OUTLINE FOR SEARCH AND SEIZURE SEMINAR
(CAP PRESENTATION ON 2/8/19)

SECTION II

UNITED STATES SUPREME COURT JURISPRUDENCE

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II. UNITED STATES SUPREME COURT JURISPRUDENCE

A. RECENT SUPREME COURT DECISIONS

1. Search and Seizure Cases[1]

***Carpenter v United States*, --- US ---; 138 S Ct 2206; 201 L Ed 2d 507 (2018)**

Warrantless Surveillance --- Expectations of Privacy --- Historical Cell Phone Tracking Data --- Duration of Surveillance --- Movement of Person

- **5-4 (Roberts; Kennedy dissenting with Thomas and Alito; Thomas dissenting; Alito dissenting with Thomas; Gorsuch dissenting),** rev. and remanding 819 F3d 880 (6 CA, 2016).

  Headline: The government's acquisition of cellphone location records from wireless carriers (not from the defendant himself) is still a Fourth Amendment "search" because the defendant has a "reasonable expectation of privacy" in those records. Ordinarily a judicial warrant supported by probable cause is required. [**Ed note:**[2] It is not possible, in a short summary, to capture all the nuances and details in over 100 pages of opinions in this important case.]

  Facts: The Court, and Justice Kennedy's dissent, both contain detailed descriptions of CSLI (cell-site location information). Anytime a cellphone is on, it "pings" cell towers to ensure the best reception, and cell companies keep records of every "ping," which shows the rough location of the cellphone. A statute, the Stored Communications Act ("SCA") permits the government to get such location data from cell companies upon a showing of "reasonable grounds to believe" that the records are "relevant and material" to a criminal investigation." The government used a request for seven days worth to get such data for Carpenter's cellphone which it introduced at Carpenter's trial for robberies of Radio Shack and T-Mobile stores (and use of firearms during such robberies), arguing that the CSLI showed that Carpenter was "right where the robbery was at the exact time of the robbery." Even Kennedy's dissent says this was "powerful, circumstantial evidence." Carpenter was convicted (along with a number of co-conspirators) and sentenced to over 100 years in prison. The district court, affirmed by the Sixth Circuit, denied his motion to suppress the CSLI, saying that he had no "reasonable expectation of

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[1] Summaries for *Carpenter v United States*, 138 S Ct 2206; 201 L Ed 2d 507 (2018); *Byrd v United States*, 138 S Ct 1518; 200 L Ed 2d 805 (2018); *DC v Wesby*, 138 S Ct 577; 199 L Ed 2d 453 (2018) and *Collins v Virginia*, 138 S Ct 1663; 201 L Ed 2d 9 (2018), are credited [with minor modifications] to Professor Rory Little, Annual Review of the Criminal Law (and Related) Opinions of the United States Supreme Court Issued During the October 2017 Term, presented at the 2018 ABA Annual Meeting in Chicago, Illinois, on August 3, 2018, pp 10-15; available at https://www.baffc.org/wp-content/uploads/2018/09/2018-Criminal-Issues-supporting-materials.pdf.

[2] References to editor's notes in the summaries refer to Prof. Little's editorial notes.

privacy" in the data since it was "voluntarily shared" with the cell companies, who kept the records as their own business records.

