counts and sentenced to 262 months in prison.<sup>153</sup>

### The Ruling

The Supreme Court held that a warrant is generally required for a search of a cell phone even if the cell phone is seized incident to arrest.<sup>154</sup> Previously, an automatic search incident to arrest exception had been justified by the possibility of danger to the arresting officer,<sup>155</sup> but the Court had determined that application of the exception need not be tied to concerns regarding safety or loss of evidence.<sup>156</sup> Further, such a search categorically included all objects found on the person, such as a crumpled cigarette packet incapable of containing a weapon.<sup>157</sup> But the opinion of the Court in *Riley* differentiated digital objects from physical objects. It held that neither harm to officers nor destruction of evidence are likely to apply to cell phones,<sup>158</sup> whereas the privacy intrusion in searching a cell phone is considerable, as “[t]he sum of an individual’s private life can be reconstructed through” such an examination, be it of photographs or internet searches.<sup>159</sup> Accordingly, the Court concluded that a warrant is generally required before such a search can take place.<sup>160</sup>

*Riley* was widely embraced as a significant development in Fourth Amendment jurisprudence, expanding the rights of defendants.<sup>161</sup> Some argue the opinion significantly broadens protections for digital information

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151. *Id.*

152. *Id.* at 380–81.

153. *Id.*

154. *Id.* at 403.

155. *Chimel v. California*, 395 U.S. 752, 762–63 (1969) (“When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape.”).

156. *United States v. Robinson*, 414 U.S. 218, 235 (1973) (“The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect.”).

157. *Id.* at 236 (“Having in the course of a lawful search come upon the crumpled package of cigarettes, he was entitled to inspect it . . .”).

158. *Riley*, 573 U.S. at 386.

159. *Id.* at 394.

160. *Id.* at 401.

161. *See, e.g.*, Bruce L. McDonald, *The Supreme Court’s Landmark “Cell Phone” Privacy Decision*, WILEY (July 2014), <https://www.wiley.law/newsletter-5032> [<https://perma.cc/X3KC-WF8M>] (“This decision likely will have future ramifications extending far beyond police practices in searching street criminals, for multiple reasons.”).

beyond the context of cell phones.<sup>162</sup> A former assistant U.S. attorney hailed the opinion as “[t]he most important privacy ruling in over 40 years,” saying: “Fifty years from now, future generations will look back on *Riley v. California* as the case that established privacy rights in the digital age” and “the bedrock of the privacy rights of future generations.”<sup>163</sup> *Riley* has been cited 10,245 times including in 2,848 cases and 1,512 law review articles.<sup>164</sup> Its impact for the defendants, however, was much less powerful.

#### The Outcome: David Leon Riley

The Supreme Court reversed the judgment of the California Court of Appeal permitting the admission of evidence against Riley.<sup>165</sup> On remand, the California Court of Appeal affirmed the judgment again. The State of California argued that the admission of the photographs was harmless because they were cumulative of other evidence against Riley.<sup>166</sup> The Court of Appeal agreed and held that the other evidence against Riley was strong enough that including the three inadmissible photographs was harmless.<sup>167</sup> The California Supreme Court denied his petition for review.<sup>168</sup> Riley remains incarcerated at Centinela State Prison in Imperial, California.<sup>169</sup> He is eligible for parole in July of 2026.<sup>170</sup>

#### The Outcome: Brima Wurie

The Supreme Court affirmed the judgment of the First Circuit, which had reversed the admission of evidence by the United States District Court for the District of Massachusetts.<sup>171</sup> Wurie moved to vacate his sentence in October 2014, arguing ineffective assistance of counsel.<sup>172</sup> In December of that year, the U.S. attorney moved to dismiss Wurie’s motion as premature and requested resentencing, noting that the Supreme Court had remanded

162. See, e.g., Orin Kerr, *The Significance of Riley*, WASH. POST (June 25, 2014, 11:56 AM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/06/25/the-significance-of-riley/> [<https://perma.cc/VC66-JG45>] (describing the case as “a big deal” that “may just be the tip of the iceberg”).

163. Mitchell Epner, *The Most Important Privacy Ruling in over 40 Years*, CNBC (June 27, 2014, 7:02 AM), <https://www.cnbc.com/2014/06/27/the-most-important-privacy-ruling-in-over-40-years-riley-v-californiasupreme-courtcommentary.html> [<https://perma.cc/8NBW-7YUS>].

164. *Citing References for Riley v. California*, 573 U.S. 373, WESTLAW (last visited Oct. 12, 2023).

165. *Riley*, 573 U.S. at 403.

166. *People v. Riley*, No. Do59840, 2015 WL 721254, at \*1 (Cal. Ct. App. Feb. 19, 2015).

167. *Id.*

168. *People v. Riley*, No. S225382, 2015 Cal. LEXIS 4470, at \*1 (June 17, 2015).

169. *Inmate Information*, CDCR INMATE LOCATOR: PUBLIC INMATE LOCATOR SYSTEM, <https://inmatelocator.cdcr.ca.gov/Details.aspx?ID=AK2503> [<https://perma.cc/DQ7D-FWJH>]. To search, look up using full name or Riley’s CDCR Number: AK2503.

170. *Id.*

171. *Riley v. California*, 573 U.S. 373, 381, 403 (2014).

172. *Motion to Vacate, Set Aside, or Correct a Sentence by a Pers. in Fed. Custody at 1, 5, United States v. Wurie*, No. o8-cr-10071 (D. Mass. Oct. 31, 2014).

the case for further proceedings.<sup>173</sup> The Court granted that motion.<sup>174</sup> When Wurie was resentenced on March 18, 2015, the Court sentenced him to 168 months' imprisonment to be followed by four years of supervised release.<sup>175</sup> Wurie appealed his new sentence to the First Circuit Court of Appeals, arguing that he should not have been sentenced as a career offender because his prior Massachusetts convictions were not crimes of violence. The First Circuit disagreed and denied his appeal.<sup>176</sup>

Wurie spent multiple years in prison litigating complicated postconviction motions. Records from Wurie's postconviction litigation period indicate that he was released before serving his full sentence.<sup>177</sup> And the Bureau of Prisons's inmate lookup shows that Brima Wurie was released from prison on September 13, 2019.<sup>178</sup> But once again, his release was not related to his win at the Supreme Court.

## 2. Felony Arrests

### i. Payton v. New York

*Payton v. New York* also involved two cases below: Theodore Payton was convicted of murder before the Supreme Court, New York County, and Obie Riddick was convicted of two armed robberies before the Supreme Court, Queens County.<sup>179</sup> Both convictions were affirmed by the Appellate Division of the Supreme Court of New York, and again by the Court of Appeals of New York in a single opinion.<sup>180</sup> The consolidated cases were reviewed by the U.S. Supreme Court to address whether police officers may "enter a private

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173. Motion to Dismiss 2255 Petition Without Prejudice Pending Entry of Final Judgment and Request for Resentencing at 1, 5, *United States v. Wurie*, No. 08-cr-10071 (D. Mass. Dec. 23, 2014).

174. *Docket Entry 103*, *United States v. Wurie*, No. 08-cr-10071 (D. Mass. Dec. 30, 2014) (reading in full: "Judge Richard G. Stearns: ELECTRONIC ORDER entered granting 101 Motion to Dismiss 2255 Petition as Premature and Request for Resentencing as to Brima Wurie (1). Court appoints FPD Mizner. (Seelye, Terri)").

175. Amended Judgment in a Crim. Case at 2, 3, *United States v. Wurie*, No. 08-cr-10071 (D. Mass. Mar. 18, 2015).

176. *United States v. Wurie*, 867 F.3d 28, 37 (1st Cir. 2017).

177. The 2018 motion to vacate the original sentence and have Wurie plead guilty to new information referenced that Wurie had already been in prison for 124 months and had substantial good time credits. Motion to Vacate at 1, *United States v. Wurie*, No. 08-cr-10071 (D. Mass. May 7, 2018). Furthermore, the last entries in the docket show that a February 26, 2020, order was mailed to Wurie at FCI Berlin, and the letter was returned as undeliverable. *Docket Entry 149*, *United States v. Wurie*, No. 08-cr-10071 (D. Mass. Feb. 26, 2020); *Docket Entry 150*, *United States v. Wurie*, No. 08-cr-10071 (D. Mass. Mar. 9, 2020).

178. *Find an Inmate*, FED. BUREAU OF PRISONS, [https://www.bop.gov/mobile/find\\_inmate](https://www.bop.gov/mobile/find_inmate) [https://perma.cc/59Q8-SZBT]. To search, look up using full name or Wurie's Register Number: 24753-038.

179. *Payton v. New York*, 445 U.S. 573, 576-78 (1980).

180. *Id.* at 578-79.

residence without a warrant and with force, if necessary, to make a routine felony arrest.”<sup>181</sup>

The Facts: Theodore Payton

Over two days of investigation, New York detectives had developed probable cause that Theodore Payton had murdered a gas station attendant, but they did not obtain an arrest warrant.<sup>182</sup> Instead, they went to Payton’s apartment to arrest him, observed light and music coming from the apartment, but received no response to their knock on the door.<sup>183</sup> After summoning assistance, they used crowbars to break open the door and enter the apartment, which was empty, but lying in plain view was a .30-caliber shell casing that was admitted into evidence at Payton’s murder trial.<sup>184</sup>

The Facts: Obie Riddick

Police had even more opportunity to get a warrant against Obie Riddick, having been investigating two armed robberies for over two years, and Riddick having been identified by the victims nine months prior to police learning his address.<sup>185</sup> Instead, four police personnel knocked on the door of his house, and when his young son opened the door, police observed Riddick sitting in bed.<sup>186</sup> They entered, placed him under arrest and conducted a search of a nearby chest of drawers, wherein they found narcotics and related paraphernalia.<sup>187</sup> Riddick was subsequently indicted on additional narcotics charges.<sup>188</sup>

The Ruling

The opinion of the Court stressed that seizures of persons are presumed unreasonable if they occur in the home without a warrant.<sup>189</sup> The expectation that arrests conducted in a house require a warrant was deemed consistent with prior common law, although there was no such explicit rule.<sup>190</sup> Also, although that expectation was not supported by a majority of states at the time of the opinion, the Court took notice of the fact that fewer states were allowing warrantless entry than previously had.<sup>191</sup> Thus, although the prior precedent was mixed, the Court determined that “neither history nor this Nation’s experience requires us to disregard the overriding respect for the sanctity of

181. *Id.* at 574.

182. *Id.* at 576.

183. *Id.*

184. *Id.* at 576–77.

185. *Id.* at 578 (“On March 14, 1974, Obie Riddick was arrested for the commission of two armed robberies that had occurred in 1971. He had been identified by the victims in June 1973, and in January 1974 the police had learned his address.”).

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.* at 586.

190. *Id.* at 598.

191. *Id.* at 598–99.



the home that has been embedded in our traditions since the origins of the Republic.”<sup>192</sup> Accordingly, in the absence of exigent circumstances, the Court ruled “that threshold may not reasonably be crossed without a warrant”<sup>193</sup> and reversed and remanded the cases back to the New York state courts.

*Payton* has been cited 25,240 times including in 9,027 cases and 1,790 law review articles.<sup>194</sup> *Payton* is considered a landmark case by both judges<sup>195</sup> and academics.<sup>196</sup> Nevertheless, numerous scholars have shown that the potential protective impact of *Payton* has been undermined.<sup>197</sup> In particular, the language of *Payton*—particularly that permitting the police to enter a suspect’s residence when they have “reason to believe” the suspect is home—has enabled judicial deference in subsequent cases to factual assumptions made by police.<sup>198</sup> And the new rule did little for the defendants themselves.

#### The Outcome: Theodore Payton

In Payton’s case, the Court of Appeals remitted the case to the Supreme Court, New York County for a hearing “and for the entry of either an order granting defendant’s motion to suppress and ordering a new trial or an amended judgment reflecting the disposition made at the hearing.”<sup>199</sup> The record provides little else other than recording that on April 2, 1981, Payton pleaded guilty to manslaughter in the first degree and was sentenced to four to twelve years in prison.<sup>200</sup>

#### The Outcome: Obie Riddick

In Riddick’s case, the entire opinion of the Court of Appeals reads simply: “Upon reargument, following remand by the Supreme Court of the United States, order reversed, motion to suppress granted and case remitted to Supreme Court, Queens County, for further proceedings on the indictment.”<sup>201</sup> Following that opinion, nothing is known about the ultimate status of the case because it is sealed.

192. *Id.* at 601.

193. *Id.* at 590, 603.

194. *Citing References for Payton v. New York*, 445 U.S. 573, WESTLAW (last visited Oct. 12, 2023).

195. *See, e.g., People v. Coles*, 428 N.Y.S.2d 412, 417 (Sup. Ct. 1980) (describing *Payton* as a “landmark case”).

196. *See, e.g., Caroline Hunt, Reaching Across the Threshold of the Fourth Amendment—Why Payton v. New York Should Be Interpreted Broadly*, 70 SMU L. REV. 189, 189 (2017) (introducing *Payton* as a “landmark case”).

197. *See, e.g., Edward G. Mascolo, Arrest Warrants and Search Warrants in the Home: Payton v. New York Revisited and Modified Under State Constitutional Law*, 66 CONN. BAR J. 333, 333–34 (1992) (arguing *Payton* provides less protection than it should, in contrast to *Steagald v. United States*, 451 U.S. 204 (1981), which requires a search warrant in addition to an arrest warrant for third parties’ homes).

198. *See generally* Matthew A. Edwards, *Posner’s Pragmatism and Payton Home Arrests*, 77 WASH. L. REV. 299 (2002) (showing this in a survey of *Payton*’s progeny).

199. *People v. Payton*, 412 N.E.2d 1288, 1292 (N.Y. 1980).

200. Telephone Interview with N.Y.C. Sup. Ct. (Apr. 9, 2021).

201. *People v. Riddick*, 411 N.E.2d 792, 792 (N.Y. 1980).

There is not enough information available about these cases to be able to tell why Theodore Payton was ultimately unsuccessful or whether and why Obie Riddick was successful or not.

### 3. Remedies: Exclusionary Rule, Standing & Fruits

#### *i.* Byrd v. United States

In September 2014, Latasha Reed rented a car from a rental agency and signed an agreement that specified that permitting any unauthorized driver to operate the car is a violation of the rental agreement.<sup>202</sup> She did not specify any other authorized driver, but immediately gave the keys and control of the car to Terrence Byrd, who stowed his possessions in the trunk and drove from New Jersey to Pennsylvania.<sup>203</sup> Pennsylvania state trooper David Long became “suspicious of Byrd because he was driving with his hands at the ‘10 and 2’ position on the steering wheel, sitting far back from the steering wheel, and driving a rental car.”<sup>204</sup> Trooper Long followed Byrd and pulled him over for a possible traffic infraction; he and another trooper sought Byrd’s consent to search the car, whereupon Byrd admitted that “he had a ‘blunt’ in the car and offered to retrieve it for them. The officers understood ‘blunt’ to mean a marijuana cigarette. They declined to let him retrieve it and continued to seek his consent to search the car, though they stated they did not need consent because he was not listed on the rental agreement.”<sup>205</sup> Acting on this belief, the troopers conducted a thorough search of the vehicle and found body armor and forty-nine bricks of heroin.<sup>206</sup>

The unanimous opinion of the Court refused to adopt the government’s limited construction of the leading case on the topic, *Rakas v. Illinois*,<sup>207</sup> as precluding passengers from having any expectation of privacy in a vehicle.<sup>208</sup> Instead, while recognizing that presence in the vehicle cannot alone be enough to establish a reasonable expectation of privacy—or else the car thief would be protected<sup>209</sup>—the Court stressed that expectations of privacy need not be based on property interests.<sup>210</sup> Rather, as both sole occupant and driver of the vehicle, Byrd had dominion and control over the car, creating an expectation of privacy.<sup>211</sup> That expectation was not contingent on the legality of his control, as the Court considered there may be many innocuous or even

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202. *Byrd v. United States*, 138 S. Ct. 1518, 1524 (2018).

203. *Id.*

204. *Id.*

205. *Id.* at 1525.

206. *Id.* at 1523.

207. *Rakas v. Illinois*, 439 U.S. 128, 144 (1978).

208. *Byrd*, 138 S. Ct. at 1528 (describing this as a “misreading”).

209. *Id.*

210. *Id.* at 1526.

211. *Id.* at 1528.

desirable reasons why an unauthorized driver may take control of a car, such as the renter being inebriated.<sup>212</sup> Accordingly, unlike the thief, who is a wrongdoer, not simply unauthorized, the mere fact of being unauthorized does not extinguish a person's reasonable expectation of privacy.<sup>213</sup>

*Byrd* may not be as famous as some of the other cases we discuss but it is highly significant for several reasons. First, as the ACLU noted in its amicus brief in the case, the immediate impact of a contrary ruling would have adversely and disproportionately affected many people of color because “[m]otor vehicle travel is a necessity for effective participation in modern society” and many individuals “depend on rental cars for everyday travel because they cannot afford to purchase their own vehicles.”<sup>214</sup> Second, scholars have noted that the significance of *Byrd* goes well beyond the rental car context. For instance, *Byrd*'s analysis may determine whether a person “has standing to challenge the installation and use of a GPS tracking device to locate a vehicle” if “‘lawful possession and control’ at the time the GPS device is installed” is enough to create a reasonable expectation of privacy.<sup>215</sup> Third, the impact of *Byrd* may extend beyond the car context altogether to encompass broader expectations of privacy, such as in a person's email, because if the terms of a rental contract do not control expectations of privacy in a car, the same argument could be made regarding terms of service in e-mail.<sup>216</sup>

We believe that *Byrd* is significant even beyond these other specified applications. By recognizing the legitimacy of expectations of privacy beyond that of property owners, the opinion lays out principles of privacy that not only apply to other topics, but that apply to different, alternative lifestyles than are usually conceived of by the Supreme Court. It is one of the few Roberts Court cases that not only finds for the defendant but does so in a way that lends itself to potential future recognition of, for instance, different living arrangements other than a nuclear family, alternative ownership arrangements, such as share-time residences often utilized by immigrant laborers, and other nonformal living and possessory arrangements. *Byrd* has been cited 1,174 times including in 424 cases and 81 law review

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212. *Id.* at 1529.

213. *Id.* at 1531.

214. Brief of the ACLU & the Nat'l Ass'n of Crim. Def. Laws. as Amici Curiae in Support of Petitioner at 4, *Byrd v. United States*, 138 S. Ct. 1518 (2018) (No. 16-1371). Further, “low-income individuals, who are disproportionately unable to purchase a car and thus must depend on rentals cars . . . also are more likely to be second unpermitted drivers.” *Id.* at 24.

215. Tracey Maclin, *Byrd v. United States: Unauthorized Drivers of Rental Cars Have Fourth Amendment Rights: Not as Evident as It Seems*, 2018 SUP. CT. REV. 81, 114–15 (quoting *Byrd*, 138 S. Ct. at 1524).

216. See Orin S. Kerr, *Byrd v. United States: The Supreme Court Takes a Broad View of Fourth Amendment Standing*, VOLOKH CONSPIRACY (May 15, 2018), <https://reason.com/volokh/2018/05/15/byrd-v-united-states-the-supreme-court-t> [<https://perma.cc/9XA4-H8PK>].

articles.<sup>217</sup> And yet, once again, the significance of the case for the defendant himself was far less clear.

