FLORIDA BAR LUNCHEON PRESENTATION

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As we proceed beyond the halfway point of the 2020 Term, there are nine cases pending on the SCOTUS docket that address criminal law issues:

1. *Borden v. United States* (19-5410; Argued 11/3/2020). Of course, there is an Armed Career Criminal Act case – can a crime qualify under the "use of force" clause if the *mens rea* for the offense is "mere" recklessness?

2. *Jones v. Mississippi* (18-1259; Argued 11/3/2020). In a case involving a conviction of a juvenile, is the sentencing authority required to make a finding that the juvenile is "permanently incorrigible" before imposing a sentence of life without parole? The Court granted cert in this case after the *Malvo* case from last term was dismissed because of a change in state law in Virginia that granted parole eligibility to the DC sniper juvenile.

3. *Edwards v. Vannoy* (19-5807; Argued 12/2/2020). Does the decision in *Ramos* requiring a unanimous verdict in a serious felony case, apply to cases on collateral review?

4. *Van Buren v. USA (19-783; Argued 11/30/2020) (*See below*)*

5. *Torres v. Madrid* (19-292; Argued 10/14/2020) (See below)

6. *Lange v*. California (20-18; Argued 2/24/2021) (See below)

7. *Caniglia v. Strom* (20-157; Argued 3/24/2021): Whether the community caretaking exception to the Fourth Amendment's warrant requirement extends to the home.

8. *Greer v. USA* (19-8709): Whether, when applying plain-error review based on an intervening SCOTUS decision, (*Rehaif*), an appellate court may review matters outside the record to determine whether the error affected a defendant's substantial rights or impacted the fairness, integrity or public reputation of the trial?

9. *USA v. Gary* (20-444): Whether defendant who pleaded guilty to possessing a firearm as a felon (§ 922(g)(1) and 924(a)), is automatically entitled to plain error relief if the district court did not advise him that one element of that offense is knowledge of his status as a felon, regardless of whether he can show that the district court's error affected the outcome of the proceedings. (Only the Fourth Circuit, the lower court in this case, provides for automatic reversal when there is a *Rehaif* error during the Rule 11 colloquy).

SUBSTANTIVE CRIMINAL LAW

Van Buren: A case, like so many in recent years, that seeks to limit the reach of criminal statutes:

Think: *Yates*: the obstruction of justice statute, § 1519
Think: *Arthur Andersen*: limiting the former § 1512(b) obstruction statute
Think: *Skilling:* limiting the honest services fraud statute § 1346
Think: *McDonnell:* limiting the bribery statute.
Think – and we will discuss – *Kelly*: the Bridgegate case in OT 2019. Limiting § 1341 in a 9-0 decision.

Those are just a few, there are more, in which a statute whose breadth was not particularly obvious, was stretched by DOJ beyond what SCOTUS (and perhaps the English Language) could endorse.

First let's look back at one of the highlights of the 2019 Term.

Kelly v. USA – decided 9-0. Stop expanding 1341 beyond *fraud* deprivation of property or money.

The Bridgegate case – *Kelly v. United States* – was argued in the Supreme Court in January 2020. The facts of the case, viewed through the prosecutors' lens, begins with three state employees deciding that it was time to punish the mayor of Fort Lee, NJ for

his failure to support Governor Christie in his reelection bid. The punishment was actually inflicted on the citizens of Fort Lee: Two of the three customary lanes of eastbound traffic that were used by Fort Lee residents to enter the George Washington Bridge during morning rush hour were converted to traffic coming from another location. The resulting traffic jams backing into the City of Fort Lee were monumental.

The three state employees claimed that the lanes were closed in order to conduct a traffic pattern study. This was false. Did they commit mail and wire fraud in violation of 18 U.S.C. §1341 and § 1343 by virtue of making this false statement? They did not receive a bribe or a kickback, so their conduct did not amount to honest services fraud, 18 U.S.C. § 1346. Thus, to amount to federal fraud, the conduct must have been a scheme to deprive the victim of property or money.

According to the indictment the defendants lied (the reason for the lane closure) and the victim (the Port Authority) was deprived of property (the proper use of the traffic lanes; and the wages paid to toll booth collectors who were required to work overtime to accommodate the increased traffic).

The dispute in the Supreme Court focused primarily on whether the Port Authority was deprived of property (either tangible or intangible).

The defendants argued that the Port Authority was not deprived of property and this was nothing more than an illegitimate "honest services fraud" prosecution in disguise. The lanes of traffic were still owned by the Port Authority and the lanes of traffic were still being used by the public, albeit not by the beleaguered citizens of Fort Lee. Only the "motive" for the lane closure was a lie and the motive for politicians' decisions are often a mixed bag (and not honestly revealed): there are always political considerations to every decision (as Mick Mulvaney candidly implored, "Get over it" during the First Impeachment trial).

The government responds that the defendants "commandeered" the lanes of traffic and that this is no different than a government employee who directs city employees to paint a private citizen's house or mow the lawn of the government employee. That is property fraud: taking the time of the city employees away from their legitimate tasks. Taking the paint and the lawn mower away from the public use to which the paint and lawn mower are supposed to be devoted.

"No," respond the defendants, "it is more akin to telling a snowplow driver first to plow the mayor's street, then the streets of the city councilmen who belong to the favored political party, and at the end of the day, the streets of the councilmen who belong to

the disfavored political party. And that command, though distasteful, is not property fraud."

The prosecutor replies: "If you want to use the snowplow hypothetical, it would be more apropos to consider a defendant who pushes the snowplow driver away from the steering wheel and drives the snowplow to the defendant's street, while the real snowplow driver is incapacitated."