Roberts (for 5): Although Fourth Amendment analysis traditionally was linked to property concepts, property is "not the sole measure of Fourth Amendment" protection, and in 1967 the Court extended protection to "reasonable expectations of privacy" as well. "No single rubric definitively resolves which EofPs are entitled to protection. But two "basic guideposts" are that the Fourth Amendment was intended to secure "the privacies of life" (*Boyd*, 1886), and that "a central aim of the Framers was 'to place obstacles in the way of a too permeating police surveillance'" (*Di Re*, 1948). More specifically, one line of cases protects against "sophisticated surveillance" of locations data (Jones, 2012). A second line of cases says that a person may have "no legitimate expectation of privacy in information he voluntarily turns over to third parties" (*Miller* 1975, and *Smith* 1979). "We decline to extend *Smith* and *Miller*" to the "new phenomenon" of "detailed, encyclopedic, and effortlessly compiled" cell-site location records. This data is "unique" and embodies a "legitimate expectation of privacy" of the cell-user, even if it is "held by a third party." It provides "an intimate window into a person's life" and raises "even greater privacy concerns than the GPS monitoring" that we ruled in *Jones* was protected by the Fourth Amendment. The "seismic shifts in digital technology" allows the effortless discovery and compilation of such private information that, in the past, was "otherwise unknown." This distinguishes this case from *Miller* and *Smith*. And the collection of such data by cell companies requires "no affirmative act" by the user, while carrying a cellphone is "indispensable to participation in modern society (*Riley*, written by Roberts, 2012). "Our decisions today is a narrow one." [**Ed. Note:** !]. We do "disturb" *Smith* and *Miller*, and we do "not call into question conventional surveillance techniques … such as security cameras" [**ed. note: double !!]**, or cases involving foreign affairs, national security, or exigent situations. Finally, "a warrant supported by probable cause" is "generally" required ("the Government's obligation is a familiar one – get a warrant."). Subpoenas are often used to get business records and we do not question that; "But this Court has never held that the Government may subpoena third parties for records in which the suspect has a reasonable expectation of privacy." Otherwise, "no type of record would ever be protected by the warrant requirement." [**Ed. note**: this may be perhaps the most innovative or surprising part of the ruling; it seems to revive arguments reminiscent of Boyd in 1886, a decision which has been largely rejected over the past 50 years.]. (The Court concludes with a reference back to Justice Brandeis's famous dissent in *Olmstead* (1928), in which a majority ruled that the Fourth Amendment did not protect against warrantless wiretapping – the case overruled by *Katz* in 1967.]

***Kennedy* dissenting, joined by Thomas and Alito**: Using the word "respectful" at least four times, says the majority misreads and misapplies precedent; offers no clear distinction between CSLI and bank and phone records in *Miller* and *Smith*, which were more intrusive on privacy; causes "confusion;" and "undermines law enforcement" while "allow[ing] the cellphone to become a protected medium that dangerous persons will use to commit serious crimes." Business records that a person "does not own, possess, control, or use," do not involve a legitimate property or privacy interest – *Miller* and *Smith* were correct. [The dissent also perceives the majority ruling to be limited only to CSLI requests of "more than six days;" but the majority clear says in footnote 3 that they are

NOT deciding whether any shorter period would not require Fourth Amendment rules.]. The Court's decision "will have ramifications that extend beyond cell-sire records to other kinds of information held by third parties." But it "gives no indication how to determine whether … information falls on the financial-records side or the cell-site-records side of its newly conceived constitutional line." And it "calls into question the subpoena practices of federal and state" entities alike.

***Thomas* dissenting:** This case should turn not on whether there was a "search," but on "*whose* property was searched." While I agree with the other dissents, "the more fundamental problem" is that "the *Katz* test has no basis in the text or history of the Fourth Amendment." It is also "unworkable." We should reject or at least reconsider it.

***Alito* dissenting, joined by Thomas:** Today's decision "guarantees a blizzard of litigation while threatening many … valuable investigation practices." It "destabilizes long-established Fourth Amendment doctrine" and "we will be making repairs – or picking up[the pieces – for a long time." (Justice Alito provides a long history of document subpoenas); the Fourth Amendment applies only to "searches and seizures," not compliance by someone with a subpoena *duces tecum*, which involves no physical intrusion into anyone's space "nor any taking." Nothing suggests that "the Founders intended" to regulate document subpoenas; Alito expressly criticizes on *Boyd*, which the majority appears to "resurrect." The majority's opinion is "puzzling" in this regard. Moreover, by "revolutionizing" the third-party doctrine, the Court flouts precedent and will engender a "crazy quilt" of "qualifications and limitations. Meanwhile, private action is a far bigger threat to privacy than legislatively-and judicially regulated business records production. "The desire to make a statement about privacy does not justify the consequences."