On May 14, 2018, the Supreme Court remanded the case against Terrence Byrd back down to the Circuit Court of Appeals for the Third Circuit.<sup>218</sup> The Supreme Court left open two possibilities: that the intentionality and fraud by which Byrd procured the rental car could render him a wrongdoer much like a thief, and thus lose his expectation of privacy; or that the police had probable cause for the search in any event.<sup>219</sup> The Third Circuit held the government did not waive its arguments regarding probable cause and defendant's reasonable expectation of privacy and remanded the case to the U.S. District Court for the Middle District of Pennsylvania.<sup>220</sup> Following remand, Byrd moved to suppress evidence obtained by the traffic stop five years earlier.<sup>221</sup> The court denied the motion, holding that although Byrd did not freely and voluntarily consent to the search, the troopers had probable cause to search the entire vehicle, and even if they lacked probable cause, the good faith exception to the exclusionary rule applied.<sup>222</sup> Byrd moved for reconsideration of the court's decision and his motion was denied.<sup>223</sup>

Byrd withdrew his plea of not guilty, pleaded guilty, and was sentenced.<sup>224</sup> Byrd filed a notice of appeal on August 27, 2019.<sup>225</sup> The Third Circuit affirmed the decision of the District Court on May 8, 2020, agreeing that probable cause supported the search.<sup>226</sup> Byrd was released from prison on August 9, 2022.<sup>227</sup>

*Byrd v. United States* shows that even if one rule tilts in a defendant's favor, the availability of several other ways to admit evidence against that defendant means that defendants often are ultimately not successful. Byrd's eventual release, eight years after his arrest, came about for reasons unrelated to his Supreme Court victory.

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217. *Citing References for Byrd v. United States*, 138 S. Ct. 1518, WESTLAW (last visited Oct. 12, 2023).

218. *Byrd*, 138 S. Ct. at 1531.

219. *Id.*

220. *United States v. Byrd*, 742 F. App'x 587, 591–92 (3d Cir. 2018).

221. *United States v. Byrd*, 388 F. Supp. 3d 406, 408 (M.D. Pa. 2019).

222. *Id.* at 417.

223. *United States v. Byrd*, No. 14-cr-321, 2019 WL 3532159, at \* 4 (M.D. Pa. Aug. 2, 2019).

224. Judgment in Crim. Case at 1, *United States v. Byrd*, No. 14-cr-00321 (M.D. Pa. Aug. 13, 2019).

225. Notice of Appeal to U.S. Ct. of Appeals for the Third Cir. at 1, *United States v. Byrd*, No. 14-cr-00321 (M.D. Pa. Aug. 27, 2019).

226. *United States v. Byrd*, 813 F. App'x 57, 58 (3d Cir. 2020).

227. *Find an Inmate*, FED. BUREAU PRISONS, <https://www.bop.gov/inmateloc> [<https://perma.cc/G3GV-XB74>]. To search, look up using full name or Byrd's Register Number: 72467-067.

*ii. Brown v. Illinois*

*Brown v. Illinois* addressed whether an arrest made without probable cause or a warrant necessarily fatally taints any inculpatory statements made or if, by the arrestee receiving *Miranda* warnings, the taint is sufficiently attenuated, making the statements admissible into evidence at trial.<sup>228</sup> As part of a murder investigation, police arrested Richard Brown outside his apartment after breaking into that apartment and searching it, all without probable cause or a warrant.<sup>229</sup> Brown's was one of numerous names given to detectives by the victim's brother, but only as an acquaintances, not suspects.<sup>230</sup> Two incriminating statements Brown subsequently made were used against him at trial, where he was convicted.<sup>231</sup> On appeal to the Illinois State Supreme Court, the government's argument that there was probable cause for the arrest failed; but the government did convince the court that "*Miranda* warnings in and of themselves broke the causal chain so that any subsequent statement, even one induced by the continuing effects of unconstitutional custody, was admissible."<sup>232</sup> This conclusion was based largely on *Wong Sun v. United States*, which held that confessions made following an unlawful arrest could be voluntary and thus attenuated from the violation.<sup>233</sup> However, that case was decided before *Miranda* and involved defendants who were released on their own recognizance, and who returned voluntarily several days later to make statements, ensuring that the taint of the violation had dissipated.<sup>234</sup>

The opinion of the Court rejected the lower court's per se rule that provision of *Miranda* warnings automatically dissolves any taint associated with the illegal conduct. Instead, it crafted a fact-intensive standard, in which the *Miranda* warnings constitute one important factor, but one of many that must be considered, along with the temporal proximity between the arrest and the confession, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct.<sup>235</sup> Finding that there was a deep and detailed factual record, the Court refused to remand the case for further factual findings. It concluded that Illinois had failed in its burden to show that the confessions were admissible under *Wong Sun*, as there were only two hours between Brown's illegal arrest and his first statement, "the second statement was clearly the result and the fruit of the first," with no intervening event, and,

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228. *Brown v. Illinois*, 422 U.S. 590, 591-92 (1975).

229. *Id.* at 592.

230. *Id.*

231. *Id.* at 596.

232. *Id.* at 590.

233. *Wong Sun v. United States*, 371 U.S. 471, 491-92 (1963).

234. *Id.* at 491.

235. *Brown*, 422 U.S. at 603-04.

most importantly, the illegality was purposeful.<sup>236</sup> Purposefulness was apparent since the procedural defects of the arrest were “obvious,” the purpose of the arrest was investigatory,<sup>237</sup> and the manner in which Brown was arrested—at gunpoint and illegally forced back inside his own residence<sup>238</sup>—“gives the appearance of having been calculated to cause surprise, fright, and confusion.”<sup>239</sup>

Accordingly, the Supreme Court held Brown’s confession inadmissible and remanded Brown’s case back to the Illinois Supreme Court “for further proceedings.”<sup>240</sup> Brown’s release followed fairly quickly: On July 28, 1975, the mandate of the Supreme Court reversing and remanding the case against Brown was received and filed by the Illinois Supreme Court Clerk’s office.<sup>241</sup> According to the Illinois Department of Corrections, Brown was released on bond on August 27, 1975.<sup>242</sup> The State of Illinois dismissed its charges against him on October 15, 1975, following a hearing at which the prosecutors told the judge that their only evidence against Brown was the confession that the Supreme Court had held inadmissible.<sup>243</sup>

The *Brown* three-factor test has become the central determinant of attenuation in confession cases, with nearly 16,000 citing references<sup>244</sup> and even a YouTube case summary video.<sup>245</sup> Yet, the test has at times been read narrowly in limiting police misbehavior. For instance, in *Utah v. Strieff*, application of the three factors in *Brown* led the Court to conclude that evidence seized as part of a search incident to arrest that follows from an unlawful *Terry* stop is nonetheless admissible,<sup>246</sup> despite evidence that the practice of conducting unlawful stops in the hope of finding such arrest warrants was standard procedure in many jurisdictions.<sup>247</sup>

Although Richard Brown was released because of his triumph at the Supreme Court, the outcome for him was also a pyrrhic victory. Brown had been incarcerated since his arrest on May 13, 1968, seven and a half years

236. *Id.* at 605.

237. *Id.*

238. *Id.* at 593.

239. *Id.* at 605.

240. *Id.*

241. *Docket Entry*, *People v. Brown*, No. 70348 (Ill. Sup. Ct. July 28, 1975).

242. Letter from Naomi Kowalski, Rec. Off. Supervisor, Ill. Dep’t of Corr., to Clerk of the Cir. Ct. (July 30, 1992).

243. Rep. of Proc. at 2–3, *People v. Brown*, No. 68-2275 (Ill. Cir. Ct. Oct. 15, 1975).

244. Westlaw reports 15,953 citing references, including 4,798 case citations and 584 law review citations. *Citing References for Brown v. Illinois*, 422 U.S. 590, WESTLAW (last visited Oct. 12, 2023).

245. Quimbee, *Brown v. Illinois Case Brief Summary*, YOUTUBE (Nov. 2, 2022), [https://www.youtube.com/watch?v=C3fZPMUjkkWE&ab\\_channel=Quimbee](https://www.youtube.com/watch?v=C3fZPMUjkkWE&ab_channel=Quimbee) [<https://perma.cc/8VRY-WDMG>].

246. *Utah v. Strieff*, 579 U.S. 232, 239 (2016).

247. *Id.* at 251 (Sotomayor, J., dissenting) (describing numerous jurisdictions in which it is “‘routine procedure’ or ‘common practice’” for police officers to run warrant checks on pedestrians they detained without reasonable suspicion).

prior to his eventual release. After he left prison, Brown struggled to find work and moved very frequently. As Brown himself explained in his deposition, “I never had a permanent residence because I never had a permanent job.”<sup>248</sup> Before he was arrested, Brown worked at Schwinn Bicycle Company for four years, working his way up to a supervisor position.<sup>249</sup> After he was released from prison, Brown worked as a day laborer and occasionally taught people how to play the drums.<sup>250</sup> He described his difficulties finding work, saying that places generally turned him down when they found out he had been to prison.<sup>251</sup> Brown noted that his unique background as someone who had been to prison but was not out on parole made it especially difficult to find a job—he said that people would say that they would hire him if he had a “parole agent.”<sup>252</sup>

Perhaps one might not be as concerned by the pyrrhic victories discussed in this Article because the defendants could, and in many cases did, pursue a civil case.<sup>253</sup> “[A] ‘fundamental purpose’ of [a] Section 1983” lawsuit—as acknowledged by the U.S. Supreme Court—is compensation.<sup>254</sup> Thus, it would be tempting to find a happy ending for Richard Brown in his successful civil rights case against the officers, but again *Brown* demonstrates that a civil remedy is not enough to repair the harm. In 1977, Brown filed a complaint against the arresting officers for violation of his Fifth and Fourteenth Amendment rights under 42 U.S.C. § 1983.<sup>255</sup> He had a few notable victories early in the case. On March 1, 1978, the court denied defendants’ motion to dismiss, holding that Brown’s case was not barred by the statute of limitations.<sup>256</sup> Brown filed a motion for summary judgment as to liability on June 12, 1979.<sup>257</sup> The court granted Brown’s motion on January 2, 1980.<sup>258</sup> In an interview we conducted with him, Sam Tenenbaum, Brown’s attorney, recalls that getting summary judgment on a case like Brown’s was “next to unheard of” at the time.<sup>259</sup>

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248. Deposition of Richard Brown at 4, *Brown v. Nolan*, No. 77-c-1017 (N.D. Ill. Apr. 24, 1979).

249. *Id.* at 9–11.

250. *Id.* at 22.

251. *Id.* at 24.

252. *Id.* at 25–26. In an interview we conducted with him, Brown’s attorney emphasized that all of those with a criminal background have difficulty finding work. Interview with Sam Tenenbaum (June 8, 2020).

253. Antoine Jones also pursued a successful Section 1983 claim. Order, *Jones v. Kirchner*, No. 12-cv-01334 (D.D.C. Oct. 27, 2020) (disbursing settlement funds).

254. John C. Jeffries, Jr., *Compensation for Constitutional Torts: Reflections on the Significance of Fault*, 88 MICH. L. REV. 82, 84 (1989) (quoting *Pembaur v. Cincinnati*, 475 U.S. 469, 481 (1986)).

255. Complaint at 1–3, *Brown v. Nolan*, No. 77-c-1017 (N.D. Ill. Mar. 28, 1977).

256. Memorandum Op. at 2–3, *Brown v. Nolan*, No. 77-c-1017 (N.D. Ill. Mar. 1, 1978).

257. Motion for Summary Judgment at 1, *Brown v. Nolan*, No. 77-c-1017 (N.D. Ill. June 12, 1979).

258. Memorandum Op. at 1, *Brown v. Nolan*, No. 77-c-1017 (N.D. Ill. Jan. 2, 1980).

259. Interview with Sam Tenenbaum, *supra* note 252.

In 1982, Tenenbaum withdrew his representation. Tenenbaum explained that he filed a motion to withdraw because Brown “accused [him] of theft.”<sup>260</sup> Tenenbaum told us,

I got a call from my bank saying that a Mr. Brown was at the bank wondering where his settlement proceeds were. . . . I found out that Brown had gone to every bank downtown asking if they had an account with Sam Tenenbaum and asking where his settlement proceeds were.<sup>261</sup>

Tenenbaum explained that he had not settled the case or had any settlement discussions.<sup>262</sup>

At the hearing for the motion to withdraw, Tenenbaum relayed, Brown “was totally divorced from what was going on.”<sup>263</sup> Tenenbaum offered that Brown “may have been living out on the street. He may well have been on drugs or gotten into drugs.”<sup>264</sup> Richard Brown was living on the streets in 1982.<sup>265</sup> Tenenbaum’s recollection of Brown’s behavior fits with the transcript of the hearings on his motion to withdraw. Brown interjects with fragments of sentences that do not make any sense. Protesting Tenenbaum’s request to withdraw as his counsel, Brown states “I have no -- Title 16, Section 6 of his amendment, prosecuting, defending in this courtroom: Objection, objection, objection, in his private office.”<sup>266</sup> He makes similar statements throughout the hearings. It is notable that Brown did not speak in fragments, try to object, or repeat himself in his 1979 deposition.

The case did not resolve until it was settled on January 9, 1984, for \$7,500, which is roughly \$18,500 in today’s dollars. Reflecting on the amount of the settlement, Tenenbaum stated that it was not low for the time: “There weren’t big money verdicts for wrongful convictions” back then as it was “hard to convince people that police had done something wrong.”<sup>267</sup> Nevertheless Tenenbaum described the amount of the settlement as “essentially meaningless.”<sup>268</sup> He said that attorneys prosecuting wrongful conviction cases today seek a settlement of half a million dollars for every year incarcerated and attorneys ask juries for a million dollars for every year incarcerated if the case goes to trial.<sup>269</sup> Brown assigned his rights to the civil judgment to a George Beckman for “ten dollars and other good and valuable

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. Transcript of Proc. at 14, *Brown v. Nolan*, No. 77-c-1017 (N.D. Ill. Dec. 22, 1982) (statement by Fred Colby, a man identifying himself as Brown’s “benefactor for the past 7.5 years”).

266. Transcript of Proc. at 3, *Brown v. Nolan*, No. 77-c-1017 (N.D. Ill. Dec. 6, 1982).

267. Interview with Sam Tenenbaum, *supra* note 252.

268. *Id.*

269. *Id.*



consideration” on April 16, 1984.<sup>270</sup> He died on July 10, 1988.<sup>271</sup> He was forty-two years old.<sup>272</sup>

Richard Brown’s story shows just how hard it is for defendants to “win” at the Supreme Court in any meaningful way. His is one of the few instances where the case against him was dismissed in response to his victory at the Court, rather than being convicted via some other exception to the probable cause and warrant requirement. And it was dismissed promptly. Yet, his life was seemingly still ruined by his experience with the criminal justice system, which had cost him years of incarceration. The civil award he was ultimately granted was of minimal use to him, both because of its small size and because it came too late, when, according to his attorney, his mind was damaged by his experience of his incarceration.

\* \* \*

To summarize the subsequent history of our probable cause and warrant requirement exception cases, the State of Arizona chose not to retry Rodney Gant although its reasons for doing so are not available in the record. David Leon Riley did not get the benefit of his Supreme Court precedent because the lower court held that the inadmissible evidence was cumulative of other evidence against Riley, so it was harmless to admit them. Likewise, his coappellant, Brima Wurie, served over ten years of the fourteen-year prison sentence he was subject to, despite the Supreme Court finding in his favor. Theodore Payton, too, remained in prison despite his Supreme Court victory, though the record is too sparse to know exactly why. Likewise, there is not enough of a record to even determine whether his coappellant, Obie Riddick, was released or not. Terrence Byrd remained in prison for eight years after his victory; once again, he was released for reasons other than his eponymous precedent. The cases of Byrd, Riley, and Wurie, all show that the availability of other prosecution-friendly rules can work to overcome the defendant-friendly rules that constitute Supreme Court landmark precedents—and the net result is prison time for the defendant. The one clear legal success in this category, Richard Brown, was arguably the most tragic: He won his release and a small civil suit, but both came about once his life and his mind were already ruined by his illegal arrest and extensive consequent incarceration.

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270. Assignment at 1, *Brown v. Nolan*, No. 77-c-1017 (Apr. 19, 1984).

271. *Richard Brown: Illinois, Cook County Deaths, 1871-1998*, FAMILYSEARCH, <https://familysearch.org/ark:/61903/1:1:QV9K-LKN8> (on file with the *Iowa Law Review*).

272. *Id.*

## C. CONFESSIONS CASES UNDER THE FIFTH AND SIXTH AMENDMENTS

## 1. Fifth Amendment Cases

i. *Miranda v. Arizona*

The famous *Miranda* case was a consolidation of four cases, the titular Ernesto A. Miranda, as well as Michael Vignera, Carl Calvin Westover, and Roy Allen Stewart.<sup>273</sup> The Supreme Court describes minimal facts of each of the four cases that led to the arrests of the four men, focusing instead on the treatment of each by the police.<sup>274</sup>

The Facts: Ernesto Miranda

Ernesto Miranda was charged with kidnapping and rape in Phoenix.<sup>275</sup> He was identified by the victim at the station and signed a written confession within two hours of being interrogated.<sup>276</sup> “At the top of the statement was a typed paragraph stating that the confession was made voluntarily, without threats or promises of immunity and ‘with full knowledge of my legal rights, understanding any statement I make may be used against me.’”<sup>277</sup> There was no allegation of mistreatment by police, but he was not advised of his right to consult with an attorney and the Supreme Court held the preprinted statement of his knowledge of his legal rights did not constitute knowing and intelligent waiver.<sup>278</sup>

The Facts: Michael Vignera

Michael Vignera was charged with first-degree robbery of a Brooklyn dress shop.<sup>279</sup> He was identified by at the police station by the store owner and a saleslady, and he orally admitted to the robbery to a detective during interrogation.<sup>280</sup> He subsequently confessed to an assistant district attorney in the presence of the hearing reporter.<sup>281</sup> After his conviction, he was adjudged a third-felony offender and sentenced to thirty to sixty years’ imprisonment.<sup>282</sup>

The Facts: Carl Calvin Westover

Carl Calvin Westover was arrested for two robberies in Kansas City and was wanted by the FBI on a felony charge in California.<sup>283</sup> After his arrest, he denied any knowledge of criminal activities.<sup>284</sup> The next day he was interrogated by both local officers and FBI agents without any warnings.<sup>285</sup>

273. *Miranda v. Arizona*, 384 U.S. 436, 491–99 (1966).

274. *See id.*

275. *Id.* at 492.

276. *Id.* at 491–92.

277. *Id.* at 492.

278. *Id.*

279. *Id.* at 493.

280. *Id.*

281. *Id.*

282. *Id.* at 494.

283. *Id.*

284. *Id.* at 495.

285. *Id.*

“After two or two and one-half hours, Westover signed separate confessions to each of these two robberies which had been prepared by one of the agents during the interrogation.”<sup>286</sup>

#### The Facts: Roy Allen Stewart

Roy Allen Stewart was investigated for “a series of purse-snatch robberies in which one of the victims had died of injuries inflicted by her assailant . . . .”<sup>287</sup> When he attempted to endorse a check stolen in one of the robberies, he was arrested in his home and consented to a search of the property, in which numerous items taken from the five robbery victims were found.<sup>288</sup> Stewart was interrogated over five days on nine different occasions; during a night session, he “admitted that he had robbed the deceased and stated that he had not meant to hurt her.”<sup>289</sup> Stewart was ultimately charged with kidnapping to commit robbery, rape, and murder.<sup>290</sup> He was found guilty of robbery and first-degree murder and sentenced to death.<sup>291</sup>

#### The Ruling

By the time of *Miranda*, the Court recognized that ritualized strong-arming by police was waning.<sup>292</sup> Nevertheless, the Court was concerned that this practice had been replaced with the psychological coercion of isolation.<sup>293</sup> That concern led the Court to conclude that all custodial interrogation is inherently coercive, and to exclude confessions obtained without adequate warning while the suspect was subject to custodial interrogation.<sup>294</sup> In an attempt to strengthen the will of the suspect through the provision of warnings of those dangers, the Court announced a broad new regimen of constitutional arrest procedures designed to safeguard individual rights and restrain police coercion.<sup>295</sup> All four defendants’ confessions were deemed inadmissible and their various convictions were overturned and the cases remanded.<sup>296</sup> However, even this most famous of Supreme Court declarations did not serve the defendants very effectively.