The oral argument did not do much to clarify this issue. What if, the Court asked, one lane of traffic was redirected to the front of the mayor's privately-owned hotel, or restaurant so that more drivers would patronize his private businesses? Is that a deprivation of the port authority property? Is that federal property fraud, assuming there is a false statement offered for the reason (and a mailing)? Surely it is an abuse of power, but is that federal fraud?

The government, in its brief, conceded that lying about a politician's motive for any decision is not mail fraud (#GetOverIt). But commandeering property is fraud. It is not fraud for the employee to give a false reason for instructing the snowplow driver to start at the mayor's street. But it is fraud to redirect lanes of traffic based on a non-existent traffic study.

The point, according to the government, is this: if the defendant had the authority to initiate a traffic study and, in fact, did so, then any false statement he makes about his motive for doing so is not federal fraud. But if there was, in fact, no traffic study at all (or, perhaps, the defendant had no authority to initiate a traffic study), then it is fraud to direct that the lanes be closed and explain, later, that it was because of a traffic study.

The defendants parried this argument, too, arguing that the defendants had the authority to redirect traffic patterns, and whether they did so because of a faux traffic study, or not, is not the difference between guilt and innocence: they had the authority to redirect traffic and the fact that they had no interest in actually studying the traffic is irrelevant. They directed the Port Authority to redirect traffic and, having done so (and having not deprived the Port Authority of any property), the reason that they redirected traffic is the type of "motive" evidence that the government conceded was not a basis for a federal fraud prosecution. Perhaps the government is, in fact, resurrecting honest services fraud. Perhaps this is a bridge too far.

Decision: 9-0: It was not "fraud" to direct the traffic maliciously *and* to lie about it. The Port Authority was not deprived of tangible or intangible property.

Van Buren

This year, the home team is destined to win another 9-0 decision, reversing Judge Orinda Evans and the Eleventh Circuit panel of – well, that's the bad news: Martin and Rosenbaum and a visiting judge. I can think of 15 judges I'd rather see reversed other than Beverly Martin and Judge Rosenbaum.

1. *Van Buren v. United States*. Under the Computer Fraud and Abuse Act, it is a crime for a person to

    intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains--

    (A) *information contained in a financial record of a financial institution, or of a card issuer as defined in section 1602(n) of title 15, or contained in a file of a consumer reporting agency on a consumer, as such terms are defined in the Fair Credit Reporting Act (15 U.S.C. 1681 et seq.);*

    (B) *information from any department or agency of the United States; or*

    (C) *information from any protected computer;*

The question in this case is whether it is a crime if a person is authorized to access information on a computer for certain purposes but accesses the computer for an improper purpose. (Checking scores of the local team; entering the March Madness pool; watching the Impeachment Trial). This case arose in the NDGa.

FOURTH AMENDMENT

Torres v. Madrid. This case was argued on October 14, 2020. This is a civil case but seeks to define the boundaries of "What is a seizure?" which would impact criminal Fourth Amendment issues, as well. The plaintiffs were sitting in a car. The police approached but did not announce who they were. Fearing a carjacking the plaintiff sped away. The police shot and hit the driver twice in the back. She kept driving and eventually pulled into a hospital. Was she "seized" for Fourth Amendment purposes? She did not stop, and in *California v. Hodari D.* the Court held that fleeing from the police is not a "seizure" for Fourth Amendment purposes, even if it reflects an effort to avoid an illegitimate command to stop. But in *Hodari D.* there was only a command to stop, not a shooting.

a. The issue of "fruit of the poisonous tree" is clear cut in a civil case. Either the shooting was a Fourth Amendment seizure or not: that is the "tree." And if it was an unlawful seizure, the damages from the shooting (pain and suffering, medical expenses, for example), are the fruit.

b. But in a criminal case, it is somewhat trickier to determine what is the fruit of the poisonous tree, even if you can identify and prove the existence of the tree. If you flee and get away, there are usually no fruits (what evidence is suppressed)? And if you eventually stop or are tackled during flight and consent to a search, or you are searched incident to arrest, then the initial shooting is arguably irrelevant, and all that needs to be considered is the eventual stop, which would undeniably be a seizure.

   In *Hodari D.*, the defendant, while fleeing, shed his cocaine and the Court seemed to assume that this was the fruit, but held that there was not a seizure, so there was no poisonous tree. If the Court in *Torres* concludes that shooting is a seizure, then any "abandonment" of contraband during flight would probably – though not necessarily – be determined to be the fruit. In *Hodari D.*, Justice Scalia also had this to say:

   > To say that an arrest is effected by the slightest application of physical force, despite the arrestee's escape, is not to say that for Fourth Amendment purposes there is a *continuing* arrest during the period of fugitivity. If, for example, Pertoso had laid his hands upon Hodari to arrest him, but Hodari had broken away and had *then* cast away the cocaine, it would hardly be realistic to say that that disclosure had been made during the course of an arrest.

What other fruit would there be absent a later undeniable seizure?

A Georgia Supreme Court decision earlier this month is worth noting. The question posed to the Court was whether a person has a common-law right to attempt to escape from the detention resulting from an unlawful arrest and, if so, whether a person may damage government property in such an attempt. The Court held that the common-law right to resist an unlawful arrest includes the right to use proportionate force against government property to escape an unlawful detention following the arrest.

Glenn v. State, --- Ga. ---, 2020 WL 5883292, at *1 (2020).

Lang v. California.

Does pursuit of a person who a police officer has probable cause to believe has committed a misdemeanor categorically qualify as an exigent circumstance sufficient to allow the officer to enter the fleeing person's home without a warrant? *See Welsh v. Wisconsin*.