***Gorsuch* dissenting: [Ed. Note:** Much of Gorsuch's opinion reads more like a concurrence than a dissent. In the end this may be the most thought-provoking of the five opinions in this case. A short summary cannot do it justice.]. Rather than endorse *Miller* and *Smith*, or conversely "set them aside" and rely wholly on *Katz*," I think we should "look for answers elsewhere." *Carpenter* expressly disavowed any property-based theory, but I think he thereby "forfeited his most promising line of argument." "Just because you entrust your data -- … your modern day papers and effects – to a third party may not mean you lose any Fourth Amendment interest in its contents." Especially if "you *have* to" so entrust it. "I cannot fault the Sixth Circuit" for following *Miller* and *Smith*. However, "much work is needed to revitalize this area …. I do not begin to claim all the answers today."

***Byrd v United States*, --- US ---; 138 S Ct 1518; 200 L Ed 2d 805 (2018), on remand *United States v Byrd*, 742 Fed Appx 587, 591 (superseding opinion) (CA 3, 2018)[3]**

Expectations of Privacy --- Rental Car ---- Non-Authorized Driver --- Rental Contract---- Lawful Possession ---- Consent of Renter --- Standing ---- Search of Vehicle

- **9 (6-3) to 0 (Kennedy; Thomas concurring with Gorsuch; Alito concurring)**, vacating and remanding 679 Fed Appx 146 (3 CA, 2017)

  Headline: A person "in otherwise lawful possession and control of a rental car has a reasonable expectation of privacy in it even if" not listed in the rental agreement, and so may challenge a law enforcement search of the car under the Fourth Amendment.

  Facts: In the course of a traffic stop of a car that Byrd was driving, alone, the police learned that the agreement for the rental car that Byrd was driving did not list Byrd as an authorized driver. The officers then search the trunk of the car over Byrd's objection, and allegedly without probable cause, and found 49 heroin bricks and some "body armor." In the subsequent prosecution, the lower courts ruled that because Bryd was not listed in the car rental agreement, he had no "reasonable expectation of privacy" in the vehicle and so under *Rakas* (1978) he had no "standing" and could not object to the search.

  (Other facts not relevant to the court's ruling: The car had been rented by Bryd's friend Latisha Reed, while Byrd stayed outside in the parking lot. Reed initialed a printed addendum stating that there was no other authorized driver and that permitting an unauthorized person to drive would "violate" the agreement and insurance coverage. Reed walked out to the parking lot, handed the rental car keys to Bryd, and drove away in a different vehicle. The officer that stopped Byrd said he was suspicious because Byrd was driving with his hands in the "10 and 2" position on the steering wheel. It was unclear that there was any traffic violation. The officer testified that when stopped, Byrd was "visibly nervous and shaking." Byrd said his friend had rented the car and he was driving with her permission. Computer searches returned a possible alias, and revealed that Byrd had prior drug and weapon convictions and an outstanding probation violation (but non-extradition) warrant. Byrd declined consent for them to search the car, but they said they did not need consent because Byrd "has no expectation of privacy" since he was "not on the renter agreement." Byrd tried to run after the officers found body armor in a bag in the passenger compartment and said they would handcuff him.)

  Kennedy (for 9): "Few protections are as essential to individual liberty as the right to be free from unreasonable searches and seizures." And "the Court has viewed with disfavor practices that permit 'police officers unbridled discretion to rummage at will among a person's private effects'" (*Gant*, 2009). It is true that the Court has said that

[3] ***United States v Byrd*, 742 Fed Appx 587, 591 (superseding opinion) (CA 3, 2018)** (remanding to district court to address, inter alia, "whether the officers had probable cause to then search *Byrd's* car—and, in particular, whether any probable cause that may have existed to search the passenger compartment of the car based on Byrd's admission that he had a "blunt" in the passenger area extended to authorize the officers to search the trunk.")

there is a "diminished expectation of privacy in automobiles" (*Acevedo*, 1991). Still, expectations of privacy analysis "supplements rather than displaces the traditional property-based understanding of the Fourth Amendment (*Jardines*, 2013). Although there is no "single metric or exhaustive list of considerations to resolve" when a "reasonable expectation of privacy" is present, protected property and privacy interests are "often linked."