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286. *Id.*

287. *Id.* at 497.

288. *Id.*

289. *Id.*

290. *Id.* at 498.

291. *Id.*

292. *Id.* at 446–47 (describing its own examples of physical coercion as “undoubtedly the exception now”).

293. *Id.* at 448 (“[T]he modern practice of in-custody interrogation is psychologically rather than physically oriented.”).

294. *Id.* at 467 (“In order to combat these pressures . . . the accused must be adequately and effectively apprised of his rights and the exercise of those rights must be fully honored.”).

295. *Id.* at 444 (“Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed.”).

296. *Id.* at 492, 494–95, 498.

*Miranda* is probably the constitutional criminal procedure case that has most broadly changed the conversation at every level of society. It has been cited an extraordinary 149,042 times, including in 75,212 cases and 8,110 law review articles.<sup>297</sup> Even more remarkably, *Miranda* has entered the public lexicon, a staple of police and court dramas that is even available as a T-shirt design<sup>298</sup>—although ordinary people typically misunderstand much about those rights.<sup>299</sup> But for the for *Miranda* defendants, it provided little practical assistance.

#### The Outcome: Ernesto Miranda

Following the Supreme Court's ruling, Maricopa County retried Miranda without his confession to the police as evidence,<sup>300</sup> utilizing a different confession. Twila Hoffman, Miranda's common-law wife, told the prosecutors that when she visited Miranda in jail a few days after his arrest, he confessed the kidnapping and rape to her.<sup>301</sup> The jury again found Miranda guilty, and he was sentenced to prison for twenty to thirty years.<sup>302</sup> Miranda attempted to appeal his second conviction but was unsuccessful.<sup>303</sup>

Miranda served nine years of his sentence and nearly went to prison again on gun and drug charges.<sup>304</sup> He died when he was thirty-four years old, the victim of a stabbing in a bar fight.<sup>305</sup> Those who write about the history of the *Miranda* case like to note that when the police arrested the man who stabbed Ernesto Miranda, the arresting officers read him his *Miranda* rights.<sup>306</sup>

#### The Outcome: Michael Vignera

Vignera was retried and convicted again on October 24, 1966. A 1967 Time magazine article reported that Vignera “has already pleaded guilty to a lesser robbery charge, and is now doing 7½ to 10 years in Sing Sing.”<sup>307</sup> He appealed that conviction, arguing the court should not have accepted his

297. *Citing References for Miranda v. Arizona*, 384 U.S. 436, WESTLAW (last visited Oct. 12, 2023).

298. See, e.g., *I Have the Right to Remain Silent. Miranda Warning Design. Protect Your Rights If You're Arrested. Long Sleeve T-Shirt*, TEEPUBLIC, <https://www.teepublic.com/long-sleeve-t-shirt/13962723-i-have-the-right-to-remain-silent-miranda-warning-> [<https://perma.cc/2U3P-FA83>].

299. Richard Rogers et al., “*Everyone Knows Their Miranda Rights*: Implicit Assumptions and Countervailing Evidence, 16 PSYCH., PUB. POL’Y & L. 300, 315 (2010) (finding “widespread misassumptions and misinformation about *Miranda* rights and waivers”). For instance, in one study, 34.4 percent of those surveyed thought their statements were protected if they were “off the record.” Richard Rogers et al., *General Knowledge and Misknowledge of Miranda Rights: Are Effective Miranda Advisements Still Necessary?*, 19 PSYCH., PUB. POL’Y, & L. 432, 437 (2013).

300. Michael S. Lief & H. Mitchell Caldwell, “*You Have the Right to Remain Silent*,” in THE DEVIL’S ADVOCATES: GREATEST CLOSING ARGUMENTS IN CRIMINAL LAW 217, 261 (2007).

301. *Id.* at 262.

302. *Id.*

303. *Id.*

304. *Id.* at 263.

305. *Id.*

306. *Id.* at 264; Jack Kelly, *The Miranda Decision, 51 Years Later*, AM. HERITAGE, <https://www.americanheritage.com/node/132695> [<https://perma.cc/RCS9-NRZA>].

307. *The Law: Catching Up with Miranda*, TIME (Mar. 3, 1967), <https://content.time.com/time/e/subscriber/article/0,33009,843458,00.html> [<https://perma.cc/MJ46-2RCQ>].

guilty plea, and on January 8, 1968, the appellate division sent Vignera's case back down again. This second appeal did not have to do with the confession but, rather, was about Vignera's guilty plea.

What happened to Vignera next is very hard to tell. Relying only on published appellate court decisions, as discussed in Part II, the next record of Vignera is an appellate division case.<sup>308</sup> That decision simply reads, "Order, Supreme Court, New York County (Starke, J.), entered on November 24, 1969, unanimously affirmed. No opinion."<sup>309</sup> Less than one month later, the Court of Appeals of New York dismissed Vignera's motion for leave to appeal that decision, with an order that hints at what happened to Vignera in between the 1968 opinion granting a new trial and 1971. The court refers to a "[p]roceeding to review decision of Parole Board revoking parole."<sup>310</sup> However, the reader is left to wonder whether Vignera was ultimately sentenced to prison for the crime at issue in the *Miranda* line of cases and paroled or if perhaps he was sent to prison for some other crime in those three years in addition to a prosecution for some federal charges. Thus, the last thing a researcher relying on traditional legal research resources knows is that the State of New York revoked Michael Vignera's parole.

But it is apparent Vignera was eventually released from prison. A public records search shows that Michael Vignera was living on Staten Island when he married in 1975.<sup>311</sup> He passed away in Brooklyn in 1983 at the age of 53.<sup>312</sup>

#### The Outcome: Carl Calvin Westover

Westover was retried in the Northern District of California, convicted again, and appealed again to the Ninth Circuit.<sup>313</sup> Whereas the original appeal and the Supreme Court case were concerned with the FBI agents' interrogation, this second appeal considered only whether "bait money" from the bank robbery in question found on Westover's person when he was arrested should have been used as evidence against him.<sup>314</sup> The Ninth Circuit remanded the case to the trial court to determine "whether the original arrest on the night of March 20, 1963, was a lawful arrest on probable cause."<sup>315</sup> On remand, the court heard evidence and argument on a motion to suppress evidence for one year and took another year to consider the motion before finally, in October 1970, granting Westover's motion to suppress the evidence

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308. *Vignera v. N.Y. State Bd. of Parole*, 320 N.Y.S.2d 500, 500 (App. Div. 1971) (mem.).

309. *Id.*

310. *Vignera v. N.Y. State Bd. of Parole*, 272 N.E.2d 342, 342 (N.Y. 1971).

311. Marriage Return of Michael Vincent Vignera and Dolores Geraldine Garrison, COMMONWEALTH OF VA. (on file with the *Iowa Law Review*).

312. Death Record: Michael Vignera, LEXISNEXIS, <https://www.lexisnexis.com/en-us/products/public-records.page> (on file with the *Iowa Law Review*) (choose "Death Records" from "People" dropdown; then enter "Michael" in the "First Name" field and "Vignera" in the "Last Name" field; then select "New York" from the "State" dropdown; then click "Search").

313. *Westover v. United States*, 394 F.2d 164, 165 (9th Cir. 1968).

314. *Id.*

315. *Id.* at 166.

of the bait money taken incident to his arrest and ordering yet another new trial. In July 1971, Westover changed his plea to guilty and was sentenced to time served plus another eight months.<sup>316</sup> That ended eleven years of proceedings starting from his arrest back in March of 1963. A search of public records shows that Carl Calvin Westover died in Sacramento, California, in 1998.<sup>317</sup>

The Outcome: Roy Allen Stewart

Following the Supreme Court ruling, Stewart was retried and convicted in the Superior Court of Los Angeles County.<sup>318</sup> Stewart pleaded not guilty to four counts of robbery and one count of murder and was sentenced to life in prison.<sup>319</sup> Stewart appealed again, arguing certain evidence, not related to his confession, should have been excluded in the second trial.<sup>320</sup> On appeal for the second conviction, the California Court of Appeal held the officers had probable cause for the arrest and, given that probable cause, they were entitled to search the premises.<sup>321</sup> The court then held the police could search the premises because Stewart's "common law wife" gave them permission and the search was limited to areas over which she exercised joint control.<sup>322</sup> Thus, the California Court of Appeals affirmed the trial court's decision. A public records search for Stewart suggests that he died in 1999 in Los Angeles, California.<sup>323</sup>

Ultimately, all four *Miranda* defendants were retried and convicted based on evidence other than their coerced confessions.<sup>324</sup>

ii. *Missouri v. Seibert*

Patrice Seibert's twelve-year-old son had cerebral palsy and had died in his sleep; she feared charges of neglect because he had bedsores on his body.<sup>325</sup> With her two teenage sons and their two friends, she conspired to incinerate his body by burning down the family's mobile home and leave a

316. *Docket Entry*, United States v. Westover, No. 13655 (N.D. Cal. July 7, 1971).

317. Death Record: Carl Calvin Westover, LEXISNEXIS, <https://www.lexisnexis.com/en-us/products/public-records.page> (on file with the *Iowa Law Review*) (choose "Death Records" from "People" dropdown; then enter "Carl" in the "First Name" field and "Calvin" in the "Middle Name" field and "Westover" in the "Last Name" field; then select "California" from the "State" dropdown; then click "Search").

318. *People v. Stewart*, 11 Cal. App. 3d 242, 244-45 (Ct. App. 1970).

319. *Id.*

320. *Id.* at 245.

321. *Id.* at 247.

322. *Id.*

323. Death Record: Roy Allen Stewart, LEXISNEXIS, <https://www.lexisnexis.com/en-us/products/public-records.page> (on file with the *Iowa Law Review*) (choose "Death Records" from "People" dropdown; then enter "Roy" in the "First Name" field and "Allen" in the "Middle Name" field and "Stewart" in the "Last Name" field; then select "California" from the "State" dropdown; then click "Search"); Roy Allen Stewart, FIND A GRAVE, <https://www.findagrave.com/memorial/88376262/roy-allen-stewart> [<https://perma.cc/W5EC-BNHS>].

324. At least in Ernesto Miranda's case, we may wonder whether he would have confessed to his common law wife if he had known that his confession to police was unlawful.

325. *Missouri v. Seibert*, 542 U.S. 600, 604 (2004).

mentally ill teenager who was living with the family to die in the fire, to avoid the appearance that the son had been left unattended.<sup>326</sup> Following her arrest, Seibert was interrogated according to a deliberate Missouri protocol that involved questioning a defendant without issuing *Miranda* warnings, then requestioning after mirandizing.<sup>327</sup> Seibert was questioned without warnings for thirty to forty minutes, during which she admitted that she knew the boy was meant to die in the fire.<sup>328</sup> She was then given a twenty-minute coffee and cigarette break, then given the *Miranda* warnings, and requestioned, in an interrogation in which she was confronted with her prewarning statements when she denied the wrongs she had previously admitted to.<sup>329</sup> She again incriminated herself.<sup>330</sup> At the subsequent suppression hearing, the interrogating officer testified he made a “conscious decision” to withhold *Miranda* warnings, following an instructed interrogation technique of “question first, then give the warnings, and then repeat the question ‘until I get the answer that she’s already provided once.’”<sup>331</sup> Seibert was convicted of second-degree murder.<sup>332</sup>

In a plurality opinion announcing the judgment of the Court, Justice Souter ruled that the later warned confession, like the prior unwarned confession, must be excluded.<sup>333</sup> The opinion reasoned that *Miranda* warnings are unlikely to be effective when the two confessions are close in time and similar in content, as that procedure suggests the second confession would not have been made if the suspect had understood his rights at the outset.<sup>334</sup> The doctrinal difficulty the Court faced in making this determination was threefold: The Court had previously ruled, in *Oregon v. Elstad*, that a warned confession following an unwarned confession can be admissible<sup>335</sup>; that “a careful and thorough administration of *Miranda* warnings” in fact “cure[s]” the violation<sup>336</sup>; and that *Miranda* has no fruit of the poisonous tree.<sup>337</sup> The plurality avoided these prior rulings by deeming the two interrogations were effectively one, in which the warnings were recited “midstream”; accordingly, the *Miranda* warnings could not be effective at

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326. *Id.*

327. *Id.* at 605–06.

328. *Id.* at 605.

329. *Id.*

330. *Id.*

331. *Id.* at 605–06.

332. *State v. Seibert*, 93 S.W.3d 700, 701 (Mo. 2002) (en banc).

333. *Seibert*, 542 U.S. at 617.

334. *Id.* at 613.

335. *Oregon v. Elstad*, 470 U.S. 298, 309 (1985) (“[T]he admissibility of any subsequent statement should turn in these circumstances solely on whether it is knowingly and voluntarily made.”).

336. *Id.* at 310–11.

337. *Id.* at 307 (“[T]he *Miranda* presumption . . . does not require that the statements and their fruits be discarded as inherently tainted.”).

informing the suspect in a meaningful way of their rights.<sup>338</sup> Whether such joinder of the two confessions has occurred must be assessed in the context of “the completeness and detail of the questions and answers in the first round of interrogation, the overlapping content of the two statements, the timing and setting of the first and the second, the continuity of police personnel, and the degree to which the interrogator’s questions treated the second round as continuous with the first.”<sup>339</sup> Describing the facts of *Seibert* as “the opposite extreme” of the technique approved in *Elstad*, the plurality considered that each of these factors contributed to a circumstance in which “a reasonable person in the suspect’s shoes would not have understood them to convey a message that she retained a choice about continuing to talk.”<sup>340</sup>

On June 28, 2004, the Supreme Court affirmed the judgment of the Missouri Supreme Court,<sup>341</sup> which had reversed the decision of the Missouri Court of Appeals treating this case as indistinguishable from *Elstad*.<sup>342</sup> Yet, following remand to the Circuit Court of Pulaski County, Missouri, Seibert pleaded guilty and was sentenced to twenty-five years in prison on August 16, 2007.<sup>343</sup> Per a public records search, she was released from prison on February 17, 2022.<sup>344</sup> There is very little other information on Patrice Seibert. We were reduced to searching for information on her on Google and attempting to confirm what we found on social media, hardly the most reliable sources, but it did add some color to the story. With that significant caveat, a person who grew up in Rolla and who has social media connections to the family<sup>345</sup> provided the following:

I grew up with her family. [Johnathan] starved to death. I remember it. And her son Darrien got 99 years, as did her 17 year old boyfriend, Derrick. They were all so high that they forgot to feed him for days. . . . He was less than 50 lbs at death. And Donald was also her

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338. *Seibert*, 542 U.S. at 604 (“Because this midstream recitation of warnings after interrogation and unwarned confession could not effectively comply with *Miranda*’s constitutional requirement, we hold that a statement repeated after a warning in such circumstances is inadmissible.”).

339. *Id.* at 615.

340. *Id.* at 616–17.

341. *Id.* at 617.

342. *State v. Seibert*, 93 S.W.3d 700, 707 (Mo. 2002) (en banc); *State v. Seibert*, No. 23729, 2002 WL 114804, at \*8–9 (Mo. Ct. App. Jan. 30, 2002).

343. *Docket Entry*, *State v. Seibert*, No. 25Ro5971327F (Mo. Cir. Ct. Aug. 16, 2007).

344. Locate a Person (Nationwide): Patrice Seibert, LEXISNEXIS, <https://www.lexisnexis.com/en-us/products/public-records.page> (on file with the *Iowa Law Review*) (choose “Locate a Person (Nationwide)” from “People” dropdown; then enter “Patrice” in the “First Name” field and “Seibert” in the “Last Name” field and “Rolla” in the “City” field; then click “Search”).

345. Shae Keeney’s Facebook page shows them to be Facebook friends with someone who posted about raising money for cerebral palsy in memory of his brother, Johnathan. Shae Keeney, FACEBOOK (Aug. 15, 2023, 2:12 PM), <https://www.facebook.com/shae.keeney.1/friends> [<https://perma.cc/M33L-gX73>].



lover. But he threatened to tell the police about Johnathan, so they beat him and left him in the fire. She's out now.<sup>346</sup>

This sad epilogue was provided as a comment to a YouTube video explaining the doctrinal significance of the *Seibert* case.<sup>347</sup>

*Seibert* has been cited 7,410 times including in 2,526 cases and 420 law review articles.<sup>348</sup> Many of the commentaries are highly critical of the Court for not doing enough to restrict police questioning outside *Miranda*.<sup>349</sup> Yet, again, the FBI paid attention.<sup>350</sup> Nevertheless, the Court ruling in the case at hand did little for the defendant.

## 2. Sixth Amendment Cases

### i. Brewer v. Williams

Robert Anthony Williams's murder conviction came before the Supreme Court twice. Williams had escaped from a mental hospital and law enforcement believed he had murdered Pamela Powers, a ten-year-old girl, from the Riverfront YMCA in Des Moines, Iowa,<sup>351</sup> after a witness saw him carrying a large bundle to his car.<sup>352</sup> Williams surrendered himself to Davenport police on his lawyer's advice, where he was to be transported back to Des Moines.<sup>353</sup> He was advised by the attorney who represented him in Davenport and another attorney who was to represent him in Des Moines not to make any statements to the police.<sup>354</sup> The police officers who drove Williams back to Des Moines agreed not to talk with Williams about the case.<sup>355</sup> Yet, en route to Des Moines, one of the officers gave the now infamous "Christian burial speech"—a psychological ploy in which the officers, knowing Williams was deeply religious, addressed him as Reverend and intimated that Williams should help locate the child's body, so she could receive a proper Christian

346. See Shaekeneey<sup>319</sup>, Comment to Quimbee, *Missouri v. Seibert Case Brief Summary | Law Case Explained*, YOUTUBE (Oct. 14, 2020), [https://www.youtube.com/watch?v=83rGAPvoCHc&ab\\_channel=Quimbee](https://www.youtube.com/watch?v=83rGAPvoCHc&ab_channel=Quimbee) [<https://perma.cc/6F9F-ZXMK>].

347. *Id.*

348. *Citing References for Missouri v. Seibert*, 542 U.S. 600, WESTLAW (last visited Sept. 1, 2023).

349. See, e.g., Stewart J. Weiss, *Missouri v. Seibert: Two-Stepping Towards the Apocalypse*, 95 J. CRIM. L. & CRIMINOLOGY 945, 946 (2005) ("[T]he *Seibert* opinion added another layer of ungainly analysis to an already abstruse process."); Daniel S. Nooter, *Is Missouri v. Seibert Practicable?: Supreme Court Dances the "Two-Step" Around Miranda*, 42 AM. CRIM. L. REV. 1093, 1093 (2005) ("[T]he practical effect that *Seibert* will have in the law enforcement community may be fundamentally vitiated by the opinion's failure to announce a coherent rule.")

350. See Lucy Ann Hoover, *The Supreme Court Brings an End to the "End Run" Around Miranda*, FBI L. ENF'T BULL., June 2005, at 26, 26.

351. *Brewer v. Williams*, 430 U.S. 387, 390 (1977).

352. *Nix v. Williams*, 467 U.S. 431, 452 (1984) (Stevens, J., concurring).