Welsh: suspect drives off the road, then walks home. In Wisconsin, even a first DUI was a civil violation. Police go in house. There were no exigent circumstances and no hot pursuit and no criminal violation.

Here, there is "playing music too loud" which in California is also not a serious crime, but when the police pulled in behind him, he declined to stop and was chased for 3 – 4 minutes and entered his home. California said it was permissible to follow him into the house: hot pursuit of misdemeanor is always ok.

Note that California says that the defendant was not necessarily seized during the 4-minute chase. Echoing Torres v. Madrid.

So back to Torres: Is the fruit the eventual detention based on flight? That detention is invalid despite the claim of the prosecution that it was justified by the *new* crime of flight, which justified the subsequent arrest. Because the flight was legal, just like kicking out the window of the police car was justified.

KANSAS V. GLOVER (OCTOBER TERM 2019)

In *Kansas v. Glover*, the police observed a vehicle that the officer determined was registered to a driver whose license had been revoked. The officer did not observe the driver. Based on one fact – the registered owner was unlicensed – and not having any information about the actual driver, the police officer stopped the car. The simple facts of this case mask the complexity of the issues that arise in determining what amounts to an articulable suspicion. Consider the following:

1. The arresting officer knew no facts – not one – about the person who he was about to stop. He had never seen him, did not know his name and did not even know the suspect's gender. It is not as if he knew the person he was encountering was selling drugs (but didn't know his name) or that he had a gun in his waistband, or that he was in a high crime area and acting suspiciously. Nor had he received a tip that the driver, though personally unknown, was driving erratically. All he knew was one fact: the person he was about to stop was driving a car that was registered to an unlicensed driver. So is that information sufficient to support a stop? In short, are there specific articulable facts supporting the stop of this person.
2. Is the answer to be found in the empirical data that exists dealing with the frequency with which a car is driven by somebody (for example, a family member) *other than* the owner of the vehicle?
3. If the answer is based on such data, should the inquiry be refined and focus on the empirical data that exists dealing with the frequency with which a car is driven by somebody other than the owner of the vehicle in cases in which the owner has had his or her license suspended or revoked (and is there a difference between revoked versus suspended, in terms of the likelihood that the owner would drive despite having no valid license)? In other words, is a person who has a suspended license more likely to drive than a person with a revoked license?
4. The data in Kansas shows that for every vehicle registered in the state, there are three drivers, does this make a difference? It also shows that 75% of revoked drivers still drive at least sometimes.
5. If the data is deemed irrelevant (or unreliable, or perhaps unknown to the officer), is the answer to the question found in the police officer's experience? In other words, if the officer has been patrolling the streets for twenty years, is the articulable suspicion based on the data derived from that officer's experience (e.g., "Six times out of ten, when I have stopped a car which is owned by a driver whose license has been revoked, that owner is unlawfully driving the car.")
6. What if the officer has not been patrolling the streets for twenty years, but only for twenty days? Does that officer's insufficient experience preclude the officer

from stopping the car? What if he calls a more experienced officer back at the precinct and asks that officer about her experience?

7. Is the officer's training, as opposed to experience, a sufficient basis for finding articulable suspicion? Does a reviewing court have the obligation to evaluate the validity of the training? The trainer?
8. If the data is not the answer; and the officer's experience is not the answer; and the officer's training is not the answer, is the answer just "common sense?" Is that really the answer that the Court may rely on in deciding Fourth Amendment probable cause and articulable suspicion questions? If the Court had divided 5-4, could the five in the majority really brag that it is "common sense" if the four dissenters disagree. Doesn't sound very common. Compare the dueling versions "society's expectations of privacy" that were exhibited in *Georgia v. Randolph*.
9. Regardless of the answers to 1 – 8, above, what percentage of illegal drivers must there be in order to support a stop? In other words, as Chief Justice Roberts posed during the oral argument, if the data demonstrates that 10% of the time, the driver will be the owner who has no valid license, may the officer stop the vehicle? 20%? 30%? Chief Justice Roberts asked the lawyer during oral argument, "Don't you agree that all teenagers frequently text while driving, or at least 10% of teenage drivers do so? And if so, may the police stop every car in which it appears that a teenager is driving? Or a teenager is the registered owner?"
10. What if the registered owner is a teenager and teenagers in that jurisdiction may not drive at night? The teenager has a valid driver's license. The car is seen on the road at night, but the officer has no idea who is driving. Can the officer stop the car? After all, it might be the teenager who is the registered owner and teenager is not allowed to drive.
11. Consider whether the answer to #9 would apply in the typical drug courier profile case. If the data supports the conclusion that 20% of travelers from a source city to a consumer city, who purchase the ticket with cash and have a quick return flight, and have no bags other than a carry-on, is a drug courier, does that mean that in every case in which the profile exists, the person can be stopped? Or does the profile have to be more predictive, more reliable?
12. And how long can the stop last? Is it a typical traffic stop, like most, that are prompted by one violation (broken taillight), but then can last through the completion of the typical "mission" as it was described in *Rodriguez* in 2015: license, registration, warrant check, insurance, stolen car check. Can the police do that, too? Or just ascertain who is the driver?

What makes *Glover* so interesting is that instead of a "profile" – an assortment of factors, which combined make it likely that the traveler is a courier

– in *Glover* there is only one fact: the registered owner is unlicensed. There are no other facts that are known to the police. In short, neither the police, nor the reviewing court is able to evaluate the "totality of the circumstances" because there were no circumstances in the record other than the fact that the car was registered to an unlicensed driver.