Here, although the fact-pattern is new, it is "a well-travelled path in this Court's Fourth Amendment jurisprudence" that "lawful possession" of an item ordinarily gives a person a protectable Fourth Amendment interest. Thus "a car thief would not have a reasonable expectation of privacy in a stolen car," but a person otherwise in lawful possession generally has a "right to exclude" others. "This general property-based concept guides resolution of this case." The government's view is "too restrictive." It is "a misreading of *Rakas*" to argue that a passenger in someone else's car can never have a protectable expectation of privacy. While "legitimate presence" alone is insufficient, here Byrd, "the driver and sole occupant," is similar to the overnight guest who was recognized to have a protected interest in the search of someone else's home in *Jones* (1960). There is "no reason" to [distinguish] based on owning rather than leasing, in either context.

The government misreads the car rental agreement here: it says an unauthorized driver is a "violation" of the agreement, not that it "voids" it. Moreover, "there may be countless innocuous reasons why an unauthorized driver might get behind the wheel of a rental car." A violation that changes "risk allocation" has no bearing on a reasonable expectation of privacy of a lawful driver. The government argues in this Court that Byrd's particular rental was a fraudulent "strawman" rental, making Byrd no better than a thief. It also argues that the facts on the scene amounted to probable cause to search, for which no consent or warrant is necessary for a vehicle. Both of these arguments may be open on remand. Moreover, because the concept of *Rakas* "standing" is just a "useful shorthand" for a protectable Fourth Amendment interest, is "should not be confused with Article III [jurisdictional] standing. So the probable cause argument can be considered first ("if … it has been preserved").

***Thomas* concurring, joined by Gorsuch**: "I have serious doubts about the 'reasonable expectation of privacy' test from *Katz*." But the Court "correctly navigates our precedents." But "in an appropriate case I would welcome briefing and argument" on further questions.

***Alito* concurring:** "I join the opinion of the Court" on my "understanding" that the Court of Appeals is "free to reexamine the question whether [Byrd] may assert a Fourth Amendment claim or to decide the appeal on another appropriate ground." **[Ed. Note:** since the majority opinion says exactly this, I do not see why Alito felt it necessary to write this separate one-paragraph concurrence. It could be that the majority did not amend its opinion to say this until Justice Alito had circulated, and so he just decided to leave it in place, perhaps as a marker that he had done that?]

***Collins v Virginia*, --- US ---; 138 S Ct 1663; 201 L Ed 2d 9 (2018)**

Scope of Automobile Exception --- Curtilage --- Warrantless Search --- Vehicle ---- Probable Cause

- **8-1 (Sotomayor; Thomas concurring; Alito dissenting)**, rev. and remand. 292 Va 486 (2016).

Headline: The automobile exception does not permit a warrantless entry onto a home's curtilage to search a vehicle that could be subject to a warrantless search (because there was probable cause) if it were not on the curtilage; [there must be an independent justification for the entry of the curtilage].

Facts: Officers had probable cause to believe that a particular motorcycle had committed traffic violations and was stolen. Officer Rhodes located what appeared to be the vehicle parked "at the top of the driveway" next to a house. The vehicle was covered by a tarp. Officer Rhodes, without a warrant, walked up the driveway and pulled off the tarp, enabling him to see the license plate and VIN (which confirmed that the vehicle was stolen). Collins explained that he had bought the motorcycle "without title," but he was charged with receiving stolen property.

