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Supreme Court Update

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I. Scope of This Outline

This outline contains all criminal law and criminal procedure cases heard by the Supreme Court in its 2017 Term *except* those pertaining solely to federal practice – because, for instance, the issue presented concerns interpretation of a federal criminal law, sentencing provision, or rule. In each section, cases already decided are discussed first, followed by a description of the issues presented in those still awaiting decision at the time of writing. The final section briefly describes criminal law and criminal procedure cases slated to be heard in the October 2018 Term.

A terrific resource for all of these cases, and to track the Supreme Court's jurisprudence in general, is SCOTUSblog.com, which, for each case on which certiorari is granted, compiles the decision below, the briefs, the transcript of oral argument, and the Court's opinion, as well as expert commentary.[1]

II. The Fourth Amendment

District of Columbia v. Wesby, 138 S. Ct. 577 (2018): Fourth Amendment probable cause requirement and qualified immunity

Background and issue: Respondents were attending a party in Washington, D.C. that generated enough noise, odor, and other attention to attract the D.C. police. When the respondents were confronted on the home's property by police, they stated that they had been invited to a party at the home by "Peaches," whom they believed to be the home's lawful owner. Peaches confirmed this fact to police by phone. Police subsequently learned, however, that Peaches was not in fact a lawful owner or occupant of the house. Unlawful entry under the D.C. criminal code requires proof not only that the defendant enter property "against the will of the lawful occupant," but also that the defendant intended to enter with knowledge that it was against the will of the occupant. Nevertheless, police at the scene arrested the respondents for unlawful entry. They were later booked on disorderly conduct charges (not unlawful entry), and released after being booked. The charges were never pursued.

Respondents sued under 42 U.S.C. Section 1983 alleging that they had been arrested without probable cause in violation of the Fourth Amendment. The district court granted the plaintiff-respondents' motion for summary judgment on the Fourth Amendment claim, and the D.C. Circuit affirmed. The lower courts held that in the absence of any facts known to the arresting officers to establish the mental element of the offense, the police lacked probable cause, and they it rejected the contention that in evaluating probable cause for an offense with a mental element, the police could reject respondents' assertions of an innocent mental state. The Circuit also held that the officers were not entitled to qualified immunity in the case. The issue before the Supreme Court was whether, on the facts presented, the police did have probable cause (and also, even if the answer is no, whether they are entitled to qualified immunity from suit).

Held (Reversed 9-0, Thomas, J. for the Court)**:** The officers had probable cause for the arrest, and even if they lacked probable cause they had qualified immunity from suit under

[1] *See*, *e.g.*, SCOTUSblog, http://www.scotusblog.com.

Section 1983 because the absence of probable cause under the particular circumstances facing the officers was not clearly established to any reasonable official, or in other words, "beyond debate." The Court's opinion specifically criticized two features of the D.C. Circuit's probable cause analysis: first, that it erroneously viewed circumstances in isolation rather than collectively, and second, that it disregarded aspects of the plaintiffs' behavior that were susceptible of innocent explanation and thereby required officers to accept such innocent explanation in evaluating probable cause. In view of the totality of the circumstances, including that the house was vacant, that the plaintiffs' conduct in the house approximated "a bachelor party with no bachelor," the fact that many partygoers ran from police, and the evasive and shifting explanations provided by Peaches, the officers had a reasonable basis for inferring that the plaintiffs knew their presence in the house was not authorized.

Justice Ginsburg wrote a concurrence to express her view that the Court's probable cause jurisprudence, in disregarding the subjective reasons for arrest, "sets the balance too heavily in favor of police unaccountability to the detriment of Fourth Amendment protection," and that therefore she "would leave open, for reexamination in a future case, whether a police officer's reason for acting, in at least some circumstances, should factor into the Fourth Amendment inquiry." 138 S. Ct. 577, 594 (2018).

Carpenter v. United States, No. 16-402: Warrant requirement for cellphone record search

Background and issue: The Fourth Amendment issue presented in this case is straightforward, even if the resolution is not. Timothy Carpenter (together with a codefendant) was convicted under the Hobbs Act of carrying out a series of armed robberies in Ohio and Michigan; he was sentenced to 116 years in prison. At trial the Government introduced cellphone records – data establishing the location of cellphone towers that a phone is connecting with – and expert testimony to prove that Carpenter and his codefendant were within one-half and two miles of several crime scenes shortly before the robberies. Through the expert witness the Government created and introduced into evidence maps showing the locations and movements of the defendants' phones.

The Government had obtained those records from cellphone carriers on the basis of magistrate judge's order issued under the Stored Communications Act, pursuant to which the government may force disclosure of records when "specific and articulable facts show[] that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation." 18 U.S.C. § 2703(d). Carpenter objected to the admission of the records at trial on the ground that, notwithstanding compliance with the SCA, the Fourth Amendment required a warrant (based on probable cause) to obtain the records. The trial court overruled Carpenter's objection, and the Sixth Circuit affirmed, relying on what is known as "third party doctrine" – the premise in Fourth Amendment jurisprudence that individuals have a reasonable expectation of privacy in communications, but not in information necessary to transmit communications (or "metadata"), the latter of which is necessarily exposed to third party communications facilitators. The cellphone records, according to the court, fell on the wrong side of that line. Second, the Sixth Circuit rejected the invitation of Carpenter and amici to disregard that distinction on the ground that five justices in *United States v. Jones*, 132 S. Ct 945 (2012), had expressed skepticism about the perdurance of third party doctrine in the

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