13. Is there any room in this analysis for insistence that the officer, before stopping the vehicle, try to determine if the driver fits the description of the unlicensed owner? In other words, if the data supports articulable suspicion, is there any duty on the part of the officer to attempt to corroborate the assumption generated by the data *before* making the stop?

To a large extent, the Supreme Court answered (and to some extent dodged) the answers to many of these questions in the opinion that was issued on April 6, 2020. *Kansas v. Glover*, 140 S. Ct. 1183 (2020). Justice Thomas wrote that the facts known to the police officer were sufficient to authorize an investigatory stop of the vehicle. It is a matter of "common sense" that a car that is being driven on the road is being driven by the registered owner and if the registered owner's license had been revoked, the police may conduct an investigatory stop. Common sense = articulable suspicion, even without any individualized fact-finding, or determination that the driver is, in fact, the unlicensed person to whom the car was registered.

Justice Thomas further held that there was no obligation on the part of the police to conduct further individualized investigation, including driving alongside the car and looking in the car window to see if the driver matched the description of the registered owner. While corroboration is often an important feature of the probable cause or articulable suspicion calculus, it is not a required obligation on the part of the police. If there is corroboration, then that might tilt the balance in favor of sufficient information. If not, so be it. The failure to pursue corroboration facts is not required and the failure to seek corroboration (or to take steps to dispel existing information) is not a factor in assessing what information is, in fact, known to the police at the time the stop is initiated.

In one of the first decisions to apply *Glover*'s "common sense" test, the Fourth Circuit held that an officer's stop of a commercial vehicle on a highway that only allowed commercial vehicles that had a permit was unlawful. *United States v. Feliciana*, 974 F.3d 519 (4th Cir. 2020). The officer's basis for stopping the vehicle was the possibility that the commercial vehicle did not have the required permit. But this was not "common sense" as was the situation with the unlicensed owner of the vehicle in *Glover*. The existence of a permit requirement does not create a reasonable suspicion that any commercial vehicle is being driven in violation of the requirement.

Carpenter 2.0

The major issues:

(1) the Third Party Doctrine is not an immutable rule. Its application is entirely case-specific.

(2) the Fourth Amendment – finally – reaches the zenith of the principle that it protects people, not places.

(3) The Fourth Amendment applies to police conduct that goes far beyond looking "into" places. Now it also applies to subpoenas, which previously was an extremely limited Fourth Amendment issue. Now, the focus is on ***what is being sought***, not just *what the police are doing to seek* for something. Is the information being sought "private" – like CSLI data? What about medical records? Or emails? Or search activity on the web?

Though *Carpenter* opened the door to challenge the seizure (even by subpoena) of certain records from a third party, the privacy of the records must be asserted by the person whose records are acquired. Thus, a doctor may not challenge the government's acquisition of pharmacy records of patients, because those records reflect the privacy interest of the patients, not the doctor. *United States v. Gayden*, 977 F.3d 1146 (11th Cir. 2020).

Other Extensions of *Carpenter*

The use of sophisticated pole cameras outside a person's home has also generated decisions recently. The pole cameras that are currently used have the ability to be remotely zoomed and panned left and right. A pole camera trained on a house, with live streaming to a police precinct, will allow the police to learn who comes and who goes. Who visits. Who stays for a while, who spends the night. Who brings a package in and who brings a package out. Not only is the video streamed live, but it is also recorded so the police can review the images days, weeks or even years after the events occur. Analogizing this type of surveillance to a police officer simply seeing what is publicly apparent makes little sense, particularly in light of the opinions of Justice Alito and Justice Sotomayor in the *Jones* decision. To date, there have been few opinions in the appellate courts that conclusively resolve whether a warrant is required for this type of surveillance and what level of particularity is required. A helpful discussion of the issue can be found in a Massachusetts district court decision, *United States v. Garcia-Gonzalez*, 2015 WL 5145537 (D. Mass. 2015). *See also United States v. May-Shaw*, 955

F.3d 563 (6th Cir. 2020) (pole camera that records events in an apartment complex parking lot is not a search requiring a search warrant). The most recent analysis of the use of a sophisticated pole camera post-*Carpenter* arose in the First Circuit: *United States v. Moore-Bush*, 963 F.3d 29 (1st Cir. 2020). The Court upheld the warrantless use of a pole camera mounted outside a target's home, which could be operated remotely:

> The pole camera operated 24/7. Officers could access the video feed either live or via recordings. When they were watching the pole camera's live stream, but only then, officers could control the camera's zoom, pan, and tilt features remotely, akin to what an observer on the street could see with or without visual aids. The zoom feature was powerful enough for officers observing live to read the license plates on cars parked in the driveway. The camera's resolution was much lower at night in the darkness. Regardless of the zoom feature, the pole camera could not capture anything happening inside of the house. Everything it captured was visible to a passerby on the street. The pole camera did not and could not capture audio, and so captured no sound, even sounds which could be heard on the street. …
> The camera did not cover or capture all aspects of life at 120 Hadley Street. … [T]he pole camera footage was only of limited use because it captured just a portion of the front of the house, was partially obstructed by a tree, and had to be monitored live in order to use the zoom feature to see faces, license plates, and other details clearly.