He moved to suppress whatever evidence the officer had obtained by his warrantless search of the motorcycle, arguing that the officer had "trespassed" on the "curtilage" of the house to do and that curtilage is protected from warrantless search just as the house would be. (Virginia concedes that the officer's actions constituted a "search" of the motorcycle.) The trial court ruled, without factual explanation, that "numerous exigencies" allowed the warrantless search. But the Virginia Supreme Court ruled on a different ground: that the automobile exception, which permits a warrantless search of movable vehicles when there is probable cause to search, applies here. That is the question now presented.

Sotomayor (for 8): Our precedents "treat[] automobiles differently from houses" (*Cady*, 1973). "Black letter law" considers "curtilage – the area 'immediately surrounding and associated with the home' *Jardines*, 2013) to be part of the home itself for Fourth Amendment purposes" (*Oliver*, 1984). "When a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred," and a judicially approved warrant to search is generally required absent some recognized exception. Based on a somewhat labored description of the driveway in this case, the "part of the driveway" where the motorcycle was parked must be considered curtilage. **[Ed. Note:** this appears to leave open the question whether the "bottom" part of the driveway, closest to the street, would be considered curtilage.] Obviously an officer would not go into the house to search without a warrant (or exception), even if he saw the motorcycle parking in the living room through a window. An "invasion of the curtilage" is the same. The privacy interests in curtilage are the same as in the home itself.

Meanwhile, "the scope of the automobile exception extends no further than the automobile itself." We will not expand the automobile exception (just as we have declined to expand various other Fourth Amendment exception (citing cases)). Otherwise we would "undervalue … core Fourth Amendment protections," and also "untether" the exception from its underlying justifications. We reject the argument that two of our older decisions require a different result here. We also reject a proposed rule that would limit the automobile exception only at the wall or threshold of a house. Among other things,

this would favor "those persons with the financial means to afford residences with garages." [Applicability] of any exigency or other exception, [is left] for remand.

***Thomas* concurring:** "The Court correctly resolves the Fourth Amendment question in this case." But I question whether this Court has the authority to actually order States to apply the "exclusionary rule," a "legally dubious" position that "encourages distortions" in Fourth Amendment law. I think "modern precedents" reject "*Mapp's* essential premise that the exclusionary rule is required by the Constitution," and in an appropriate case, we should "revisit that question."

***Alito* dissenting:** "What the police did in this case was entirely reasonable. The Court's decision is not. "An ordinary person of common sense" would not see any difference between removing the tarp from a motorcycle parked on the street versus in a driveway. [Justice Sotomayor's opinion expressly disputes this claim.]. This may have been a "search," but "the question before us … is whether the search was reasonable." The concept of curtilage does not limit other exceptions. And this "intrusion" was "negligible." And the motorcycle was clearly "moveable," which would allow the same "destruction of evidence possibility" rationale that underlies the automobile exception – a type of "exigency" – to apply here.

2. § 1983 Claims

***DC v Wesby*, --- US ---; 138 S Ct 577; 199 L Ed 2d 453 (2018)**

Probable Cause --- Totality of Circumstances --- Trespass --- False Arrest --- Qualified Immunity

- **9 (7-2) to 0 (Thomas; Sotomayor concur in and in the judgment; Ginsburg concurring in the judgment in part),** reversing and remanding 765 F3d 13 (D.C. Cir. 2014).

Headline: The police officers had probable cause to arrest several partygoers (who had sued for false arrest); and the officers were entitled to qualified immunity in any case.

Facts (although some facts were disputed at a late stage in SCOTUS, the Court says its analysis "would not change no matter" what): Wesby and others were arrested after officers responded at 1a.m. to "a raucous, late-night party in a house they did not have permission to enter." Neighbors told the officers that the house had been unoccupied for some time, and upon entering the officers smelled marijuana and observed "debauchery" and "a make-shift strip club." 21 persons found in the house hid and gave inconsistent stories. A woman named "Peaches" allegedly had given the partygoers permission to be there, but the owner when contacted said that Peaches had no permission to use the house. The officers arrested all 21 people for "unlawful entry." Those charges were eventually dropped, and 16 of them sued for false arrest, alleging that the officers had lacked probable cause.