353. *Brewer*, 430 U.S. at 390.

354. *Id.* at 390–91.

355. *Id.* at 391.

burial before snow covered it.<sup>356</sup> This prompted Williams to direct the officers to the body, and he was indicted for first-degree murder.<sup>357</sup>

At pretrial, Williams sought suppression of all evidence relating to or resulting from the statements that Williams made during the car ride from Davenport to Des Moines, including where and how the body was found as a result of Williams's directions.<sup>358</sup> That motion was denied.<sup>359</sup> A jury in Polk County, Iowa, found him guilty of murder and the Iowa Supreme Court affirmed the conviction.<sup>360</sup> That was the case's first trip through the Iowa state courts.

After being unsuccessful in the state courts, Williams pursued his case through the federal courts. He petitioned for a writ of habeas corpus in the United States District Court for the Southern District of Iowa.<sup>361</sup> The district court concluded the evidence should not have been admitted and the United States Court of Appeals for the Eighth Circuit agreed.<sup>362</sup> On March 23, 1977, the U.S. Supreme Court held his right to counsel had been violated by eliciting incriminating statements during the car ride.<sup>363</sup> A divided Court held that the adversarial proceeding had begun prior to the transport, meaning Williams was entitled to counsel, and the Christian burial speech amounted to interrogation without counsel present.<sup>364</sup> In a footnote, the Court noted it would suspend the writ of habeas corpus for sixty days to allow the state of Iowa to initiate a new trial.<sup>365</sup>

*Brewer* has been cited 7,622 times, including in 2,575 cases and 886 law review articles.<sup>366</sup> Not only did it establish a new test for interrogation under the Sixth Amendment, but it was the first case to accept that the body of the victim could be excluded as evidence, contrary to prior widespread assumption.<sup>367</sup> That decision infuriated the dissenting Justices in the case, a

356. *Id.* at 392-93.

357. *Id.* at 393.

358. *Id.* at 393-94.

359. *Id.*

360. *Id.*

361. *Id.*

362. *Id.* at 394-95.

363. *Id.* at 406.

364. *Id.*; *Nix v. Williams*, 476 U.S. 431, 454-55 (1984) (Stevens, J., concurring) ("The 'Christian burial speech' was nothing less than an attempt to substitute an *ex parte*, inquisitorial process for the clash of adversaries commanded by the Constitution.").

365. *Brewer*, 430 U.S. at 406 n.13.

366. *Citing References for Brewer v. Williams*, 430 U.S. 387, WESTLAW (last visited Oct. 12, 2023).

367. *Brewer*, 430 U.S. at 416 (1977) (Burger, C.J., dissenting) ("Today's holding fulfills Judge (later Mr. Justice) Cardozo's grim prophecy that someday some court might carry the exclusionary rule to the absurd extent that its operative effect would exclude evidence relating to the body of a murder victim because of the means by which it was found.").

rage that was still apparent seven years later when Williams's case appeared before them again.<sup>368</sup>

Following the Supreme Court's decision, the prosecution of Williams resumed in April 1977. Williams again moved to suppress the evidence that arose from his car ride with the officers and was again denied.<sup>369</sup> His petition to have the venue of the trial moved was sustained, and he was tried in Cedar Rapids in Linn County, Iowa, about 130 miles from Des Moines.<sup>370</sup> The jury in Linn County found him guilty of murder, and he was sentenced to life in prison.<sup>371</sup>

Williams appealed that second judgment against him.<sup>372</sup> In 1979, the Iowa Supreme Court affirmed Williams's conviction and declined to consider Williams's claims of ineffective assistance of counsel and prosecutorial misconduct stating that "[h]is right to raise that issue by postconviction proceedings . . . is reserved."<sup>373</sup> Williams did not pursue his ineffective assistance of counsel and prosecutorial misconduct claims in state court, however. Instead, he filed another petition for writ of habeas corpus in federal court in the early 1980s, based on the claims the Iowa state court had already heard on the merits.<sup>374</sup> That habeas petition was also ultimately unsuccessful.<sup>375</sup>

The Supreme Court in *Brewer* had included another footnote of significance, leaving open the possibility that "evidence of where the body was found and of its condition might well be admissible on the theory that the body would have been discovered in any event, even had incriminating statements not been elicited from Williams."<sup>376</sup> When Iowa retried Williams, the prosecution duly introduced an inevitable discovery theory based on a search that was already underway when the body was found.<sup>377</sup> After finding some of the victim's clothing at a rest stop, a two-hundred-person search effort had been dispatched to find the body.<sup>378</sup> This effort was called off once Williams had led officers to the victim's location, at which point one of the search teams was "essentially within the area to be searched," two-and-a-half

368. As evidenced by Justice White devoting his entire concurrence to admonishing both the *Brewer* majority and Justice Stevens's *Nix* concurrence for their criticism of Iowa law enforcement. *Nix*, 476 U.S. at 450 (White, J., concurring) (stating the officer in *Brewer* "had done nothing wrong all, let alone anything unconstitutional").

369. See *Docket*, State v. Williams, No. 55805 (Iowa Dist. Ct. of Polk Cnty.).

370. *Id.*

371. *Id.*

372. *Id.*

373. State v. Williams, 285 N.W.2d 248, 271 (Iowa 1979); Williams v. Thalacker, 106 F.3d 405, 405 (8th Cir. 1997).

374. Williams, 106 F.3d at 405.

375. Williams v. Nix, 528 F. Supp. 664 (S.D. Iowa 1981), *rev'd*, 700 F.2d 1164 (8th Cir. 1983), *rev'd*, 467 U.S. 431 (1984), *remanded to*, 751 F.2d 956 (8th Cir. 1985), *cert. denied*, 471 U.S. 1138 (1985).

376. Brewer v. Williams, 430 U.S. 387, 406 n.12 (1977).

377. Williams, 467 U.S. at 437-38.

378. The group had divided into teams of four to six, searching assigned sections along I-80. *Id.* at 435, 449.

miles away from the body.<sup>379</sup> The Iowa Supreme Court agreed with this theory and affirmed Williams's guilt again, despite the Sixth Amendment violation.<sup>380</sup>

The U.S. Supreme Court denied Williams's direct appeal, but the case reached the Court again via a writ of habeas corpus attacking the prosecution's use of inevitable discovery.<sup>381</sup> The Eighth Circuit reversed the federal district court's denial and ordered the writ be issued.<sup>382</sup> In 1984, the second landmark case that Williams had brought to the Supreme Court was handed down, but this time his conviction was upheld by the Court in *Nix v. Williams*,<sup>383</sup> under the theory suggested by the *Brewer* Court's footnote that inevitable discovery may apply. Examining the factual record to construct the appropriate counterfactual, the opinion of the Court concluded that although "it would have taken an additional three to five hours to discover the body if the search had continued . . . the body was found near a culvert, one of the kinds of places the teams had been specifically directed to search."<sup>384</sup> So it was "clear that the search parties were approaching the actual location of the body, and . . . that the volunteer search teams would have resumed the search had Williams not earlier led the police to the body and the body inevitably would have been found."<sup>385</sup>

After his second Supreme Court case, in the 1990s, Williams again pursued his state postconviction claims for ineffective assistance of counsel and prosecutorial misconduct.<sup>386</sup> After the state courts denied relief, Williams filed another petition for writ of habeas corpus which alleged those ineffective assistance of counsel and prosecutorial misconduct claims in federal court for the first time.<sup>387</sup> On June 6, 1995, Williams filed a "brief in support of resistance to motion to dismiss" which argued against the motion to dismiss and, in the alternative, sought an additional sixty days in which to "supplement and present his claim of actual innocence."<sup>388</sup>

The judge heard argument and, on August 1, 1995, ruled that Williams would have additional time to make a showing of actual innocence.<sup>389</sup> The court held that the "changes in habeas procedural law since [Williams] made his choice on how to proceed . . . do not constitute cause that would excuse

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379. *Id.* at 436.

380. *Id.* at 438.

381. *Williams v. Nix*, 700 F.2d 1164, 1173 (8th Cir. 1983).

382. *Id.*

383. *Williams*, 467 U.S. at 431.

384. *Id.* at 449 (citation omitted).

385. *Id.* at 449-50.

386. *Williams v. Thalacker*, 106 F.3d 405, 405 (8th Cir. 1997).

387. *Id.*

388. Brief in Support of Resistance to Motion to Dismiss at 6, *Williams v. Thalacker*, No. 95-cv-10163 (S.D. Iowa June 6, 1995).

389. Order at 2, *Williams v. Thalacker*, No. 95-cv-10163 (S.D. Iowa Aug. 1, 1995).

petitioner's failure to raise his claims in his first petition."<sup>390</sup> Consequently, the court concluded, the petition would be dismissed as an abuse of the writ unless "a fundamental miscarriage of justice would result if the claims were not heard."<sup>391</sup> Thus, the court granted Williams until October 1, 1995, to present his claim of actual innocence.

To support his claim of actual innocence, Williams contended that "the investigation of this case was closed before it began and a certainty of guilt became fixated on Anthony Williams" because of the "atmosphere that prevailed in Des Moines in late December 1968: a young white girl was dead and had been sexually molested and a black man had been charged with murder."<sup>392</sup> He presented several arguments or pieces of evidence that he argued he could have presented but for prosecutorial misconduct or ineffective assistance of counsel.<sup>393</sup>

The district court considered Williams's claim of actual innocence, found that the alleged new evidence was speculative, possibly suspicious, and did not ultimately find it exculpatory. Thus, it would not meet a burden of showing that no reasonable juror would have found him guilty beyond a reasonable doubt.<sup>394</sup> The district court dismissed the petition, holding that it was an abuse of the writ and the Eighth Circuit affirmed that dismissal in 1997.<sup>395</sup> Robert Anthony Williams died in prison on December 26, 2017.<sup>396</sup>

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In summary, all six of our landmark confessions case victors failed to gain much practical relief from the Supreme Court. All four *Miranda* defendants were convicted once again following their famous ruling. Patrice Seibert pleaded guilty and spent eighteen years in prison. And, after multiple state and federal attempts to vindicate himself, including returning to the U.S. Supreme Court, Robert Anthony Williams died in prison.

Combined with our previous categories of defendants, only Charles Katz, Danny Lee Kyllo, and Richard Brown were freed as a result of their Supreme Court wins. Two of those victories took around a decade each, and in the case of Richard Brown, he never recovered from his ordeal. Rodney Gant may also have been free due to his win, but the record is unclear. Timothy Carpenter, Antoine Jones, David Leon Riley, Brima Wurie, Theodore Payton, Obie

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390. *Id.* at 7.

391. *Id.*

392. Petitioner's Memorandum Re: Supplementation of Claim of Actual Innocence at 3, Williams v. Thalacker, No. 95-cv-10163 (S.D. Iowa Nov. 6, 1995).

393. *Id.* at 3-4.

394. Order at 6, Williams v. Thalacker, No. 95-cv-10163 (S.D. Iowa Dec. 12, 1995).

395. Williams v. Thalacker, 106 F.3d 405, 405 (8th Cir. 1997).

396. William Petroski, *Des Moines Child Killer Robert Anthony Williams Dies in Prison*, DES MOINES REG. (Dec. 21, 2017, 9:32 AM), <https://www.desmoinesregister.com/story/news/politics/2017/12/20/des-moines-child-killer-robert-anthony-williams-dead-73/971490001> [<https://perma.cc/Z3CB-EVNM>].

Riddick, and Terrence Byrd all served long prison sentences despite their legal triumphs. Some were eventually released, usually decades later, but for reasons unrelated to their cases.

D. *THE SIGNIFICANCE OF THE PYRRHIC NATURE OF SUPREME COURT VICTORIES*

In 1983, in *Immigration & Naturalization Service v. Chadha*, the Supreme Court struck down the exercise of Congress's legislative veto of an administrative decision that had previously allowed certain individuals to avoid deportation.<sup>397</sup> The Court declared unconstitutional both single-chamber and dual-chamber legislative vetoes, as contrary to the requirement of bicameral approval and presentment to the President under Article I, Section 7.<sup>398</sup> Ten years later, constitutional scholar Louis Fisher showed that the legislative veto nonetheless continued to be used by legislative committees and subcommittees.<sup>399</sup> This was because such vetoes meet the needs of Congress to constrain an ever-growing administrative body and the Executive is willing to tolerate these now illegal mechanisms, since Congress holds both the purse strings and the power to write laws.<sup>400</sup> More than another decade later, Fisher wrote a Congressional Research Studies report, showing the same empirical effect.<sup>401</sup> And yet, more than fifteen years later still, top constitutional law scholars continue to declare that the Supreme Court in *Chadha* "ended that arrangement" of power sharing between Congress and the President,<sup>402</sup> and "made it all but impossible for Congress to end a national emergency" due to the inability to exercise legislative vetoes.<sup>403</sup> The idea among both legal academia and the public is that when the Supreme Court declares something, particularly a constitutional determination, that is the undeniable truth going forward. Fisher showed that the Supreme Court is not as powerful as we all assume it to be.

This Part has shown that, just as Fisher showed for Realpolitik, so too with constitutional criminal procedure: A Supreme Court declaration vindicating

397. *Immigr. & Naturalization Serv. v. Chadha*, 462 U.S. 919, 959 (1983).

398. U.S. CONST. art. I, § 7, cl. 2 ("Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President.").

399. Louis Fisher, *The Legislative Veto: Invalidated, It Survives*, LAW & CONTEMP. PROBS., Autumn 1993, at 273, 288 ("From the date of the Court's decision in *Chadha* to the end of the 102nd Congress on October 8, 1992, Congress enacted more than two hundred new legislative vetoes.").

400. *Id.* at 292 ("[T]he Court directed the executive and legislative branches to adhere to procedures that would be impracticable and unworkable. Neither Congress nor the executive branch wanted the static model of government offered by the Court.").

401. LOUIS FISHER, CONG. RSCH. SERV., RS22132, LEGISLATIVE VETOES AFTER CHADHA 2 (2005).

402. Richard H. Pildes, *How the Supreme Court Weakened Congress on Emergency Declarations*, WASH. POST (Mar. 14, 2019, 2:53 PM), <https://www.washingtonpost.com/opinions/2019/03/14/how-supreme-court-weakened-congress-emergency-declarations> (on file with the *Iowa Law Review*).

403. Aziz Huq, *How the Supreme Court Stripped Congress of the Power to End National Emergencies*, WASH. POST (Feb. 27, 2019, 1:17 PM), <https://www.washingtonpost.com/outlook/2019/02/27/congress-is-voting-end-trumps-emergency-vote-wont-stop-him> (on file with the *Iowa Law Review*).

the rights of a defendant often does not translate into freedom for the defendant. And just as it is important to understand the difference between the separation of powers in theory and in practice, so too is it important to recognize the difference in constitutional criminal procedure in theory and in practice. In both cases, when examined closely, the reality is that the government has power that Court rulings belie. The idea that the defendant who wins a major doctrinal victory before the Supreme Court is often not freed as a result of that case is fundamentally challenging to the idea of the Supreme Court as having supreme power.

It is also challenging to our shared belief that our justice system is designedly biased in favor of defendants, so much so that some number of guilty persons should go free to protect the innocent.<sup>404</sup> The importance of this innocent-guilty balance is not limited to a philosophical principle. Even if we take a law-and-economics approach to the topic, it is foundational that the defendant benefits from their eponymous case. For instance, as discussed, the Supreme Court declared in *Arizona v. Gant* it could no longer tolerate the empirical mistruth that even defendants with their hands handcuffed behind them and placed in the back of a police squad car could “generally, even if not inevitably” reach within the vehicle they were arrested in or near.<sup>405</sup> But even though the same description applied to the search undertaken of Willie Davis in a subsequent case, and even though the new *Gant* rule applied retroactively to Davis, the Court ruled that the same remedy of exclusion did not apply.<sup>406</sup> The Court explained that the police conducted the search of Davis in objectively reasonable reliance on existing and binding pre-*Gant* judicial precedent; accordingly, the remedy of exclusion would provide no marginal deterrence, since there was no wrongdoing by the police.<sup>407</sup> But this explanation cannot hold water: The same remedial analysis was undertaken in *Gant*, where police were similarly following the then-existing rule.<sup>408</sup> So why the difference? The successful complainant in a case must always get the benefit of a new rule. This is not, as may be assumed, that to do otherwise would violate the foundational axiom of *Marbury v. Madison*, that every wrong

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404. See, e.g., *Coffin v. United States*, 156 U.S. 432, 454 (1895) (“The noble (divus) Trajan wrote to Julius Frontonus that no man should be condemned on a criminal charge in his absence, because it was better to let the crime of a guilty person go unpunished than to condemn the innocent.”); see also *Olmstead v. United States*, 277 U.S. 438, 470 (1928) (Holmes, J., dissenting) (“[F]or my part I think it a less evil that some criminals should escape than that the government should play an ignoble part.”).

405. *Arizona v. Gant*, 556 U.S. 332, 347 (2009); see *supra* Section I.B.1.i.

406. *Davis v. United States*, 564 U.S. 229, 244, 249–50 (2011).

407. *Id.* at 239–40 (“Although the search turned out to be unconstitutional under *Gant*, all agree that the officers’ conduct was in strict compliance with then-binding Circuit law and was not culpable in any way.”).

408. *Gant*, 556 U.S. at 351 (affirming the Arizona Supreme Court’s holding that the case involved an unreasonable search).

must receive a remedy.<sup>409</sup> On that principle, the same remedy should apply to Davis also. Rather, it is because otherwise, complainants would have no incentive to bring a case establishing a new rule.<sup>410</sup> Yet, we have shown here that even in landmark cases, new rules in their favor do defendants little good. As such, our findings challenge the foundational understanding of how the benefits of cases are distributed to potential litigants.

Our findings also challenge the presumption of a system tilted in favor of defendants, including guilty defendants: If it is not true that we let ten (or more) guilty men go free to not incarcerate one innocent person, then society is paying a lower price than is portrayed for its principles of justice. This conclusion has implications for at least two major doctrinal debates within criminal procedure.

First, this conclusion has relevance for the debate on how costly the exclusionary rule is. In *Herring v. United States*,<sup>411</sup> the Supreme Court arguably revolutionized the exclusionary rule, turning it into an exclusionary standard,<sup>412</sup> a remedy that only applies when exclusion “pays its way” in terms of marginal deterrence.<sup>413</sup> Declaring that the benefits of exclusion in any application must outweigh the costs of such exclusion, the Supreme Court described the “substantial social costs,” of which “[t]he principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free.”<sup>414</sup> This is not a rarity or a lower price to pay, according to Chief Justice Roberts, but rather a “costly toll upon truth-seeking and law enforcement.”<sup>415</sup> And yet, our study suggests that price is seldom actually paid.<sup>416</sup>

Second, since *Miranda*, numerous cases have chipped away at *Miranda* protections because the Court claims that to do otherwise would be to give defendants too much at the cost of society in terms of lost convictions, a view

409. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803) (“It is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.”).

410. Note, however, this argument was unsuccessfully argued by Davis. Transcript of Oral Argument at 6, *Davis v. United States*, 564 U.S. 229 (2011) (No. 09-11328) (“[W]hatever rule is applied in this case would have to be the same rule that applies in *Gant* itself, and without the incentive of counsel to argue in favor of the change in the law, that would block claims by defense attorneys to overturn the precedents of this Court.”).

411. See generally *Herring v. United States*, 555 U.S. 135 (2009).

412. Frank Cross, Tonja Jacobi & Emerson Tiller, *A Positive Political Theory of Rules and Standards*, 2012 U. ILL. L. REV. 1, 39 (describing the Roberts Court as having created “a flexible standard”).