Id. at 33. Relying on First Circuit precedent, *United States v. Bucci*, 582 F.3d 108 (1st Cir. 2009), the majority opinion held that a search warrant was not required for this type of surveillance, because nothing was learned about what occurred inside the house and nothing was observed outside the house that could not be observed by any passerby, including the police. *Carpenter* did not explicitly or implicitly overrule the First Circuit precedent and prior Supreme Court decisions, including *California v. Ciraolo*, 476 U.S. 207 (1986), which upheld the warrantless use of a low-flying airplane from which the police could review the backyard of the defendant's house supported the warrantless recording of the outside of a home. Of note in the *Moore-Bush* decision are the opening lines of the concurring opinion:

> When a catcher flashes the sign for a fastball rather than a curve, he takes the risk that the runner on second will tip off the batter to the pitch that's coming. But, while that runner's sign stealing breaks no rules, his team's does if it involves hiding a high-resolution video camera with zooming capacity behind the wall in center field, recording every move that the opposing catcher makes behind the plate, and using that video log to keep hitters in the know for all nine innings.

Geofence Warrants

In two recent district court opinions, the courts rejected search warrant applications known as "geofence" warrants. In *In the Matter of the Search of: Information Stored at Premises Controlled by Google*, 20 M 297 (N.D. Ill. July 8, 2020), the government was trying to determine the identity of a person who was believed to be at a certain location on three separate occasions. The proposed search warrant would require Google to reveal to the government information about any device that was within a 100-meter radius (slightly less than 8 acres) from the location during a forty-five-minute period of time. In its affidavit, the government explained that approximately 97% of smartphones in the world use Google applications or Google's operating system. The warrant prescribed the following procedure:

> (1) Google will be required to disclose to the government an anonymized list of devices that specifies information including the corresponding unique device ID, timestamp, coordinates, and data source, if available, of the devices that reported their location within the geofence during the forty-five minute periods; (2) the government will then review the list to prioritize the devices about which it wishes to obtain associated information; and (3) Google will then be required to disclose to the government the information identifying the Google account(s) for those devices about which the government further inquires. The warrant application includes no criteria or limitations as to which cellular telephones government agents can seek additional information.

The district court held that the warrant application failed both prongs of the Fourth Amendment particularity requirement, because of the number of people whose phones would be detected and the failure of the warrant to specify the procedure that the government would then use to further identify the phones and accounts that Google would be required to identify.

The second geofence decision arose from the same case, but a modified warrant application that further limited the geographical scope of the "fence" and also limited the information that Google would provide to the government. Nevertheless, the court rejected this warrant, as well, because once the government could obtain the identity of the selected devices through a subpoena (not relying on the third step of the initial application's protocol and also because the warrant authorized the acquisition of information about innocent people' whereabouts without even a suggestion of probable cause. *In the Matter of the Search of: Information Stored at Premises Controlled by*

Google, 2020 WL 4931052 (N.D. Il. August 24, 2020). Here are the court's concluding remarks:

> The technological capability of law enforcement to gather information, from service providers like Google and others, continues to grow, as demonstrated here by the Amended Application. Our appeals court has recognized, for quite some time now, that "[t]echnological progress poses a threat to privacy by enabling an extent of surveillance that in earlier times would have been prohibitively expensive." *United States v. Garcia*, 474 F.3d 994, 998 (7th Cir. 2007). In *Carpenter* and *Riley*, the Supreme Court recognized that as the use of mobile electronic devices becomes more and more ubiquitous, the privacy interests of the general public using these devices, including the privacy interest in a person's physical location at a particular point in time, warrants protection. 138 S. Ct at 2217; *see Riley*, 573 U.S. at 393, 134 S.Ct. 2473. Longstanding Fourth Amendment principles of probable cause and particularity govern this case, and the technological advances making possible the government's seizure of the type of personal information sought in this case must not diminish the force and scope of Fourth Amendment protections with roots in the reviled abuses of colonial times. Simply because Google *can* collect this information, or because the government *can* obtain it from Google under a "constrained" approach "justified" by the investigation's parameters, does not mean that the approach clears the hurdles of Fourth Amendment probable cause and particularity. But nor does the Court intend to suggest that geofence warrants are categorically unconstitutional. Each specific proposed application must comply with longstanding Fourth Amendment constitutional protections of individual privacy rights, which should not be diminished by increased technical capability for intrusion, or by how effective those capabilities might be at solving crimes. The potential to use Google's capabilities to identify a wrongdoer by identifying everyone (or nearly everyone) at the time and place of a crime may be tempting. But if the government can identify that wrongdoer only by sifting through the identities of unknown innocent persons without probable cause and in a manner that allows officials to "rummage where they please in order to see what turns up," *Sanchez-Jara*, 889 F.3d at 421, even if they have reason to believe something will turn up, a federal court in the United States of America should not permit the intrusion. Nowhere in Fourth Amendment jurisprudence has the end been held to justify unconstitutional means.

Tower dumps have achieved somewhat better results post-*Carpenter*: *See, e.g., United States v. James*, 2018 WL6566000 (D. Minn. November 26, 2018).

Consider the debate among the Eleventh Circuit judges in the recent *en banc* decision in *United States v. Johnson*, 921 F.3d 991 (11th Cir. 2019): a police officer frisked a suspect who was believed to have recently committed a burglary. The officer felt what appeared to be a single round of ammunition in the suspect's pocket (but no gun) and the officer seized the bullet. Did the totality of the circumstances support the seizure? Over the course of this lengthy opinion, the twelve judges debated this issue, seven deciding that the circumstances supported the seizure, four concluding that the circumstances did not support the seizure, and one judge declining to decide at all. The circumstances that supported the seizure were, according to the majority, as follows: the encounter occurred at 4:00 a.m. in a high crime area that involved a large number of gun violence calls to the police; the police knew that burglars often have guns; the scene where the encounter occurred had not been secured. The dissenting judges found that these circumstances, coupled with certain additional facts, rendered the seizure unlawful: there was no report of a weapon or an accomplice at the scene; there were other armed officers on the scene; the defendant was handcuffed and he had surrendered peacefully when confronted by the police. If eleven judges divide 7-4 about whether these unique facts do, or do not, support the seizure of a round of ammunition from a suspect's pocket, how can a police officer know, at the time of the event, what is permissible? How does a police officer know what factor controls, or how much weight to give to each of these factors that comprise the "totality of the circumstances?" What if, for example, as Judge Newsom inquired in his concurring opinion, the encounter occurred at 4:00 p.m., rather than 4:00 a.m.? Would that have made a difference? What if the encounter occurred in a low crime area, rather than a high crime area? Would the seizure of the ammunition have violated the constitution? The "I-know-it-when-I-see-it" reasoning of the judiciary is often all that distinguishes what is reasonable from what is not reasonable; what is constitutional and what is unconstitutional. Are these questions always decided by the judges who "know it when they see it" or are judges obligated to defer to the police officers who profess to "know it when they see it?" Does the legislature have a say in what is reasonable?