The district court granted summary judgment on liability to the partygoers, finding that the officers had no probable cause to believe that they had known that Peaches had not, in fact, had permission from the owner to use the house. Qualified

immunity was denied to two officers, and damages of "nearly $1 million" were awarded after trial. The D.C. Circuit affirmed (2-1), ruling that with no reason to question Peaches' invitation to the party, there was no evidence to support a conclusion that the partygoers "knew or should have known" that the invitation was in fact invalid, and the officers should have known that if the partygoers had an invitation to enter from Peaches, they lacked the intent for the crime of unlawful entry. *En banc* review was denied, calling the disagreement merely a "case-specific assessment of circumstantial evidence," over a four-judge dissent written by now-Supreme-Court-nominee Brett Kavanaugh.

Thomas (for 7): "Considering the totality of the circumstances, the officers made an 'entirely reasonable inference' that the partygoers were knowingly taking advantage of a vacant house" (quoting *Pringle*, 2003). "Common-sense conclusions about human behavior" support this (quoting *Illinois v. Gates*, 1983). The fact that the partygoers "scattered" and some hid when the officers arrived, supports a *mens rea* inference, as did their "vague and implausible" stories and Peaches' own "nervous, agitated, and evasive" statements. It was error for the courts below to "engage in an 'excessively technical dissection'" of the facts (quoting *Gates*). And officers need not accept a suspect's "innocent explanation" when facts are "suspicious." "Innocent explanations … do not have any automatic probable-cause-vitiating effect." "The circumstances here certainly suggested criminal activity."

Moreover, even though our probable cause determination is "sufficient to resolve this case, … we have discretion to correct" further errors which "would undermine the values qualified immunity seeks to promote." So here. On these facts, "the constitutionality of the officer's conduct" was not "beyond debate" (quoting *Ashcroft v. al-Kidd* (2011)). Probable cause must be assessed "in the particular circumstances before" the officers; the analysis below was conducted at too "high [a] level of generality." There is no similar "single precedent – much less a controlling case or robust consensus of cases" – that would make this an "obvious case" against the officers or place the unconstitutionality of their conduct "beyond debate." Even if D.C. caselaw could serve as controlling precedent, there was disputed relevant caselaw here. The officers here were entitled to summary judgment based on qualified immunity.

***Sotomayor* concurring in part and concurring in the judgment**: I agree only due to qualified immunity, and I think the Court should not have reached the "heavily fact-bound nature of the probable cause determination here." (The Court does this "apparently only to ensure that … the Court's decision will resolve respondents' state-law claims.")

***Ginsburg* concurring in the judgment in part:** The arresting Sergeant here undisputedly acted on an error of law, thinking that the owner's lack of consent made the partygoers' intent irrelevant. I think that should factor into our Fourth Amendment analysis, but I recognize that *Whren* (1996) stands in the way. So I agree that the officers are "sheltered by qualified immunity" – but "I am concerned that the Court's jurisprudence sets the balance too heavily in favor of police unaccountability" [edited slightly for semantic flow].

***Kisela v Hughes*, --- US ---; 138 S Ct 1148; 200 L Ed 2d 449 (2018)**

Qualified Immunity --- Use of Force --- Clearly Established Law

- (**per curiam; Sotomayor and Ginsberg, dissenting)**, reversing 862 F.3d 775 (9 CA, 2017)

  Facts: Police officer responded to a 911 call of a woman hacking a tree with a knife. When they arrived they saw Hughes on the other side of a five-foot chain link fence holding a large knife, near another woman (Chadwick). Officers quickly twice told Hughes to drop the knife, but she did not acknowledge them. Meanwhile, Chadwick said "take it easy" to the officers. Less than a minute after arriving, Kisela dropped to the ground and non-fatally shot Hughes. Hughes sued, claiming unreasonable (excessive) force. The district court dismissed, but the Ninth Circuit ultimately reinstated the suit en banc over seven dissenting judges, finding the Fourth Amendment violation "obvious" and the law "clearly established" under CA9 precedent. . The Supreme Court granted certiorari, reversed and remanded. Justice Sotomayor filed a dissenting opinion, in which Justice Ginsburg joined.