413. *Herring*, 555 U.S. at 141 (“[T]he benefits of deterrence must outweigh the costs.”).

414. *Id.*

415. *Id.* (quoting *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 364–65 (1998)).

416. As Justice Brennan previously wrote in dissent, “it is clear that we have not been treated to an honest assessment of the merits of the exclusionary rule, but have instead been drawn into a curious world where the ‘costs’ of excluding illegally obtained evidence loom to exaggerated heights and where the ‘benefits’ of such exclusion are made to disappear with a mere wave of the hand.” *United States v. Leon*, 468 U.S. 897, 929 (1984) (Brennan, J., dissenting).



supported by scholars critical of *Miranda*.<sup>417</sup> For instance, the Court has deemed *Miranda* not worthy of fruit of the poisonous tree doctrine because “a simple failure to administer the warnings” does not justify excluding subsequently discovered evidence if it is not accompanied by “any actual coercion,”<sup>418</sup> even though *Miranda* held that custodial interrogation is inevitably coercive.<sup>419</sup> Yet, we have seen that, like Mr. *Miranda* himself and his coappellants, many successful defendants nonetheless remain in prison, without the state paying this cost.<sup>420</sup>

These debates—the application of the exclusionary rule and exclusion of evidence due to violations of *Miranda*—lie at the heart of the ideological division in criminal procedure between liberal and conservative Justices and commentators. But the conclusion that even defendants who win at the Supreme Court often remain in prison for many years or until their deaths has significance even beyond these specific jurisprudential aspects. It suggests that we must reconsider how we conceptualize the left-right swings on the Supreme Court over the last sixty years when it comes to criminal procedure cases. To the extent that we see leftward tendencies—be it in overall court eras, such as the Warren Court in contrast to, for example, the Rehnquist Court, or particular doctrinal turns, such as the Roberts Court embracing a more prodefendant stance in relation to expectations of privacy in cell phones—our findings suggest that the leftward swings are not as impactful as the rightward swings. This becomes particularly important in an era where the Supreme Court takes significantly more criminal procedure cases than it did in prior eras.<sup>421</sup> Even though the division between judicial votes on the continuum between prosecution and prodefense in criminal procedure cases correlates highly with a liberal-conservative continuum in all other areas that the Supreme Court considers,<sup>422</sup> in its effect, and in terms of its impact on parties before the Court, this means that the Supreme Court does not so

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417. See, e.g., Paul G. Cassell, *The Costs of the Miranda Mandate: A Lesson in the Dangers of Inflexible, “Prophylactic” Supreme Court Inventions*, 28 ARIZ. ST. L.J. 299, 303 (1996) (“Following *Miranda*, some number of criminals escaped prosecution because police were unable to obtain confessions under the restrictive warning-and-waiver regime.”).

418. *Oregon v. Elstad*, 470 U.S. 298, 309 (1985) (“If errors are made by law enforcement officers in administering the prophylactic *Miranda* procedures, they should not breed the same irremediable consequences as police infringement of the Fifth Amendment itself.”).

419. *Miranda v. Arizona*, 384 U.S. 436, 468 (1966) (“[S]uch a warning is an absolute prerequisite in overcoming the inherent pressures of the interrogation atmosphere.”).

420. See *supra* Part I.C.1.i.

421. Tonja Jacobi & Ross Berlin, *Supreme Irrelevance: The Court’s Abdication in Criminal Procedure Jurisprudence*, 51 U.C. DAVIS L. REV. 2033 app. at 2126 fig.1 (2018).

422. See generally Tonja Jacobi & Eryn Mascia, *Alternative Facts: An Empirical Study of Fact Manipulation in Criminal Procedure Cases* 73 EMORY L.J. (forthcoming 2023) (developing a measure of judicial votes in criminal procedure cases scored on a prosecution-prodefense continuum and showing case outcomes can be predicted on the basis of judicial votes in noncriminal procedure cases scored on a liberal-conservative continuum).

much oscillate between liberal and conservative in this area as it does between moderate and conservative.

## II. DIFFICULTIES RESEARCHING WHAT HAPPENED IN LANDMARK CASES

A foundational element of the rule of law is that the law should be transparent and discernible to the ordinary person.<sup>423</sup> Supreme Court declarations of doctrine make up part of the body of laws, and so the same should apply. Yet, if the bulk of legal information is not readily available for free online, especially information from trial courts, in landmark cases, how can it be realistically available in ordinary cases? In Part I, expert researchers with access to specialized resources and funds for that research were only partially successful in unveiling this information in the most high-profile cases in criminal procedure as applied to police investigations. The transparency aspect of the rule of law as it applies to the courts, then, is currently failing.

This Part analyzes the systemic features of traditional legal research resources and court records that frustrated our efforts to learn what happened to these defendants. Traditional legal research resources—the sources that legal professionals use in their daily work, like Lexis and Westlaw—do not provide sufficient access to information from trial courts, especially state trial courts. As a result, specialized resources or record requests are necessary. But finding and ordering court records is difficult and expensive. And even if a researcher accesses the court records, the record may not reveal what happened to the defendant or the records may be described, coded, and written in language that even legal professionals who do not practice criminal law before that particular court cannot understand. Therefore, the information about what happened to defendants is not practically available, even with money and expertise.

This Part also explains why the information is not practically available. Court records are maintained to serve the state in general and prosecutors and judges in particular. As a result, the clerk of the court in a given jurisdiction has enormous discretion in how and even if a record will be maintained. Ultimately, our legal information ecosystem fails to promote the rule of law because it hides and obscures the actions of the court in order to serve the state.

### A. EXPERTISE LIMITATIONS

#### 1. Where Would Ordinary People Learn All This? They Wouldn't

The individuals who are subject to the criminal laws of the United States should be able to know what those laws are and the practical effect of those

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423. See, e.g., Exec. Order No. 13,892, 84 Fed. Reg. 55239 (Oct. 9, 2019) (“The rule of law requires transparency. Regulated parties must know in advance the rules by which the Federal Government will judge their actions.”), *revoked by* Exec. Order No. 13,992, 86 Fed. Reg. 7049 (Jan. 20, 2021).

laws. The caselaw of the U.S. Supreme Court suggests that no one will lose their freedom as a result of a violation of their constitutional rights. But Part I showed that those whose constitutional rights were violated will often ultimately lose their freedom. Thus, the result does not match an individual's expectation about the way the law will operate.

The trouble is not just that the expectation is not met, but that individuals do not have any way to know that their expectations are not met. Ordinary individuals living in and subject to the laws of the United States do not have a way to learn of the findings we presented in Part I. It is common for legacy media, like newspapers and television, and new media, like websites and Twitter, to report on Supreme Court decisions and the crime that gave rise to a prosecution leading to a Supreme Court case. But the ultimate fates of the defendants in those cases do not receive that same kind of coverage. We only found one piece of reporting that made the connection between one of our defendant's success at the Supreme Court and his ultimate failure to be vindicated.<sup>424</sup>

The ultimate fate of defendants is sometimes reported on without noting this irony, typically in especially salacious circumstances and mostly in local forums. For example, Robert Anthony Williams's case, involving the sexual assault and murder of a young white girl, was infamous enough in Des Moines, Iowa, that decades later, when the new federal courthouse in Des Moines was to be built, the woman who answered the phone at the Polk County courthouse knew the case and noted that the new courthouse was to be located on the site of the YMCA where Williams allegedly kidnapped Pamela Powers before murdering her.<sup>425</sup> The crime, the trial, and even the building itself were covered in the news. And the Des Moines Register reported Robert Anthony Williams's subsequent death.<sup>426</sup> Likewise, the local press in Washington, D.C., continued to cover Antoine Jones's attempts to overcome the prosecution's case, especially once Jones started representing himself and behaving erratically in the courtroom, tearing up a copy of the indictment and yelling at witnesses.<sup>427</sup> But these are exceptions.

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424. Kristina Davis, *Won Battle, Lost War in Cellphone Search Case*, SAN DIEGO UNION-TRIB. (Aug. 1, 2015, 11:00 AM), <https://www.sandiegouniontribune.com/sdut-riley-cellphone-searches-warrants-gangs-ruling-2015aug01-htmlstory.html> [<https://perma.cc/3XY5-43GY>] ("As far as rulings go, the one in Riley v. California was a game changer—for nearly everyone but the man the center of the case. Despite the high court opinion in his favor, David Leon Riley was ultimately ordered to remain in prison to serve out his sentence of 15 years to life.")

425. Mike Kilen, *Riverfront YMCA: Farewell to a Friend*, DES MOINES REG. (Dec. 19, 2014, 9:32 PM), <https://www.desmoinesregister.com/story/news/local/des-moines/2014/12/19/riverfront-ymca-des-moines-farewell/20675903> [<https://perma.cc/YM97-MEYH>]; Kim Norvell, *Ground Broken on Courthouse*, DES MOINES REG., Sept. 4, 2019, at A9.

426. Petroski, *supra* note 396.

427. Matt Zapposky, *Accused Drug Dealer, Representing Himself, Addresses Jurors*, WASH. POST (Jan. 28, 2013, 10:23 PM), [https://www.washingtonpost.com/local/accused-drug-dealer-representing-himself-addresses-jurors/2013/01/28/16ef9546-6999-11e2-ada3-d86a4806d5ee\\_story.html](https://www.washingtonpost.com/local/accused-drug-dealer-representing-himself-addresses-jurors/2013/01/28/16ef9546-6999-11e2-ada3-d86a4806d5ee_story.html) (on file with the *Iowa Law Review*).

One of the few defendants to receive broader attention after his Supreme Court case was Ernesto Miranda.<sup>428</sup> This is likely attributable to both the familiarity of the eponymous *Miranda* warning that features throughout pop culture and the ironic or poetic parts of the story: that Miranda made money selling autographed copies of cards with the *Miranda* warning—an interesting, if likely apocryphal story<sup>429</sup>; that Miranda was read his *Miranda* rights when he was rearrested<sup>430</sup>; and, as mentioned, so was the man arrested for stabbing Miranda to death.<sup>431</sup>

Yet, although books and articles have already been written telling the story of what happened to Miranda, more typical is the complete inattention paid to the other three defendants whose cases were consolidated with Miranda's, who faded into obscurity. While Miranda's retrial and reconviction made newspapers around the country,<sup>432</sup> only the newspaper in the city where he committed his alleged crimes reported on the retrial and reconviction of Roy Allen Stewart.<sup>433</sup> In 1967, *Time* magazine published a brief article on the whereabouts of all four defendants.<sup>434</sup> A 2006 book relegates the other three men to a single sentence merely recognizing that there were three other cases.<sup>435</sup> One 2020 book describes how the four *Miranda* cases were initially known to the Supreme Court as “the *Escobedo* cases”; Miranda's name was only on the case because the Court issued a single opinion with all defendants' names in alphabetical order.<sup>436</sup> Thus, the authors write, “Miranda may have felt his case was the most important one in the bunch; in reality, his name just came first in the alphabet.”<sup>437</sup>

Even bearing the name of an exceptionally significant doctrinal development does not guarantee a defendant's fate will be remembered. For instance, Charles Katz's attorney wrote a law review article, *Katz v. United States: The Untold Story*.<sup>438</sup> Despite the title, the subsequent history about Katz

428. See, e.g., Lief & Caldwell, *supra* note 300, at 261–63; AMOS N. GUIORA & LOUISA M.A. HEINY, *FIVE WORDS THAT CHANGED AMERICA: MIRANDA V. ARIZONA AND THE RIGHT TO REMAIN SILENT* 186 (2020); Kelly, *supra* note 306.

429. GUIORA & HEINY, *supra* note 428, at 208 (listing sources at the end of the book without attributing them to any assertions, suggesting this autographed *Miranda* warning card story is apocryphal).

430. *Miranda Gets Rights His Case Brought*, L.A. TIMES, Jul. 16, 1974, at A20.

431. See *supra* Part I.C.1.i; Lief & Caldwell, *supra* note 300, at 263; Kelly, *supra* note 306.

432. See, e.g., *Miranda Again Found Guilty*, BOS. GLOBE, Feb. 25, 1967, at 5; *Rape Retrial Jury Convicts Miranda Again: Result Same Despite Appeal Ruling*, CHI. TRIB., Feb. 25, 1967, at 5; *Miranda Guilty In 2d Rape Trial: Figure in Historic Ruling on Confessions Is Convicted*, N.Y. TIMES, Feb. 25, 1967, at 13.

433. *Man Found Guilty in Second Murder Trial*, L.A. SENTINEL, May 29, 1969, at A2; Rudy Villasenor, *Judge Refuses to Apply Ruling, Sentences Killer*, L.A. TIMES, Jul. 8, 1969, at SF1.

434. *The Law: Catching Up with Miranda*, *supra* note 307.

435. Lief & Caldwell, *supra* note 300, at 239.

436. GUIORA & HEINY, *supra* note 428, at 107–08.

437. *Id.* at 109.

438. See generally Schneider, *supra* note 43.

himself did not extend beyond the anecdote mentioned about Katz asking his attorney whether he could sue the phone company for letting the FBI use a phone booth.<sup>439</sup> For some defendants, it is left to them to tell their own story. For instance, Danny Lee Kylo created a website that is still online and represents the best information available about what happened to him after his case was decided by the Supreme Court.<sup>440</sup> Kylo also maintains a social media presence, and we found him commenting on a video about his case.<sup>441</sup>

Most research on the fate of defendants, however, relies on more prosaic sources, such as inquiring of the government agency in charge of incarcerating the defendants. For instance, we used the Federal Bureau of Prisons's inmate lookup tool to find the whereabouts of Terence Byrd in federal prison.<sup>442</sup> Similarly, David Riley's incarceration information was available from the California Department of Corrections's website.<sup>443</sup> However, these tools provide limited information and, to be properly understood, often require context from information from court records. For instance, the Federal Bureau of Prisons allows searching by first and last name, but in the case of Terrence Byrd, it was necessary to disambiguate his name from the others in the system using the number assigned to him on his judgment and sentencing document from 2019.<sup>444</sup> But this secondary information is not freely available to the general public.

Sometimes, instead, it is the docket that fails to provide full information. For example, the docket in *United States v. Jones* lists Antoine Jones as "incarcerated," and Jones signed a 2012 complaint in a Section 1983 case with a handwritten note that said "DCDC #241-912."<sup>445</sup> Searching the Federal Bureau of Prisons lookup tool by this DCDC number, we found Antoine Jones listed with a release date of February 22, 2019.<sup>446</sup> The only entry pertaining to Jones from even close to that date was a 2016 entry releasing a transcript

439. *Id.* at 23; see *supra* Section I.A.1. When contacted, the author stated that he did not remember Charles Katz and never met him. Telephone Interview by Brittany Adams, Special Collections, Archival & Digitization Servs. Libr., Pritzker Legal Rsch. Ctr., with J. Harvey Schneider, former att'y for Charles Katz (June 16, 2021).

440. *Court Info*, DANNY LEE KYLLO'S HOMEPAGE, <http://dannyleekylo.com/court.html> [<https://perma.cc/K8XB-LBD2>]. Kylo's case received some attention from local media as well. *Final Charges Are Dismissed in Landmark Case*, OREGONIAN, Oct. 7, 2001, at D05.

441. Danny Lee Kylo (@KylloLee), X (Jan. 17, 2022, 8:53 AM), <https://twitter.com/KylloLee> [<https://perma.cc/4CPM-2EL2>]; Danny Kylo (@r2d26gs), *Meet DANNY LEE KYLLO KYLLO vs US 2001! Landmark 713 decision in The US Supreme Court!*, YOUTUBE (Sept. 11, 2016), <https://youtube/4eGmPAXCFo4> [<https://perma.cc/YB3S-CNBS>]; Danny Kylo (@r2d26gs), comment to searchpluseizure (@searchpluseizure), *Kylo v. United States*, YOUTUBE (Dec. 11, 2011), <https://youtube/iKyXvLgzTFY> [<https://perma.cc/LF8U-WS34>].

442. *Find an Inmate*, *supra* note 227.

443. *Inmate Information*, *supra* note 169.

444. Judgment in a Crim. Case at 1, *United States v. Byrd*, No. 14-cr-00321 (M.D. Pa. Aug. 13, 2019).

445. Complaint at 17, *Jones v. Kirchner*, No. 12-cv-01334 (D.D.C. Aug. 13, 2012).

446. *Find an Inmate*, *supra* note 71.

from before his 2013 trial.<sup>447</sup> Looking just at the dockets in *United States v. Jones* before the D.C. District Court and the D.C. Circuit Court of Appeals, the electronic paper trail on Jones goes cold in 2015 when his appeal regarding ineffective assistance of counsel ended. Subsequently, the docket refers to hearings in 2019 regarding Jones's supervised release, providing that, on August 21, 2019, Jones was found to be in compliance with supervised release but there is no mention of his release the previous February.<sup>448</sup>

The inmate lookup system can also provide confusing information or information that does not quite fit with the docket. When Brima Wurie—case consolidated in *Riley v. California*—was resentenced on March 18, 2015, the court sentenced him to 168 months' imprisonment to be followed by four years of supervised release.<sup>449</sup> The Bureau of Prisons inmate lookup shows Wurie was released from prison on September 13, 2019.<sup>450</sup> A 2018 motion in his case mentioned Wurie had already been in prison for 124 months and had substantial good time credits. The last thing in the docket for Wurie's case is an entry showing that the court's February 26, 2020, order was mailed to Wurie at FCI Berlin and the letter was returned as undeliverable.<sup>451</sup> There is nothing in the docket regarding why he was released from prison; we could only infer from the fact the letter from the court to the prison was returned as undeliverable that Wurie was released before he served the full 168-month sentence.

Williams, Miranda, Katz, Jones, and Kyllo were the only defendants studied whose subsequent history was written about in news, other published sources, or even just on the internet. Other defendants faded into obscurity. Thus, it is not sufficient to say that people will find out what happened to the defendants in Supreme Court cases from the same sources where they learned about the cases themselves.

## 2. Even Legal Experts Struggle to Find This Information

There are numerous barriers to going beyond media, internet, and pop culture reporting to find out what happened to defendants following their victories in Supreme Court cases. The first barrier is legal expertise. Knowledge of procedure and the hierarchy of courts is important for finding court records because the records are maintained by every jurisdiction that hears the case. A case may be reported as a "win" for a criminal defendant, but it is not necessarily a win in the colloquial sense. The language at the

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447. Transcript of Proc. in Case as to Antoine Jones Before J. Ellen S. Huvelle Held on Feb. 19, 2013, *United States v. Jones*, No. 05-cr-00386 (D.D.C. Jan. 12, 2016).

448. See *Docket*, *United States v. Jones*, No. 05-cr-00386 (D.D.C.).

449. Amended Judgment in a Crim. Case at 2–3, *United States v. Wurie*, No. 08-cr-10071 (D. Mass. Mar. 18, 2015).

450. *Find an Inmate*, *supra* note 178.

451. *Docket Entry 149*, *United States v. Wurie*, No. 08-cr-10071 (D. Mass. Feb. 26, 2020); *Docket Entry 150*, *United States v. Wurie*, No. 08-cr-10071 (D. Mass. Mar. 9, 2020).

conclusion of many of these cases is simply: “This case is hereby remanded for proceedings consistent with this opinion.”