The Second Circuit engaged in a similar lively debate in the course of deciding the propriety of a routine stop and frisk. *United States v. Weaver*, 975 F.3d 94 (2d Cir. 2020). The defendant was stopped based on a traffic violation and was noticeably fumbling with something in his pants. The police frisked him and discovered a gun. The question was whether, at the inception of the frisk, the police had a reasonable basis for believing the defendant had a weapon (a necessary predicate for a frisk). The majority opinion concluded that the officer may have reasonably believed that the defendant had *something* in his pants but did not have sufficient information to believe he was in

possession of a weapon. In a concurring opinion, Judge Calabresi wrote about the incremental erosion of the Fourth Amendment and attributed this to the expanding use of the exceptions to the exclusionary rule, coupled with the doctrine of qualified immunity.

> The exclusionary rule, as a way of controlling police behavior, has been a disaster, I think. Don't get me wrong: some way of keeping the police from undertaking unreasonable searches and seizures is essential. And exclusion of wrongfully found evidence seems a plausible way. But in practice its effect has been a slow and steady erosion of rights to be free from unreasonable searches.
>
> Courts are—and should be—guided by precedents. A case asserting an improper search and the exclusion of evidence there found is likely to be, on its facts, just a step beyond a prior case in which police behavior was justified. The precedents might not compel the court to take that next step, but another factor will all too frequently bring that about: the defendant seeking exclusion *is almost always guilty of something* and might be dangerous. As in the case before us, the officers' hunch or stereotype was correct! Courts do not want to release criminals, those who have done and may again do harm. And so, often and understandably, courts have taken "the next step," for to do otherwise would have led to the release of a felon. This "next step" case then becomes the precedent for the subsequent "close case." Through a series of holdings, each one driven by the desire to avoid excluding determinative evidence, we have approved one after another form of increasingly unreasonable police action, until we find ourselves reviewing actions that would, on their face, seem obviously improper but which, instead, on our precedents, on governing law, are "close."

975 F.3d at 108 (Calabresi, J., concurring). The dissenting opinion in *Weaver* decried the "startling and untenable conclusion" of the majority. *Id*. at 111. The dissenting judge focused on the dangerous neighborhood in which the encounter occurred, as well as the efforts the defendant made to clearly hide something in his pants:

> The Supreme Court … has cautioned that appellate judges in assessing reasonable suspicion on a cold record "should take care both to review findings of historical fact only for clear error[,] ... give due weight to inferences drawn from those facts by ... local law enforcement officers ... [and] give due weight to a trial court's finding that the officer was credible and the inference was reasonable." *Ornelas*, 517 U.S. at 699–700, 116 S.Ct. 1657. Rather than "mind[ing] ... the limitations of the judicial function in controlling the myriad daily situations in which policemen and citizens confront each other on the street" and "only judg[ing] the facts of

> the case before us," *Terry*, 392 U.S. at 12, 15, 88 S.Ct. 1868, the majority advocates for a less modest—and even outsized—role for appellate judges in which they construct their own understanding of the facts, unmoored from the inferences drawn by the officers on the scene and credited by the district court.

Id. at 119-120 (Livingston, J., dissenting).

Yet a third recent *Terry* stop and frisk case that prompted a series of acrimonious opinions was decided last summer in the Fourth Circuit. Anybody who believes that there are objective measures of what is "reasonable" should spend some time reading the seven opinions in the contentious Fourth Circuit *en banc* decision in *United States v. Curry*, 965 F.3d 313 (4th Cir. 2020). "Reasonable" searches might be measured by the extent to which the search succeeds in capturing criminals. "Reasonable" searches might be measured by the extent to which the search protects a citizen's right to privacy. Or the reasonableness of a search might be measured by balancing these two interests. But that is like trying to figure out whether a rock weighs more than a tree is tall.

In *Curry*, the police, assigned to patrol a "high crime" area in Richmond, Virginia, heard gunshots near a housing complex. The officers arrived in less than a minute and saw several individuals calmly walking away from the area where the gunshots were fired. The police promptly detained one of the individuals and later acknowledged that they had no individualized suspicion to support his detention, but given the exigent circumstances, the officer and the government claimed that the brief detention (which resulted in the discovery of a weapon) was reasonable. The nine Judges in the majority held that the search was not reasonable; the six dissenting judges argued that the search was reasonable, even in the absence of an articulable suspicion that Curry was involved in the gun fire. Simple facts. Yet, over the course of 50 pages in the Federal Reporter, seven members of the Fourth Circuit debated the reasonableness of the police conduct, trading accusations of racial profiling; preventing the police from protecting innocent people in disadvantaged communities; and seeking to "protect minority and disadvantaged communities from themselves." One Judge wrote, "My colleague insists on a Hobson's choice for these communities: decide between their constitutional rights against unwarranted searches and seizures or forgo governmental protection that is readily afforded to other communities." *Id.* at 332-333. The dissent concluded with this condemnation of the majority's discussion about what is reasonable:

> Today's decision is a mistake. It will now be harder than ever to safeguard our communities from the most serious of threats. Wherever our citizens and officers

> find themselves—music festivals, houses of worship, or main streets—they will now be less safe. So too for Creighton Court. That result, though tragic, would be tolerable were it required by the Fourth Amendment (or even permitted by the Supreme Court). But where the Fourth Amendment requires no such thing, I cannot bring myself to follow the majority's lead in arrogating to ourselves such power over the safety of our fellow citizens. Barring even the most modest of steps to protect from the most serious of threats is neither constitutional nor compassionate. *Id*. at 365.