  Held: The officer's use force did not violate clearly established law, and thus, officer was entitled to qualified immunity.

  Dissent: (**Sotomayor and Ginsberg, JJ)**: Qualified immunity should not be an "absolute shield," and "identical cases" are not required. It should be "beyond debate" here that Kisela's response was unreasonable. Moreover, this is at least a "close call," and does not warrant the "extraordinary remedy" of summary reversal.

  This unwarranted summary reversal is symptomatic of "a disturbing trend regarding the use of this Court's resources" in qualified-immunity cases . . . This Court routinely displays an unflinching willingness "to summarily reverse courts for wrongly denying officers the protection of qualified immunity" but "rarely intervene[s] where courts wrongly afford officers the benefit of qualified immunity in these same cases." . . . Such a one-sided approach to qualified immunity transforms the doctrine into an absolute shield for law enforcement officers, gutting the deterrent effect of the Fourth Amendment.

  The majority today exacerbates that troubling asymmetry. Its decision is not just wrong on the law; it also sends an alarming signal to law enforcement officers and the public. It tells officers that they can shoot first and think later, and it tells the public that palpably unreasonable conduct will go unpunished. Because there is nothing right or just under the law about this, I respectfully dissent.

B. PENDING SUPREME COURT CASES AND ISSUES

1. Search and Seizure Cases

***Missouri v Douglass*, No. 18-285** [Petition filed 2018 - response req. by USSC (due late February 2019)]
Warrants - Requirements/Remedies ----Severance ---- Particularity Clause ---- Exclusionary Rule

Facts: The search of respondents' home was conducted pursuant to a partially defective warrant, and a divided Missouri court upheld the suppression of all the seized evidence. State appealed.

Issues: (1) Whether severance is the default remedy when part of a warrant is valid (majority of courts) , or whether the Fourth Amendment requires that the valid sections make up "the greater part of the warrant" (minority, 10 CA and MO);

(2) whether the particularity clause—which requires a warrant to describe "the place to be search[ed]" and "the things to be seized" with sufficient particularity— also requires a warrant to state its probable-cause findings with particularity; and

(3) whether the exclusionary rule applies when the issuing judge signs off on the officer's legal mistake in filling out a warrant form.

***Kansas v Glover*, No. 18-556** [Petition filed 2018 - response requested by SC (due late February 2019)]
Traffic Stop - Reasonable Suspicion Driver is Owner --- Registration Checks --- Unlawful Driving

Facts: While on a routine patrol, a Kansas officer ran a registration check on a pickup truck and learned that the registered owner's license had been revoked. Suspecting that the owner was unlawfully driving - the officer did not observe any traffic infractions and did not identify the driver - the officer stopped the truck, confirmed that the owner was driving, and issued the owner a citation for being a habitual violator of Kansas traffic laws. The Kansas Supreme Court, breaking with 12 state supreme courts and 4 federal circuits, held the stop violated the Fourth Amendment. State appealed.

Issue: Whether, for purposes of an investigative stop under the Fourth Amendment, it is reasonable for an officer to suspect that the registered owner of a vehicle is the one driving the vehicle absent any information to the contrary.

***Mitchell v Wisconsin*, No. 18-6210** [Filed October 2018, distributed for conference on 1/9/19]
Warrantless Blood Draw ---- Unconscious, Intoxicated Driver ---- Implied Consent Statute

Facts: Without obtaining a warrant, police directed the taking of petitioner's blood while he was unconscious following his arrest for driving while intoxicated. There was no evidence of any exigency preventing the police from obtaining a warrant, and the state disclaimed any reliance on the exigency exception to the warrant requirement.