Furthermore, even if a lay reader knew what it means to remand a case, without knowledge of the hierarchy of courts, they would not know what court would hear the case after the Supreme Court or to what court the case would go after that. For example, Richard Brown’s case started in the Circuit Court of Cook County, was appealed to the Illinois Appellate Court and the Illinois Supreme Court before it was heard by the U.S. Supreme Court. Looking only at the language of the Supreme Court’s opinion, the Court merely mentions a “circuit court” and discusses the decision of the Illinois Supreme Court. There is no way for a lay reader to know, looking only at the Court’s opinion, that Brown’s case would be in effect handed back to the Illinois Supreme Court, the Illinois Appellate Court, and the Circuit Court of Cook County. In fact, the only way to surmise that the case would restart with the Circuit Court of Cook County is either to know Illinois geography—the Court’s opinion states that the crime took place in Chicago, Illinois—or to have access to the Supreme Court’s opinion published by a legal research publisher or database like Westlaw or Lexis. That version of the opinion provides a synopsis written by employees of the publisher, which states that the case originated in the Circuit Court of Cook County. Knowledge of the procedure and hierarchy is essential because, as discussed further below, subsequent information about a case will often only be available in court records, and the availability of court records is determined by individual courts. One cannot request a court record without knowing which court holds that record.

Even expert legal knowledge is inadequate without local legal knowledge. Our knowledge of Illinois courts’ geography and hierarchy helped in researching *Brown*, but our lack of knowledge of the peculiarities of the New York state court system and especially of the criminal courts in New York City caused real problems with the research of the subsequent history of *Payton v. New York*. We knew that the trial level court in New York state is called the Supreme Court, however it was only after multiple attempts to contact the New York Supreme Court that we learned that, in *New York City*, cases are first filed with the “lower criminal court,” and only if there is an indictment returned against the defendant do they then go to the Supreme Court. Thus, even knowledge of the basics of a statewide system does not guarantee understanding the very detailed specifics of a local system.

A court’s geography may even change. Carl Calvin Westover was accused of robbing banks in Sacramento, California. When he appealed to the Ninth Circuit, the published cases state that he was convicted in the Northern District of California, Northern Division.<sup>452</sup> But our 2022 search for his records with the Northern District of California was fruitless because Sacramento

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452. *Westover v. United States*, 342 F.2d 684, 685 (9th Cir. 1965); *Westover v. United States*, 394 F.2d 164, 166 (9th Cir. 1968).

became part of the Eastern District of California on March 18, 1966. The records of Westover's prosecution are no longer held at the Northern District,<sup>453</sup> even though federal statute provides that his prosecution stayed with the Northern District when Sacramento became part of the Eastern District.<sup>454</sup>

Finally, legal experts may have difficulty finding information about what happened to a defendant because this research makes use of genealogy sources and public records, specialized research that may be unfamiliar to those trained in law. We were fortunate to work with trained archivists and one of us has a master's degree in library and information science in addition to a law degree. Affiliation with a large research university gave us access to Ancestry.com, a genealogy resource that charges independent researchers \$49.99 per month for a subscription level that includes what an academic user can access,<sup>455</sup> and the public records module of Lexis—an area of Lexis that is unavailable until a student's second semester of law school, likely owing to the inclusion of social security numbers and other sensitive personal information.<sup>456</sup>

### B. RESOURCE LIMITATIONS

Even those who have the legal expertise to understand court procedure and hierarchy will struggle to find the subsequent history of these cases and their defendants. Accessing court records is difficult, time consuming, and expensive. Even if court records are available, the records may not reveal what happened or, even if they do, they may be impermeable to most researchers, written or coded in a way that even legal experts cannot understand without expertise specific to practice in a particular jurisdiction. The obscure language problem is only amplified in older cases that use arcane legal terms.

#### 1. Limitations of Traditional Legal Research Resources

Finding the subsequent history of defendants in Supreme Court cases is not a task that can be accomplished with the tools most used by legal professionals. The subsequent history of these cases can only rarely be found in the same places where a legal professional might find the cases themselves. Accessing information on traditional legal research resources like Lexis and Westlaw is advantageous for a couple of reasons. First, if a researcher is a law professor or librarian, their law school contracts for, essentially, unlimited access for all of its users, unlike the pay-per-page or per-document model of PACER access or Bloomberg's model of limiting both an institution's access

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453. *U.S. District Courts for the Districts of California: Judicial District Organization, 1850-Present*, FED. JUD. CTR., <https://www.fjc.gov/history/courts/us-district-courts-districts-california-judicial-district-organization-1850-present> [<https://perma.cc/PU26-TMHM>].

454. *Westover*, 394 F.2d at 166.

455. *Subscribe*, ANCESTRY, <https://www.ancestry.com/cs/offers/subscribe> [<https://perma.cc/UM44-8GKX>].

456. E-mail from Tianna Gadbow, Prac. Area Consultant, LexisNexis, to Clare Gaynor Willis, Rsch. & Instructional Servs. Libr., Nw. Univ. Pritzker Sch. of L. (Jan. 12, 2023) (on file with authors).



and an individual within that institution's access to dockets to a certain dollar amount as well.<sup>457</sup> Second, there are tools in traditional legal resources that should bring related cases together to make it easier to find related information. The fate of the defendants in these Supreme Court cases is determined by trial courts, however, and those decisions are not always available on traditional legal research resources.

Many of the subsequent decisions in the cases discussed in Part I that are available using traditional legal research resources are intermediate appellate court decisions. Some information is simply lacking; for instance, the California Supreme Court's decision denying David Riley's final petition for review is only available on Lexis, not Westlaw.<sup>458</sup> And even when subsequent intermediate appellate court decisions are available, they typically provide very little information about what actually happened to defendants after their Supreme Court wins. These cases get remanded to fix some error at the trial level, so the opinion of the appellate court ordinarily does nothing else besides send the case back to the trial court.

Some trial court decisions are available from traditional legal research resources. The decision of the Third Circuit Court of Appeals<sup>459</sup> and Middle District of Pennsylvania<sup>460</sup> in *United States v. Byrd* following remand from the Supreme Court are available on Westlaw. But learning about the ultimate outcome of a defendant's case may be limited to those situations where the case resulted in a written decision by a federal district court because traditional legal research resources' coverage of the federal courts is largely limited to written decisions.<sup>461</sup> Those decisions will usually be available, including for older cases because West Publishing and its successors have published decisions of the U.S. District Courts in the Federal Supplement since 1933.<sup>462</sup> But motions, interim orders, other nonfinal decisions, and even

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457. There is a monthly limit on Westlaw use for law students, but not for law faculty. E-mail from Elan Kleis, Acad. Acct. Manager, ThomsonReuters to Clare Gaynor Willis, Rsch. & Instructional Servs. Libr., Nw. Univ. Pritzker Sch. of L. (Nov. 30, 2022) (on file with authors). Bloomberg limits academic users to \$1,500 in dockets charges and further limits institutions to an amount of dockets charges equal to thirty percent of the institution's Bloomberg Law subscription fees on an annual basis. Michael Lissner, *As Bloomberg Law Imposes Caps on PACER Access, PACER Must Support Academics.*, FREE L. PROJECT (Apr. 4, 2020), <https://free.law/2020/04/04/as-bloomberg-law-imposes-caps-on-pacer-access-pacer-must-support-academics> [<https://perma.cc/4C3Y-J6P4>].

458. *People v. Riley*, No. S225382, 2015 Cal. LEXIS 4470, at \*1 (June 17, 2015).

459. *See generally* *United States v. Byrd*, 742 F. App'x 587 (3d Cir. 2018).

460. *See generally* *United States v. Byrd*, 388 F. Supp. 3d 406 (M.D. Pa. 2019).

461. This is not always the case. In 1997, the Eighth Circuit affirmed the district court's dismissal of Williams's most recent petition for writ of habeas corpus as an abuse of the writ. The district court's decision is not available on traditional legal research resources and required placing a request with the Federal Records Center.

462. *Federal Supplement*, THOMSON REUTERS, <https://store.legal.thomsonreuters.com/law-products/Case-Law/Federal-Supplementreg/p/100000605> [<https://perma.cc/VFU7-Q9RM>].

dockets will often require using another tool like PACER or, for older cases, paper records owned and maintained by the government.

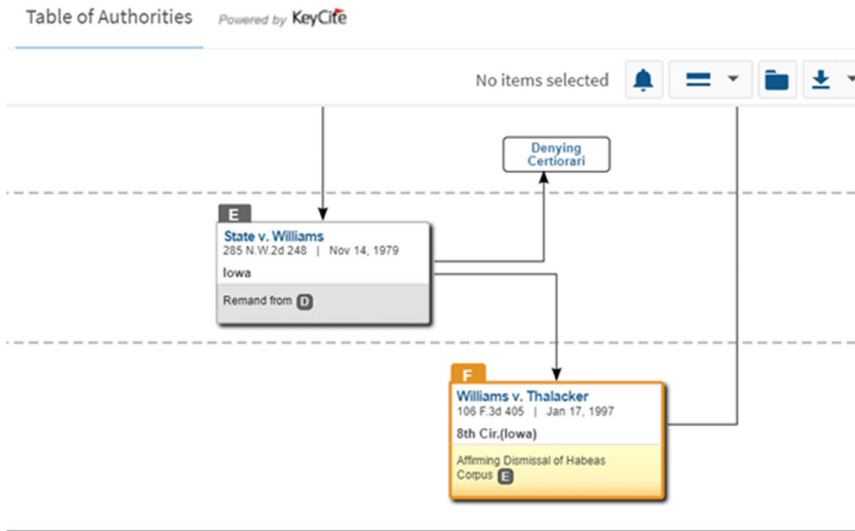
Aside from making a decision available online, traditional legal research resources could be a powerful tool to alert a researcher to the existence of subsequent cases or the existence of other cases involving a defendant that may be relevant, but they do not provide this feature consistently and may provide inaccurate information. Westlaw purports to show researchers the connections between cases using their graphical history feature. Lexis's Shepard's report has a similar graphic and helpfully indicates prior and subsequent history in its listing of cases. The Shepard's report for *Miranda v. Arizona* showed Miranda's unsuccessful subsequent appeal.<sup>463</sup> But using the graphical history tool for the research underlying Part I revealed some errors and omissions.<sup>464</sup> For instance, Robert Anthony Williams's last petition for writ of habeas corpus was dismissed by the Southern District of Iowa as an abuse of the writ and the Eighth Circuit affirmed that decision in 1997.<sup>465</sup> As illustrated in the screenshot below, Westlaw's graphical history indicates that the Eighth Circuit decision affirming the dismissal of habeas corpus was affirming the decision marked "E." The decision marked "E" is the last Iowa Supreme Court decision in 1979. That is the wrong decision.

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463. *Shepard's Report for State v. Miranda*, 450 P.2d 364 (Ariz. 1969), LEXIS+.

464. For example, *Jones v. Kirchner*, 835 F.3d 74 (D.C. Cir. 2016), a decision regarding Antoine Jones's Section 1983 claim related to his arrest, is linked from the Shepard's Report on Lexis and is findable on Westlaw by searching for Jones's name but is not listed in the graphical history for *United States v. Jones*.

465. *Williams v. Thalacker*, 106 F.3d 405, 405 (8th Cir. 1997).

Figure 1: Westlaw Graphical History of *Brewer v. Williams*

Furthermore, consider the difference in the graphical history for the two cases consolidated as *Payton v. New York* at the Supreme Court. The graphical history for *Payton* shows the subsequent Court of Appeals decision in Theodore Payton’s case. It does not show the subsequent Court of Appeals decision in Obie Riddick’s case, even though that decision is also available on Westlaw.<sup>466</sup> Searching by a party’s name enabled us to uncover subsequent decisions for Michael Vignera, Carl Calvin Westover, and Roy Allen Stewart that were not listed with the graphical history of *Miranda v. Arizona*. But searching by name can be speculative, especially for a common name. Or it can reveal further errors, such as the Arizona Supreme Court listing Ernesto Miranda as “Ernest Miranda.”<sup>467</sup>

These errors are particularly problematic because these tools are one of the few solutions to another research problem: New litigation by the same person will be assigned a new docket number and a new case name, even if the new litigation involves some of the same subject matter. Consider the complicated history of Robert Anthony Williams and his direct and collateral attacks on his conviction. Williams’s first writ of habeas corpus to challenge his detention resulting from his prosecution and trial for murder was styled *Williams v. Brewer* because Lou V. Brewer was the warden of the prison where

466. *People v. Riddick*, 51 N.Y.2d 764, 765 (1980) (reading in its entirety, “[u]pon reargument, following remand by the Supreme Court of the United States, order reversed, motion to suppress granted and case remitted to Supreme Court, Queens County, for further proceedings on the indictment”).

467. *State v. Miranda*, 450 P.2d 364, 373 (Ariz. 1969).

Williams was incarcerated.<sup>468</sup> When Williams filed another petition in the early 1980s challenging his detention, it was styled *Williams v. Nix* because Crispus Nix was the warden.<sup>469</sup> In the 1990s, Williams filed another petition for habeas corpus challenging his detention.<sup>470</sup> That case was styled *Williams v. Thalacker*, the name of the warden then serving. All of those petitions were assigned a different docket number.

The different case names and different docket numbers represent a serious challenge for legal research. Not only do case names change with every newly filed litigation, case names may also change on appeal when the appellant is listed first<sup>471</sup> or when someone is sued in their official capacity and the individual holding that position changes during the pendency of the litigation.<sup>472</sup> Hence, the docket number is a much better legal research tool because it does not change at any stage in the litigation, including following remand. A search for the docket number, so long as one designates the correct court,<sup>473</sup> will bring together all of the information in that litigation before that court. But we show next that there are problems finding and using docket numbers also, along with other difficulties in accessing court records.

## 2. Limitations and Challenges in Accessing Court Records

Without the ability to access the information about a case using traditional legal research resources, it is necessary to find the information from court records. For federal courts, this means using PACER or one of the commercial tools that exist to give easier access to the documents on PACER. PACER has provided access to court records from some federal courts on the internet since around 2000, although the exact date varies by court. PACER has a reputation for being difficult to use, expensive, and impeding access to justice.<sup>474</sup> However, from a researcher's standpoint, the existence of a search tool for all federal courts at the trial court, and not just the appellate court, that provides both the docket and the underlying court records is something

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468. *Williams v. Brewer*, 375 F. Supp. 170, 172 (S.D. Iowa 1974).

469. *Williams v. Nix*, 528 F. Supp. 664, 665 (S.D. Iowa 1981), *rev'd*, 700 F.2d 1164 (8th Cir. 1983), *rev'd*, 467 U.S. 431 (1984), *remanded to* 751 F.2d 956 (8th Cir. 1985), *cert. denied*, 471 U.S. 1138 (1985).

470. *Thalacker*, 106 F.3d at 1.

471. *Compare* *Brown v. Illinois*, 422 U.S. 590, 590 (1975) (listing Brown, the petitioner, first), *with* *Order at 1, People v. Brown*, No. 68-2275 (Ill. Cir. Ct. June 1, 1979) (listing Brown, the appellee, second on appeal).

472. *See, e.g., Nix*, 528 F. Supp. at 665 n.1, *rev'd*, 700 F.2d 1164 (8th Cir. 1983), *rev'd*, 467 U.S. 431 (1984) ("Since this action was commenced, named defendant David Scurr ceased serving as warden of the Iowa State Penitentiary and he has been replaced by Crispus Nix, who is automatically substituted as party defendant under the provisions of Fed.R.Civ.P. 25(d)(1).").

473. *See infra* Section II.D (discussing further that keeping the same style of docket numbers for every court obscures which court was involved).

474. Brian Carver, *What Is the "PACER Problem"?*, FREE L. PROJECT (Mar. 20, 2015), <https://freelaw.com/2015/03/20/what-is-the-pacer-problem> [<https://perma.cc/58BB-MGJ9>] (listing numerous problems well recognized in PACER, including expense, lack of accountability, and difficulty of use).

of a miracle, especially when compared to finding court records from state courts. Commercial tools for accessing documents on PACER allow a researcher to track a docket and find out when something new is filed. *United States v. Byrd* was still an open case when we started researching it on November 5, 2019, and Bloomberg provided updates. Docket alerts are easy and helpful. The biggest challenge is weeding out the irrelevant things that come through in a docket alert, like motions to extend the briefing and changes in counsel. But even this apparent miracle has its limits.

A federal case covered by PACER, like *United States v. Jones*, is the best-case scenario for finding out what happened to a case after it was decided. Unfortunately, there is nothing that comes close to PACER for state courts in terms of a nationwide system to retrieve dockets and court records. In other jurisdictions, there is only a paper record or there may only be a paper record for records prior to the introduction of electronic case filing. Electronic court records, where they exist, are often maintained by individual counties rather than statewide.<sup>475</sup> Electronic access to documents from state courts is not the norm, although it is expanding. In April 2020, the Circuit Court of Cook County announced that it had a new online case lookup service that would give docket information for criminal cases.<sup>476</sup> This was a big deal because previously, criminal docket information required using the computers at the courthouse or knowing someone with access. But the new service is limited to attorneys with an active Illinois law license, which excludes out-of-state researchers or researchers who have gone inactive due to not wanting to pay ongoing fees for bar dues.

Furthermore, requesting federal court records from before the existence of PACER is more like finding state court records because there is not a single, centralized place to look. However, even those pre-PACER federal court records can be easier to find than state court records because the National Archives and Records Administration (“NARA”) serves as a singular entity holding the records of federal courts, albeit in multiple locations. This is complicated by records that are held not in a NARA location, but in a Federal Records Center location, and some records could still be with the court that heard the case initially.

When it is necessary to request the court record, that process is facilitated greatly by having a docket number. Once the court is specified, the docket

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475. But some states offer some online access to decisions the trial court level in a statewide database. See, e.g., *Just One Look: Alabama's ON-DEMAND Public Access to Trial Court Records*, ALACOURT.COM, <https://pa.alacourt.com/default.aspx?loc=alacourt.gov> [<https://perma.cc/KB7V-26KU>]; *Court Opinions*, N.J. CTS., <https://www.njcourts.gov/attorneys/opinions> [<https://perma.cc/AT8Y-G9FK>]; *Opinions and Orders*, DEL. CTS.: JUD. BRANCH, <https://courts.delaware.gov/opinions> [<https://perma.cc/6C9E-EQAM>]; *Opinions, Decisions and Order Library*, VT. JUDICIARY, <https://www.vermontjudiciary.org/opinions-decisions> [<https://perma.cc/XD25-5GFX>].

476. Andrew Maloney, *Clerk Opens Online Hub for Criminal Case Search*, CHI. DAILY L. BULL. (Apr. 13, 2020), <https://www.chicagolawbulletin.com/clerk-opens-online-hub-to-search-for-criminal-cases-20200413> [<https://perma.cc/7L2K-LCH7?type=image>].

number will allow accurate collocation of all the documents associated with a case. But docket numbers may not be easy to find. For example, we managed to find the *Katz* docket number only because the docket of the original case was included as part of the transcript of the record when *Katz* filed his petition for writ of certiorari with the Supreme Court. Even a contemporary case may not provide the docket number from a lower court in the decision of a higher court. The most recent Sixth Circuit decision in *United States v. Carpenter* is available on Westlaw,<sup>477</sup> but the court did not include the docket number for the original Eastern District of Michigan case; luckily, it was mentioned in the second to last Sixth Circuit case.<sup>478</sup> Because the District Court docket number is not included in any of the published cases against Carl Calvin Westover, either before or after his case was consolidated with three others in *Miranda v. Arizona*, NARA was unable to help and could only refer us to the Clerk of the United States District Court for the Eastern District of California, Sacramento division. An employee at the Clerk's office told us that we would have to pay a search fee and send a request by mail to search for a case from the 1960s by name.<sup>479</sup>

Even with a docket number, some detective work is necessary. For instance, the docket for *United States v. Kyllo* is on PACER, but the underlying court documents are too old to be included on PACER and cannot be requested without contacting the courthouse. We had to rely on, and make inferences from, a summary of the documents contained in the docket, including entry 211: "Order by Honorable Helen J. Frye Granting Motion to Dismiss Indictment by USA as to Defendant Danny Kyllo [210-1] s/ 9/27/01 (cc: Counsel notified) (rr) (Entered: 09/28/2001)."<sup>480</sup>

Very little has been written on this topic. One of the few works to address these questions is a recently published paper in the *Journal of Criminal Law and Criminology*, which looks at the problem of access to court documents in the context of finding and requesting court transcripts.<sup>481</sup> Kat Albrecht and Kaitlyn Filip sought to quantitatively analyze court transcripts but concluded that quantitative analysis of court transcripts is not possible because one cannot create a corpus of text where the transcripts are not available as a practical matter. Their difficulty finding court transcripts mirrors our experience with other court records. They characterize court records requests as an example of "managerializ[ed] rights," defined by the authors as rights that "require[] individuals to act on their own accord to secure protection of

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477. *United States v. Carpenter*, 788 F. App'x 364, 364 (6th Cir. 2019).