What is reasonable, it turns out, finds no definition in the Constitution, or in sociological treatises, or in police manuals. In *Curry*, each of the six dissenting judges was appointed by Republican Presidents and the nine members of the majority were appointed by Democratic Presidents (Chief Judge Gregory initially was nominated by a Democratic President, though finally confirmed after the inauguration of the subsequent Republican President). The meta-message from *Curry* may be that what qualifies as reasonable may be a political decision as much as a constitutional determination.

United States v. Curry

A few Teasers:

> When I read the first line of Judge Wilkinson's dissent I was heartened by the thought: well, at least he acknowledges that there are "two Americas." But this glint of enlightenment was to serve as a "soap box" for his charge against the majority's decision. It is understandable that such a pseudo-sociological platform was necessary as his assertions are bereft of any jurisprudential reasoning. More to the point, his recognition of a divided America is merely a preamble to the fallacy-laden exegesis of "predictive policing" that follows. Through his opinion, my colleague contributes to the volumes of work gifted by others who felt obliged to bear their burden to save minority or disadvantaged communities from themselves.

United States v. Curry, 965 F.3d 313, 331–32 (4th Cir. 2020).

> There's a long history of black and brown communities feeling unsafe in police presence. *See, e.g.*, James Baldwin, *A Report from Occupied Territory*, The Nation, July 11, 1966 ("[T]he police are simply the hired enemies of this population. ... This is why those pious calls to 'respect the law,' always to be heard from prominent citizens each time the ghetto explodes, are so obscene.")

United States v. Curry, 965 F.3d 313, 332 (4th Cir. 2020)

> In a society where some are considered dangerous even when they are in their living rooms eating ice cream, asleep in their beds, playing in the park, standing in the pulpit of their church, birdwatching, exercising in public, or walking home from a trip to the store to purchase a bag of Skittles, it is still within their own communities—even those deemed "dispossessed" or "disadvantaged"—that they feel the most secure. Permitting unconstitutional governmental intrusions into these communities in the name of protecting them presents a false dichotomy. My colleague insists on a Hobson's choice for these communities: decide between their constitutional rights against unwarranted searches and seizures or forgo governmental protection that is readily afforded to other communities.

United States v. Curry, 965 F.3d 313, 332–33 (4th Cir. 2020)

> I concur in all respects with the majority opinion. I am compelled to write this separate concurring opinion only in response to the dissenting opinion authored by Judge Wilkinson, who writes today with a smooth pen and a tin ear. Judge Wilkinson's dissenting opinion accuses the majority members of our court of all but dismantling the rule of law and of "overstep[ping our] proper role." Wilkinson Dissenting Op., *post* at 346. I cannot sit silent in the face of Judge Wilkinson's dissent. In my view, the use of predictive policing, which Judge Wilkinson endorses, is little more than racial profiling writ large.
> Judge Wilkinson's dissent hails predictive policing as an "innovation" in policing and notes, "As relevant here, Richmond has relied in part on 'hot spot policing' -- the idea that, by identifying specific areas where crimes are most likely to occur, and dispatching police officers accordingly, police can reduce the level of crime that ultimately takes place." Wilkinson Dissenting Op., *post* at 348, 347. But predictive policing is not the panacea Judge Wilkinson professes -- far from it. Although of relatively recent vintage, the "innovation" of preventive policing, which uses computer algorithms to predict high crime areas, is no longer the shiny new object it may once have appeared to be, but instead has revealed itself to be tarnished with racial bias. Predictive policing is merely a covert effort to attempt to justify racial profiling.

United States v. Curry, 965 F.3d 313, 343–44 (4th Cir. 2020).

Stare Decisis

The *Torres* oral argument, discussed above, spent considerable time on the topic whether *Hodari D.* was relevant precedent and whether the prior decision should be followed. Considerably more time was spent in the past couple months on the topic of *stare decisis* during the Senate confirmation hearings for Judge Barrett.

Louisiana supplies to the rest of America the best jazz and the best beignets. But in this past term in the Supreme Court, Louisiana provided to us two cases that involved critically important Constitutional rights: (1) the right to insist that 12 people unanimously decide a person's fate in a criminal case; and (2) the right to prevent the government from deciding the fate of a woman's pregnancy. *Ramos v. Louisiana* and *June Medical*.

Worth considering is another aspect of these decisions: the role and application of the principle of *stare decisis*: how the Court decides whether to adhere to a precedent that appears, at least on the surface, to determine the outcome of a particular controversy.

Not a term goes by that the Court is not asked to overturn, limit, or expand a previous decision. The factors that the appellate court considers (or claims to consider) in deciding whether to jettison a precedent include: (1) the soundness of the reasoning of the prior decision, including its consistency with related decisions, (2) the age of the precedent, (3) the reliance interests involved (economic, regulatory, or social interests that a litigant seeks to preserve), and (4) the workability of the prior decision.