Issue: Whether a statute authorizing a blood draw from an unconscious motorist provides an exception to the Fourth Amendment warrant requirement.

***Torrez v United States*, No. 17-1189 (appeal from 4 CA)** [Petition filed February 2018]

Warrantless - Electronic Surveillance ---- Cell Phone Records ---- Historical CLSI ----- Location and Movement ---- Length of Time

Facts: In July 2009, Navy Intelligence Specialist Amanda Snell was found dead in her bedroom at Joint Base Myer. Torrez, who lived down the hall from Snell, complied with federal investigators' requests to permit a search of his room and provide a DNA sample. Investigators did not arrest Torrez or anyone else for the Snell murder. Seven months later, in February 2010, Torrez committed two other assaultive crimes.

Torrez was charged with the February 2010 offenses, in Virginia state court. In July 2010, while Torrez was awaiting his Virginia trial, a state investigator obtained an order from a Virginia state court. The order directed the telecommunications company Sprint to disclose Torrez's cellphone records—including cell-site location information (CSLI)—from April 2009, three months before the Snell murder, and ten months before the Virginia offenses, until the date of his arrest in February 2010. The CSLI showed that Torrez's phone was near the barracks he shared with Snell at the time of her murder.

The Fourth Circuit did not address Torrez's argument that the collection and use of his cell-site location in formation violated the Fourth Amendment, because Torrez had conceded that circuit precedent foreclosed argument.

Issue: Whether, *inter alia*, (3) the warrantless seizure and search of historical cell-site location information, revealing a cell-phone user's location and movement over a prolonged period (332 days), violates the Fourth Amendment.

2. <u>§ 1983 Claims</u>

***Swartz v Rodriguez*, No. 18-309 (appeal from 9 CA)**

[Distributed for conference on 10/3/18, Solicitor general invited to file brief 10/29/18]

Issues: (1) Whether the panel's decision to create an implied remedy for damages under *Bivens* [citation] in the new context of a cross-border shooting misapplies Supreme Court precedent and violates the separation-of-powers principles, when foreign relations, border security and the extraterritorial application of the Fourth Amendment are some of the special factors that counsel hesitation against such an extension; and

(2) whether, if the above "antecedent" question is answered in the negative, Agent Swartz is entitled to qualified immunity because there is no clearly established law applying the Fourth Amendment to protect a Mexican citizen, with no significant connection to the United States, who is injured in Mexico by a federal agent's cross-border shooting.

***Hernandez v Mesa*, No. 17-1678 (appeal from 5 CA)**

[Distributed for Conference 9/2418, Solicitor General invited to file brief 10/1/18]

Issues: (1) Whether, when the plaintiffs plausibly allege that a rogue federal law enforcement officer violated clearly established Fourth and Fifth amendment rights for which there is no alternative legal remedy, the federal courts can and should recognize a damages claim under *Bivens*; and

(2) whether, if the federal courts do not recognize such a claim, the Westfall Act violates the due process clause of the Fifth Amendment insofar as it pre-empts state-law torts suits for damages against rogue federal law enforcement officers acting within the scope of their employment for which there is no alternative legal remedy.

C. BIBLIOGRAPHY / RESOURCES / ADDITIONAL INFORMATION

- Case summaries, dockets, briefs and opinions can be found at the SCOTUS website, https://www.supremecourt.gov/
- For a complete analysis and discussion of the Court's decisions from the last term, see Rory Little, et al, Annual Review of the Criminal Law (and Related) Opinions of the United States Supreme Court Issued During the October 2017 Term. Presented at the 2018 ABA Annual Meeting (Chicago, Illinois – August 3, 2018), https://www.baffc.org/wp-content/uploads/2018/09/2018-Criminal-Issues-supporting-materials.pdf
- Orin Kerr, Judge Kavanaugh on the Fourth Amendment, Scotusblog (Jul. 20, 2018, 6:16 PM), https://www.scotusblog.com/2018/07/judge-kavanaugh-on-the-fourth-amendment/