478. *United States v. Carpenter*, 926 F.3d 313, 314 (6th Cir. 2019).

479. Phone Conversation with Representative of Clerk of the U.S. Dist. Ct. for the E. Dist. of Cal., Sacramento Div. (Nov. 30, 2022).

480. *Docket Entry 211*, *United States v. Kyllo*, No. 92-cr-00051 (Dist. Or. Sept. 13, 1992).

481. Kat Albrecht & Kaitlyn Filip, *Public Records Aren't Public: Systemic Barriers to Measuring Court Functioning & Equity*, 113 J. CRIM. L. & CRIMINOLOGY 1, 4-5 (2023).

their rights from a larger institution.”<sup>482</sup> We agree: We had to work extremely hard in order to uncover the public information contained in this Article.

### 3. Record Retention, Local Variation, and Official Discretion

Accessing court records is made yet more difficult by a variety of record retention policies and hyperlocal control of documents. For court records, even in the federal courts, there is no standard record-retention policy. Every court can set its own policies. The docket sheet for Richard Brown’s Section 1983 case was held at the National Archives facility in Chicago. But Carl Calvin Westover’s docket sheet, for a case that originated in the Northern District of California, is not available with the clerk of that court. Westover’s alleged crime was committed in Sacramento, which is now part of the Eastern District of California, another court that retains docket sheets from older cases.<sup>483</sup>

Furthermore, some records are destroyed, effectively erasing what happened in that case. Charles Miller at NARA’s San Francisco office noted, “some of the Civil case files are now considered temporary, and are disposed of after a certain time period (I think 15 years).”<sup>484</sup> Stephanie Crawford, librarian with the Seventh Circuit, noted that some records are destroyed before they are sent to NARA and she has heard that some court records are destroyed by the Federal Records Center as well.<sup>485</sup> Although the docket sheet for Westover’s prosecution was retained, the underling court records were not.

Perhaps most notably, there does not exist any way to search the whereabouts of a particular record across the records of the federal courts to determine if they are with the court, the Federal Records Center, or NARA. Even employees of the federal courts cannot use an internal system to find out where a record is held, although individual courts may have something available to look up the whereabouts of the records of that court, like the Northern District of Illinois has.<sup>486</sup> Stephanie Crawford stressed the importance of starting a search with the clerk of a court.<sup>487</sup> The outsized power of the clerk of the court, a position that most people do not know exists, is discussed below.<sup>488</sup>

Even where records have been retained, several features of cases and their records complicate the research. One complication in finding out what

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482. *Id.* at 8.

483. *U.S. District Courts for the Districts of California: Judicial District Organization, 1850-Present*, *supra* note 453.

484. E-mail from Charles Miller, Nat’l Archives & Recs. Admin., to Clare Gaynor Willis, Rsch. & Instructional Servs. Libr., Nw. Univ. Pritzker Sch. of L. (Apr. 6, 2022, 11:53 AM) (on file with authors).

485. E-mail from Stephanie Crawford, Headquarters Libr., Libr. of the U.S. Cts. for the Seventh Cir., to Clare Gaynor Willis, Rsch. & Instructional Servs. Libr., Nw. Univ. Pritzker Sch. of L. (July 7, 2022) (on file with authors).

486. *Federal Record Lookup*, U.S. DIST. CT. FOR THE N. DIST. OF ILL., <https://www.ilnd.uscourts.gov/FederalRecordLookup.aspx> [<https://perma.cc/VC38-2625>].

487. E-mail from Stephanie Crawford, *supra* note 485.

488. *See infra* Section II.D.i.

happened to someone after a Supreme Court victory is the fact that one case may involve multiple defendants in a single prosecution, yet not all defendants will have been affected by the Court's decision. The docket for *Carpenter*, which as of the most recent docket entry on November 21, 2022, has 646 entries, is flooded with entries about the fourteen defendants other than Timothy Ivory Carpenter.<sup>489</sup> *United States v. Jones* involved no fewer than fifteen defendants on the same docket.<sup>490</sup> Because of this, as of November 30, 2022, there are 795 docket entries in the *Jones* docket, starting in 2005.<sup>491</sup> This consolidation has the effect of hiding a lot of information simply because there is so much to sift through. Things are arranged by date, not by defendant, so it is easy to lose track of the defendant one is looking for. In other instances, multiple cases are consolidated before the Court, as seen with *Payton v. New York* and *Riley v. California*. Consolidated cases like these have the effect of multiplying the work of researching them and also complicating the research by bringing in different jurisdictions because every new jurisdiction represents an additional, and possibly very different, process.

Local control over court records also serves to create silos that fracture information about one person into several places. Robert Anthony Williams was prosecuted in state court in Polk County, Iowa, and the Iowa Supreme Court affirmed the conviction.<sup>492</sup> Williams's case then moved to federal courts through a petition for a writ of habeas corpus in the Southern District of Iowa,<sup>493</sup> an appeal to the Eighth Circuit,<sup>494</sup> and, ultimately, the U.S. Supreme Court.<sup>495</sup> Following that decision, Williams's case reentered the state court system for a new trial.<sup>496</sup> The new trial went to yet another jurisdiction, Linn County, Iowa, following a motion for a change of venue.<sup>497</sup> This triggered another appeal to the Iowa Supreme Court,<sup>498</sup> another petition for writ of habeas corpus in federal court,<sup>499</sup> postconviction claims in state court, and another petition for writ of habeas corpus.<sup>500</sup> All of this stretched from the 1970s through the mid 1990s. The records of these proceedings are maintained by the court that heard the cases, which means that a little piece of Williams's story is held by Polk County, Linn County, the Iowa Supreme

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489. *Docket*, *United States v. Green*, No. 12-cr-20218 (E.D. Mich.).

490. *United States v. Jones*, 565 U.S. 400 (2012).

491. *Docket*, *United States v. Jones*, 05-cr-00386 (D.D.C.).

492. *Brewer v. Williams*, 430 U.S. 387, 394 (1977).

493. *Id.*

494. *Id.* at 395.

495. *Id.* at 406.

496. *Id.* at 406 n.13.

497. *Docket*, *State v. Williams*, No. 55805 (Iowa Dist. Ct.).

498. *See id.*; *State v. Williams*, 285 N.W.2d 248, 248 (Iowa 1979).

499. *Williams v. Nix*, 528 F. Supp. 664 (S.D. Iowa 1981), *rev'd*, 700 F.2d 1164 (8th Cir. 1983), *rev'd*, 467 U.S. 431 (1984), *remanded to*, 751 F.2d 956 (8th Cir. 1985), *cert. denied*, 471 U.S. 1138 (1985).

500. Brief in Support of Resistance to Motion to Dismiss at 6, *Williams v. Thalacker*, No. 95-cv-10163 (S.D. Iowa June 6, 1995).



Court, and NARA, which holds the records for the Southern District of Iowa and the Eighth Circuit Court of Appeals. When a case involves multiple jurisdictions, a researcher must make separate requests for every jurisdiction and piece the puzzle back together again.

Similarly, Richard Brown's court records relating to his state prosecution are with the archives of the Circuit Court of Cook County, Illinois, and the Illinois Supreme Court, and the records relating to his Section 1983 case arising out of the police conduct in that prosecution are with the National Archives. To someone who is trying to look at Brown's experience with the legal system holistically, the Section 1983 case is meaningfully related to his unlawful 1968 arrest. It is only as a matter of records retention that separates those two, but that separation has a real practical effect because the only indication in Brown's state court record that a federal case even exists is a subpoena which indicated that his record had been sent to the federal court for a separate proceeding.<sup>501</sup> Once again, there is no reliable tool that brings together related cases.

Researching court records is also difficult because it can be very slow. As a practical matter, obtaining court records in-person may be faster and easier, provided that one happens to be physically present in the jurisdiction. For example, we were able to physically access Richard Brown's records from the United States District Court for the Northern District of Illinois at a NARA records retention facility on the far southwest side of Chicago. A visit to the facility on December 17, 2019, required scanning the documents and creating digital files that could be read, worked with, and saved for later. In Brown's Circuit Court of Cook County case, a microfilm transcript of some court proceedings was held in the archives office; the rest of the file had to be ordered from offsite.

Obtaining records from a state the researcher does not happen to reside in is even more slow and complicated, delays only exacerbated once the COVID pandemic closed courts and offices. Researching what happened in *Katz* required emailing the NARA offices in San Bruno, California, and Riverside, California, because the website indicated that the office was closed due to COVID. The Riverside archives sent a scanned copy of the docket from *Katz's* case forty-two days after our original request. Similarly, obtaining the Federal Records Center records relating to Robert Anthony Williams took about six weeks. Aside from delays, the COVID pandemic also created

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501. The record of Brown's case in the Circuit Court of Cook County contains a subpoena from the U.S. District Court for the Northern District of Illinois, Eastern Division, with a docket number 77 C 1017. Subpoena at 1, *Brown v. Nolan*, No. 77-c-1017 (N.D. Ill. Aug. 8, 1978). It reads, "You are commanded to appear 208 South LaSalle Street, Suite 2000 in the city of Chicago on the 15th day August, 1978, at 10:00 o'clock A.M. . . . in the above entitled action pending in the United States District Court for the Northern District of Illinois and bring with you any and all documents, pleadings, transcripts relating to Richard Brown and criminal indictment number 68-2275." *Id.*

information overload. During the early days of the pandemic, docket alerts were all flooded with notices delaying hearings and setting up Zoom appearances. These docket alerts cannot be opted out of and each one is counted in a limited quota of access that Bloomberg allows researchers, discussed further below.<sup>502</sup> In a case like *Carpenter*, that meant numerous docket alerts for the various defendants—at least three of whom were actively pursuing compassionate release during the pandemic.

Even electronic records requests using PACER or a commercial tool like Bloomberg can be delayed where redaction is necessary. A transcript of Timothy Carpenter’s February 11, 2022, resentencing hearing was technically added to the docket on Bloomberg on March 23, 2022. That triggered the docket alert and a docket alert charge. But the court gave the parties ninety days to allow requests for redaction, so the transcript was not available to download until June 23, 2022.<sup>503</sup>

Court records are also difficult to research because they sometimes require a phone call to the courthouse, which presents its own set of challenges. If a researcher is fortunate enough to speak with helpful and patient people, the expertise of those who work with court records can ease the request process and lead to helpful information. For *Williams v. Brewer*, Leslie at the Polk County clerk’s office was willing to pull microfiche from the 1960s just with the name “Robert Anthony Williams.” Logan from Polk County criminal records found a 1969 sentencing order, responded quickly to a request that he search for something after the 1977 Supreme Court decision, and made multiple requests with the records department to find a Polk County judgment from 1977 and the Polk County docket sheet. Similarly, for *Missouri v. Siebert*, the employees at the Clerk of the Missouri Supreme Court and the Clerk of the Pulaski County Missouri Circuit Court were helpful, friendly, and glad to help. But access to justice should not depend on the discretion of the person called.

In larger and busier jurisdictions, it is hard to find a person who can or will help. We needed to call both New York County, which covers the borough of Manhattan, and Queens County, which covers the borough of Queens, to research *Payton v. New York*. After we identified the correct Queens County court,<sup>504</sup> Queens County passed the phone call from the Correspondence Section to the Record Room who then said it was a “purged case,” but later noted that might mean it was only purged from the computer. A woman from the Record Room then found an index card with a final entry reading “New Trial Court of Appeals 10/20/80.” She did not know what that meant. We requested the record but, upon calling back two weeks later, there was no record and no record of the request. We again requested a copy of the record

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502. See *infra* Section II.B.4.

503. *Docket Entry 616*, United States v. Green, No. 12-cr-20218 (E.D. Mich. Mar. 23, 2022).

504. See *supra* Section I.B.2.i.

and was told to call again in two weeks. About six weeks after the first call to Queens County, we were told that the record had arrived, but it was sealed, so we could not access its contents. The only way to access the contents of the file had it been unsealed would be to fly to New York City because, as of June 2021, they were not offering to copy or send certified copies until September 2021. Despite some success researching *Brown v. Illinois* in Chicago, phone calls to the Cook County Archives at the Daley Center sent us to the Clerk of the Circuit Court of Cook County, which referred us to the Clerk of the Circuit Court of Cook County's criminal division, which never returned any message. Ultimately, Cook County's electronic records system, which is only open to attorneys with an active license, was the only way to obtain the record. Likewise, we were only able to access the case for Rodney Joseph Gant by paying for the records.<sup>505</sup>

#### 4. Expenses in Accessing Court Records

Accessing court records, even for a legal professional, has been shown to be difficult: Inconsistent and opaque record retention policies make it difficult to see if a record exists; multiple defendants, consolidated cases, and multiple jurisdictions fracture and multiply the research process; and phone calls may be necessary to request records and the success of those requests may depend on the kindness and patience of the person who answers the phone. But in addition, accessing court records can be expensive. That expense is particularly prohibitive to this research because one may need to spend money just to know if a record is relevant.

The exact cost of using PACER is complicated to understand and difficult to predict. The quoted price is ten cents per page.<sup>506</sup> The cost of certain documents, including dockets, motions, and orders, is capped at \$3.00 per document and court opinions are free. But the cost of other documents is not capped and that includes transcripts and searches which are priced based on the how many pages are in the search result. The Administrative Office of the United States Courts does have fee waivers that fall under a cap of \$30 per quarter, but it is difficult to estimate how many pages one will need just from looking at the docket.<sup>507</sup> These costs are exacerbated because it is not possible to see the document before paying for it, making it necessary to pay to download documents that are not helpful. PACER can also be difficult to use, as discussed above. As a result, many law firms and law schools pay for services that include data from PACER. For law schools, the most popular service is

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505. *Case Search*, PIMA CNTY. CONSOL. JUST. CT., <https://www.jp.pima.gov/casesearch> [<https://perma.cc/H6PN-PZ6S>].

506. *PACER Pricing: How Fees Work*, PACER: PUB. ACCESS TO CT. ELEC. RECS., <https://pacer.uscourts.gov/pacer-pricing-how-fees-work> [<https://perma.cc/Fg5D-WA7H>].

507. *See Electronic Public Access Fee Schedule*, U.S. CTS. (Dec. 31, 2019), <https://www.uscourts.gov/services-forms/fees/electronic-public-access-fee-schedule> [<https://perma.cc/6AH6-K3zC>].

Bloomberg Law. Bloomberg is considered an expensive service and imposes an annual cap on individual downloads and total downloads for the institution.<sup>508</sup>

Paywalls to access a copy of a physical record from NARA can also be expensive and similarly involve speculation about the contents of the documents requested. Some jurisdictions require a researcher to purchase the entire record or meet a page number minimum to place a request. The records for Williams's 1993 petition for writ of habeas corpus before the Southern District of Iowa are held by the Federal Records Center in Lenexa, Kansas, not the National Archives at Kansas City, which held other federal records from *Brewer v. Williams*. Getting the records from the Federal Records Center required a request for court records through the NARA online portal. All we needed was one district court decision, but the only option was to order the entire file for \$90. To get two court records in *Katz*, we requested several extra superfluous documents to reach a \$20 minimum order set by NARA. Requesting documents at the state level is also expensive and speculative. To obtain the Pima County court record for *Gant*, we paid fifty cents per page and a \$7.00 postage and handling fee.

There are projects that are working to bring down the cost of PACER. For example, the RECAP project lets PACER users with the RECAP browser extension to download PACER documents and share them with other users.<sup>509</sup> Congress has repeatedly introduced legislation to eliminate PACER fees in the past few years.<sup>510</sup> Most recently, a class action alleging that PACER fees were excessive settled for \$125 million.<sup>511</sup> Protecting the fundamental right to vote took a constitutional amendment<sup>512</sup>; it is unclear what it will take to enable the fundamental accountability required by the rule of law.

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508. See Duane Strojny, *Is Access to Lexis, Westlaw, and BloombergLaw Feasible?*, RIPS L. LIBR. BLOG (Dec. 8, 2016), <https://ripslawlibrarian.wordpress.com/2016/12/08/is-access-to-lexis-westlaw-and-bloomberglaw-feasible> [<https://perma.cc/Q696-JBUM>]. We were unable to get an official quote or price range from Bloomberg.

509. *RECAP Suite—Turning PACER Around Since 2009*, FREE L. PROJECT, <https://free.law/recap> [<https://perma.cc/7GST-PPS3>]; *CourtListener*, FREE L. PROJECT, <https://www.courtlistener.com> [<https://perma.cc/E33J-6JPF>].

510. See Open Courts Act of 2021, S. 2614, 117th Cong. (2021); Open Courts Act of 2020, H.R. 8235, 116th Cong. (2020); Electronic Court Records Reform Act of 2019, H.R. 1164, 116th Cong. (2019); Judiciary ROOM Act of 2018, H.R. 6755, 115th Cong. (2018).

511. See Madison Alder, *PACER Settlement Would Secure \$125 Million in User Refunds*, U.S. L. WEEK (Oct. 11, 2022, 5:25 PM), <https://news.bloomberglaw.com/us-law-week/pacer-settlement-would-secure-125-million-refund-for-most-users> [<https://perma.cc/3UMH-MV92>]; Plaintiffs' Motion for Preliminary Approval of Class Settlement at 10, *Nat'l Veterans Legal Servs. Program v. United States*, No. 16-cv-00745 (D.D.C. Oct. 11, 2022).

512. U.S. CONST. amend. XXIV ("The right of citizens of the United States to vote in any primary or other election . . . shall not be denied or abridged . . . by reason of failure to pay poll tax or other tax.").

C. INFORMATIONAL LIMITATIONS IN COURT RECORDS

1. Information Not Contained in the Record

Even if a record can be found and the cost borne, the record still may not say what ultimately happened to a defendant. In *Arizona v. Gant*, the most recent document in the court record is a July 28, 2015, “property disposition authorization” filed by Pima County that lists the date of the case’s final disposition as December 10, 2002.<sup>513</sup> That date is confusing because there is no reference to a dismissal or even anything happening with the case in December 2002, in any of the court opinions. To unravel this mystery, we asked the Pima County Clerk to send the index—what Pima County calls the docket sheet—the property disposition authorization, and another document listed in the index: the December 11, 2002, “Status Conference Re Court of Appeals Mandate.”

The property disposition authorization is a simple checkbox form from the Pima County Attorney’s Office. It reads: “You are hereby authorized to release/dispose of all exhibits being held at Pima County Superior Court in our case . . . State v. Rodney Joseph Gant . . . .”<sup>514</sup> At the bottom of the letter, it states “date of final disposition: 12/10/2002.”<sup>515</sup> The Pima County Superior Court docket lists the status conference as December 11, 2002, although the corresponding court record, a Minute Entry, is dated December 10, 2002.<sup>516</sup> The document states: “There being no objection and good cause appearing, IT IS ORDERED that all charges against the defendant are DISMISSED without prejudice.”<sup>517</sup>

Thus, the July 8, 2015, property disposition authorization refers back to that December 10, 2002, dismissal as the final disposition of the prosecution’s case against Rodney Gant. Because the last file in the court record refers to something prior to the 2009 Supreme Court case as the final disposition of the case, it follows that Gant was not retried following the Supreme Court case.