There are several subsidiary factors, as well: (a) Was the prior precedent a unanimous decision or a plurality decision with the narrowest holding representing the view of only one concurring Justice? (b) Is the prior precedent really controlling on the issue presented in the case at hand, or is it dicta that only appears to govern the outcome? (c) are the facts in the current case distinguishable in a material way from the facts of the precedent that is offered as binding precedent? (d) Have the facts that prompted the previous Court to reach a decision changed, such that the precedent's foundation is too obsolete: this could relate to the facts viewed on a micro level (when is a baby *in utero* viable?), or perhaps facts viewed more broadly (have advances in technology altered our view of the expectation of privacy? Or has the country's tolerance for the death penalty waned to the extent that it views the death penalty as being "unusual," and has the country's tolerance of gay marriage changed)?

What role do lower courts play? To some extent, a potentially outcome-determinative role.

While deciding whether a precedent was "wrongly decided" (or as Justice Kavanaugh wrote in *Ramos*, "grievously wrong"), the lower court's role is minimal. But in laying the groundwork for considerations of "workability" and "reliance interests" and "changed facts both large and small" the trial court's foundational work is essential in providing the appellate court with the information it needs to decide those issues.

First, we consider *Ramos* and *June Medical*, though not on the merits, as much as on the approach the Court took to *stare decisis*.

In *Ramos*, the question was simple: In all courts, state and federal, in order to convict the defendant of a serious felony, must the jury's verdict be unanimous? The precedent – *Apodaca v. Oregon* – in a fractured opinion, held that in federal court, a unanimous verdict was required, but in state court, the states could "experiment" and permit a conviction based on less than a unanimous verdict. In short, the decision held that the 12-person unanimous requirement that had previously been found to be part of the Sixth Amendment did *not* apply to the states. But *Apodaca* was an odd decision. Because four Justices held that the 12-person unanimous decision requirement did not exist in any court (state or federal) and was not enshrined in the Sixth Amendment; and four justices held that the 12-person unanimous requirement applied in *both* the state and federal courts. Justice Kennedy engaged in Solomonic jurisprudence and held that the unanimity requirement applied in federal court but not in state court. That decision, the "narrowest" holding, became the law of the land despite the fact that only one Justice on the Court reached that Goldilocks decision.

Ramos decided that the fact that only one Justice had reached that result was one of the reasons that the *Apodaca* precedent should be discarded. And for that reason, among several others voiced by other members of the current Court (including the apparent racist genesis of the non-unanimous verdict rule in Louisiana), *Apodaca* was jettisoned.

In his concurring opinion, Justice Kavanaugh's list of Supreme Court decisions that abandoned precedent is impressive:

Obergefell v. *Hodges*, 576 U. S. 644 (2015); *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010); *Montejo v. Louisiana*, 556 U.S. 778 (2009); *Crawford v. Washington*, 541 U.S. 36 (2004); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Ring v. Arizona*, 536 U.S. 584 (2002); *Agostini v. Felton*, 521 U.S. 203 (1997); *Seminole Tribe of Fla. v. Florida*, 517 U.S.

44 (1996); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992);[1]*Payne v. Tennessee*, 501 U.S. 808 (1991); *Batson v. Kentucky*, 476 U.S. 79 (1986); *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985); *Illinois v. Gates*, 462 U.S. 213 (1983); *United States v. Scott*, 437 U.S. 8 (1978); *Craig v. Boren*, 429 U.S. 190 (1976); *Taylor v. Louisiana*, 419 U.S. 522 (1975); *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Katz v. United States*, 389 U.S. 347 (1967); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Malloy v. Hogan*, 378 U.S. 1 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *Baker v. Carr*, 369 U.S. 186 (1962); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Brown v. Board of Education*, 347 U.S. 483 (1954); *Smith v. Allwright*, 321 U.S. 649 (1944); *West Virginia Bd. of Ed. v. Barnette*, 319 U.S. 624 (1943); *United States v. Darby*, 312 U.S. 100 (1941); *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

June Medical on the other hand, contains a lengthy discussion of the precedents that were at play. *Roe v. Wade*; *Planned Parenthood v. Casey*; and *Whole Woman's Health* were prior decisions that the Justices considered in deciding two fundamental aspects of the *stare decisis* question: (1) should the court abandon or limit one or more of those decisions? (2) Did the recent *Whole Woman's Health* decision actually govern the decision in *June Medical*? After all, Texas is Texas and Louisiana is Louisiana and just because the Texas law was found to be unconstitutional, based on the facts on the ground in Texas, this did not automatically mean that the exact same statute in Louisiana was unconstitutional because the facts on the ground in Louisiana were (or perhaps were not) different. After all, the fundamental principle of *stare decisis* is that "like cases should be treated alike" so the process must decide whether the "like" ingredient exists.

Ultimately, as we all know, after a painstaking review of the facts in Louisiana in Justice Breyer's plurality opinion, the Court, joined by Chief Justice Roberts in a concurring opinion, held that *Whole Woman's Health* was factually indistinguishable precedent that: (1) applied to the similar factual situation in Louisiana; and (2) should not be overturned. Justice Kavanaugh's separate decision in *June Medical* sought to avoid the focus on "should precedent be overturned" and wrote that more fact-finding was necessary to determine whether the facts in *Whole Woman's Health* were sufficiently "like" the facts in *June Medical* so as to demand that the like cases be treated alike. Thus, in *June Medical* the role of the lower court cannot be overstated. Absent the thorough fact-finding upon which Justice Breyer relied, there is no telling where *June Medical* would have landed.