There are no entries in the docket after the 2009 Supreme Court case other than the aforementioned property disposition and authorizations captioned “Motion & Order for Release of Exhibits,” and “Notice to Destroy Exhibits.”<sup>518</sup> There were no docket entries regarding dispositive motions or a

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513. Prop. Disposition Authorization, State v. Gant, No. cr-2000-0042 (Ariz. Super. Ct. July 8, 2015).

514. *Id.*

515. *Id.*

516. *Docket Entry*, State v. Gant, No. cr-2000-0042 (Ariz. Super. Ct. Dec. 11, 2002); *Minute Entry: Status Conf. re Ct. of Appeals Mandate*, State v. Gant, No. cr-2000-0042 (Ariz. Super. Ct. Dec. 10, 2002).

517. *Minute Entry*, *supra* note 516.

518. See *Docket Entry*, State v. Gant, No. cr-2000-0042 (Ariz. Super. Ct. Aug. 31, 2010); *Docket Entry*, State v. Gant, No. cr-2000-0042 (Ariz. Super. Ct. July 8, 2015); *Docket Entry*, State v. Gant, No. cr-2000-0042 (Ariz. Super. Ct. Nov. 5, 2015).

trial after the 2009 Supreme Court case. Taken together, these documents imply that the charges against Rodney Gant were never revived and the case against him effectively ended in 2009. However, coming to this conclusion requires making inferences from the gaps and reading into court records from six years later that exist to dispose of property, not to provide information about what happened to Rodney Gant.

The record ending Antoine Jones's Section 1983 case against the officers is similarly opaque.<sup>519</sup> After several docket entries delaying deadlines, there is simply a docket entry on October 25, 2020, dispersing settlement funds.<sup>520</sup>

Similarly, the underlying documents which may explain a docket entry may be unavailable without a clear reason why. The message given by Bloomberg that the district court's order granting the United States's motion to dismiss Wurie's motion to vacate his sentence stated that it required a courier to retrieve, which is strange because the document is styled as an "electronic order."<sup>521</sup> Academic Bloomberg accounts do not authorize a courier to go to the courthouse to get a document. We were able to download the United States's motion and gleaned that it was granted from reading the docket. We had the same problem with the October 15, 2018, order granting the joint motion to vacate.<sup>522</sup>

## 2. Even Legal Experts Struggle to Understand Court Records

The record request process can be shrouded in language comprehensible only to archivists. When we requested the file from the Federal Records Center to get the district court's decision rejecting Robert Anthony Williams's last petition for writ of habeas corpus, NARA's form required the transfer number, box number, and location number for the record. Bob Beebe at NARA provided that information, which is not otherwise available to nonemployees.

The records themselves can also use language that is only accessible to those who work for the government as judges and prosecutors or as defense attorneys. For instance, in doing background research for this project on a case that was not ultimately included in our writeup, *Illinois v. Rodriguez*, much of the information in the trial court record was written in abbreviations and shorthand that we did not understand. We had to rely on a friend, Randi Peterson, a longtime public defender in Cook County, to decipher the abbreviations and codes. Randi also noted that although the online case retrieval system includes older cases, some of them were added to the system in a way that makes the record difficult to read and understand as compared

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519. Complaint at 2, *Jones v. Kirchner*, No. 12-cv-01334 (D.D.C. Aug. 13, 2012).

520. Order at 1–2, *Jones v. Kirchner*, No. 12-cv-01334 (D.D.C. Oct. 25, 2020).

521. Order on Petitioner's Motion to Vacate, Set Aside, or Correct Sentence and Gov't's Motion for Summary Dismissal, *United States v. Wurie*, 08-cr-10071 (D. Mass. Feb. 26, 2020).

522. *Docket Entry 149*, *United States v. Wurie*, No. 08-cr-10071 (D. Mass. Feb. 26, 2020).

to a record that was born electronically. This experience makes us wonder how anyone who does not have a friend who practices criminal law can hope to understand these docket sheets.

Likewise, historical records further complicate the problem of language because the language in old court records can be incredibly archaic and difficult to parse, even for someone with legal training. In *United States v. Westover*, one of the cases consolidated in *Miranda v. Arizona*, the docket contains several references to a “Writ of Habeas Corpus ad Prosequendum.”<sup>523</sup> Black’s Law Dictionary tells us that “habeas corpus ad Prosequendum” is “[a] writ used in criminal cases to bring before a court a prisoner to be tried on charges other than those for which the prisoner is currently being confined.”<sup>524</sup> The part of the definition about charges other than those for which the prisoner is currently being confined was intriguing but nothing in the record mentioned any other charges than the original bank robbery charges. Practical advice on legal writing discourages attorneys from using Latin and legalese,<sup>525</sup> but the dead language’s long history of use in legal English means that a researcher is sure to find Latin in older records.<sup>526</sup>

D. WHY IS THIS INFORMATION SO HARD TO FIND? IT’S A FEATURE, NOT A BUG

We maintain that it is no mistake that this information is so difficult to find. The information is maintained to serve the state, not its citizens. Our research illustrates the lack of accountability in the criminal justice system, where the state wields enormous power against the individual not only to incarcerate individuals but to obliterate their stories.

Our legal information ecosystem is set up to hide the power of prosecutors and trial courts. The information produced at the trial stage is the least available, even to attorneys. It feeds into an idea that we should not worry about what prosecutors and trial judges do because there is an appeals process that should correct it. But we see from these cases that even if a decision is corrected by a higher court, someone often still goes to prison. For instance, Timothy Carpenter helped establish a landmark Supreme Court doctrine but was denied the benefit of his own Court win when the case was remanded back down to the lower courts. That common outcome is hidden behind paywalls, phone calls to clerk’s offices, and incomplete, indecipherable, or entirely erased court records, all of which allows the ultimate power of prosecutors and trial courts to stay hidden and maintain the illusion that the system vindicates individual rights.

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523. *Docket*, *United States v. Westover*, No. 13655 (N.D. Cal.).

524. *Habeas Corpus*, BLACK’S LAW DICTIONARY (11th ed. 2019).

525. *See, e.g.*, Justice Michael B. Hyman, *Go Easy on the Legalese*, ILL. BAR J., Sept. 2018, at 48, 48.

526. Peter R. Macleod, *Latin in Legal Writing: An Inquiry into the Use of Latin in the Modern Legal World*, 39 B.C. L. REV. 235, 235 (1997); *Appendix A: Legal Maxims*, BLACK’S LAW DICTIONARY (11th ed. 2019).

The legal research resources and records retention systems used in the research for this Article are designed to produce certain types of information for certain types of audiences. We are not suggesting there is a conspiracy to hide information from the public or to prevent aggregation of information, but there may as well be, because by designing a system only to serve some interests, it has the same effect. Consider docket numbers, the unit of information that is most useful to find a case. Their inscrutability and the difficulty in finding those numbers in traditional legal research resources shows that information about cases is designed to serve the court and the attorneys in the case, rather than an outside researcher who wants information about that case. The numbers are formatted in a similar way but are not unique to a given court. There may be a civil case with the docket number “22-CV-123” in every court. The judge and attorneys working on the case know which court their case is in, but the docket number does not communicate that information to the public. A researcher who reads about a Supreme Court case in the news only gets the name of the case. Reading the case should reveal what court initially decided the case, but a Supreme Court case may not provide the docket number. So, the unit of information that people would need to find the subsequent history is obscured.

In other jurisdictions, something like the docket number may collocate information. From researching *Payton v. New York*, we learned that an indictment number, rather than a docket number, serves to collocate information about a criminal case in New York County and Queens County. We were able to find the indictment numbers in the database, U.S. Supreme Court Records and Briefs, 1832–1978.<sup>527</sup> There was an “Appendix” filed on January 3, 1979, although it is not apparent to what this is an appendix.<sup>528</sup> The appendix contained indictments, transcripts, and decisions from both cases, Payton’s and Riddick’s.<sup>529</sup>

There is no consideration of accountability of justice in the maintenance and organization of court records. And without that accountability, the public is left with a false impression of how the legal system operates. We treat the doctrinal process as if it is made up of stories, each case an episode with characters, a process, and an outcome; but that is misleading, as we only get one moment in that story and we do not actually find out what happens to the main character. We can get the false impression that a person has been vindicated, when in fact they are still in prison, even as we celebrate their victory in having their rights recognized.

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527. *Appendix*, *Payton v. New York*, No. 78-5420, *Riddick v. New York*, No. 78-5421 (U.S. Jan. 3, 1979).

528. *Id.*

529. *Id.*



### 1. Local Discretion, Local Variation, Power of the Clerk of the Court

Our view of these cases as stories is also skewed because the story of a person is complicated by local discretion to organize and maintain court documents which leads to a lack of uniformity. Further, different court systems and different jurisdictions each feed into that story. Take *Brewer*: Williams was prosecuted by the State of Iowa and his case was appealed through state courts. Then his writ of habeas corpus was heard by the United States District Court for the Southern District of Iowa and appealed through the federal court system and famously culminated at the Supreme Court. Following that, the case went through the Iowa state court system again and the federal court system two more times. If one only looks at the decision of the Supreme Court, one can find the vindication of Williams's constitutional rights by the federal courts. The difficulty that this presents a researcher was already discussed, but it also hides the role of the Iowa state courts in what really happened to Williams.

Furthermore, the records of even a single case can be held by multiple different entities depending on the records retention policy or just the preference of a particular court. Individual courts have a great deal of discretion with their records, as illustrated by the Northern District of California's decision to hold all docket books back to 1955. According to Charles Miller of NARA's San Francisco office, the general retention period for court case files is fifteen years, after which (if it is not destroyed) the file will be transferred to the Federal Records Center, where it is still owned by the court.<sup>530</sup> The records request system for the Federal Records Center is very expensive and glitchy. After another fifteen years, the record is transferred to the National Archives.<sup>531</sup> At that point, NARA owns the record and it is easier to request.<sup>532</sup> Thus, the records of court cases in a single jurisdiction may be in multiple places depending on their age and the preference of the court. The records retention policy is available from the Administrative Office of the U.S. Courts, but a court has discretion over what to do with its own documents, so a researcher must call the clerk of the court. The records retention policy for dockets states that they are to be transferred to the National Archives after twenty-five years, but the Northern District of California does otherwise.<sup>533</sup> The lack of uniformity, even within the federal court system, means that the process in finding court records can be different for each research subject.

Overall, this local discretion and lack of uniformity places incredible power with a relatively obscure government official, the clerk of the court.

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530. E-mail from Charles Miller, *supra* note 484.

531. U.S. CTS., 10 GUIDE TO JUDICIARY POLICY: APPX. 6B: RECORDS DISPOSITION SCHEDULE 2 at 1-4 (Feb. 28, 2023), <https://www.uscourts.gov/courtrecords/court-records-schedule> [<https://perma.cc/32LS-ST8U>].

532. E-mail from Charles Miller, *supra* note 484; U.S. CTS., *supra* note 531, at 2.

533. U.S. CTS., *supra* note 531, at 2, 3.

The clerk of the court serves the judges and prosecutors to handle intake, scheduling, and such. Their job is to move the process along, not to make sure that people can find out what happened or is happening. The position serves an established legal elite in the government. In some jurisdictions, this is an elected position, but in others, it is not. So, there is an antidemocratic element to this problem as well.

## 2. Potential Counterarguments

Here we consider three potential counterarguments to the thesis of this Article—that it is problematic that this information is not available to the public.

### First, do appellate courts fix these errors?

One may argue that the availability of an appeals process corrects any errors at the trial level and thus trial court decisions need not be available. But where the appellate court adopts or ratifies the reasoning of a trial court without fully explaining that reasoning, and where one cannot access the trial court's decision, it becomes impossible to know what the appellate court is agreeing with. For example, the last decision of any court that considered a petition from Robert Anthony Williams was published in 1997. In that case, the Eighth Circuit affirmed the district court's dismissal of Williams's latest petition for writ of habeas corpus as an abuse of the writ.<sup>534</sup> The opinion concludes: "We have carefully considered this argument and have thoroughly reviewed the parties' briefs and submissions. Upon such examination, we are convinced the district court's ruling was correct in all respects. Accordingly, we affirm."<sup>535</sup> The court was convinced, but of what? As discussed above, the graphical history of the 1997 decision on Westlaw says that the Eighth Circuit's decision affirms an Iowa Supreme Court decision from 1979, which is not true.<sup>536</sup> Without access to a decision online, the district court's decision exists only in paper records owned and maintained by the government.<sup>537</sup> Thus, a researcher can either accept the Eighth Circuit's characterization of Williams's writ or embark on a difficult and expensive request for records.

### Second, do only legal professionals need this information?

One might also argue that the fact that it is difficult to find the subsequent history of these cases is not a problem because our legal research systems are designed to bring attorneys precedent they can cite, and trial court decisions are only binding on the parties. But this is belied by the fact that some trial court decisions are available. West Publishing and its successors have published federal district court cases in the Federal Supplement since

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534. Williams v. Thalacker, No. 96-1235, 1997 WL 14771, at \*1 (8th Cir. Jan. 17, 1997).

535. *Id.*

536. *See supra* Section II.B.1.

537. SOURCEBOOK TO PUBLIC RECORDS INFORMATION 1943 (11th ed. 2015) ("31 [percent] of civil courts and criminal courts do not provide online access to record data.").

1933.<sup>538</sup> Westlaw and Lexis also have databases of state trial court orders.<sup>539</sup> Some state trial court decisions, notably those of the State of New York, have been published since the early nineteenth century.<sup>540</sup> Likewise, PACER provides access to cases decided after their court adopted electronic case filing—all such court records, except for those that are sealed, can be downloaded. Why are these resources provided if not to meet a research need?

Most significantly, this argument ignores the public's right to know what happened in these cases. As discussed in the introduction, transparency is key to the rule of law, and the state should not decide what information about the state's prosecution and incarceration of individuals is important for the public and what is adequate to only provide to legal professionals.

Third, is this system justified in the interest of privacy?

It is worth thinking about the balance between privacy and access to information. We were able to find when Richard Brown died by exploiting a form in his record that had his birthdate and social security number. That allowed another Northwestern librarian, Brittany Adams, to use genealogical resources to search through death records and find Brown's date of death.<sup>541</sup>

The defendants we discuss in this Article did not make a heroic choice to forge a new precedent. They wanted their rights vindicated and they probably wanted, more than anything, to be free. Perhaps it is an invasion of their privacy to research where they lived and when they died. However, if our society in general and the legal profession in particular is going to celebrate their victories and pat ourselves on the back for recognizing their rights, then we should be able to know if those rights were, ultimately, recognized. Further, some records can be sealed, as was the case for Obie Riddick (consolidated in *Payton v. New York*). The existence of sealed records may mitigate the concern that access to these kinds of trial court records violates a right to privacy.

Ultimately, the difficulty of researching how many people go free after they are successful before the Supreme Court gives the lie to the classic statement that in our legal system, we prefer to have ten or one hundred guilty

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538. *Federal Supplement*, *supra* note 462.

539. *Trial Court Orders*, WESTLAWEDGE, [https://www.westlaw.com/Browse/Home/TrialCourtOrders?transitionType=Default&contextData=\(sc.Default\)&VR=3.o&RS=cblt1.o](https://www.westlaw.com/Browse/Home/TrialCourtOrders?transitionType=Default&contextData=(sc.Default)&VR=3.o&RS=cblt1.ohttps://www.westlaw.com/Browse/Home/TrialCourtOrders?transitionType=Default&contextData=(sc.Default)&VR=3.o&RS=cblt1.o); *All Trial Court Orders*, LEXIS+, <https://plus.lexis.com/api/permalink/b77da727-ecce-452f-8e65-d1359f1c96c3/?context=1530671>.

540. See THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 271–72 tbl.T.1 (Columbia L. Rev. Ass'n et al. eds., 21st ed. 2020); *New York Trial Court Cases*, WESTLAWEDGE, [https://www.westlaw.com/Browse/Home/Cases/NewYorkStateFederalCases/NewYorkStateCases/NewYorkTrialCourtCases?transitionType=Default&contextData=\(sc.Default\)&VR=3.o&RS=cblt1.o](https://www.westlaw.com/Browse/Home/Cases/NewYorkStateFederalCases/NewYorkStateCases/NewYorkTrialCourtCases?transitionType=Default&contextData=(sc.Default)&VR=3.o&RS=cblt1.o) (“Coverage begins with 1828.”).

541. Public records searching using a name only can be exceptional difficult where a name is common. For our research, the names “Roy Allen Stewart” and “Antoine Jones” were too common to rely on public records searches.

people go free rather than one innocent person. If one only looked at the Supreme Court opinions discussed in this Article, one would get the impression of a lot more people going free, innocent or guilty. If ordinary citizens knew how few people go free, would they still support our legal system? Or would they demand accountability? We believe they would demand accountability and that accountability can start with the organization and dissemination of court records.

#### CONCLUSION

This Article began as a research project concerning only Part I, an inquiry into whether winning at the Supreme Court in criminal procedure cases leads to meaningful victories for successful defendants. It seemed shocking, and worthy of research, how many of those whose names and cases are discussed not just in law school classes but bandied around on TV shows and even emblazoned on T-shirts, continued to languish in prison. How frequently those individuals fail to benefit from the very principles they helped establish gives a lie to the notion of the criminal justice system being tilted in favor of the individual against the state. And importantly, that frequency of outcome means we must reconsider the formulation and application of fundamental doctrinal standards. Notably, the trend of *Miranda* protections being constricted because *Miranda* is too costly to society<sup>542</sup> must be reconsidered now that we see that those costs are seldom borne by the state. Likewise, the notion that we should weigh the relative costs and benefits of applying the exclusionary rule<sup>543</sup> presumes that we know what those costs and benefits are.

In fact, it turns out that finding out what those costs are, in the form of “letting the criminal go free,” is extremely difficult, time consuming, and costly—and sometimes actually impossible. Part II of this Article grew out of our shock and disillusionment at just how opaque the criminal justice system is. It became clear that it was designed only to provide information to, and aid the research of, state actors—those already involved in the incarceration of an enormous percentage of the American public.<sup>544</sup> It became clear that just as the adage that we preference letting multiple criminals go free so as not to sully the criminal justice system is a fiction that we tell ourselves, so, too, is the notion of a transparent and accessible record of what has happened, as mandated by the rule of law. Thus, not only do the findings of this Article

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542. See *supra* Section I.D.

543. *Herring v. United States*, 555 U.S. 135, 140 (2009); see *supra* Section I.D.

544. 1,204,300 people were incarcerated in U.S. prisons year-end in 2021. E. Ann Carson, *Prisoners in 2021 – Statistical Tables*, U.S. DEP’T OF JUST. BUREAU OF JUST. STATS. (Dec. 20, 2022), <https://bjs.ojp.gov/library/publications/prisoners-2021-statistical-tables> [<https://perma.cc/3PA7-SXNC>]. Additionally, 636,300 people were incarcerated in jails midyear in 2021. ZHEN ZENG, *JAIL INMATES IN 2021 – STATISTICAL TABLES 1* (2022), <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/ji12st.pdf> [<https://perma.cc/7P3C-VZFC>].

dictate that we must reconsider doctrines that smugly assume certain outcomes, we must also consider how the criminal justice system itself is oriented.