Making Sense of Search and Seizure Law

A Fourth Amendment Handbook

Second Edition

2019 SUPPLEMENT

Phillip A. Hubbart and Thomas Regnier

Carolina Academic Press
700 Kent Street
Durham, North Carolina 27701
Telephone (919) 489-7486
Fax (919) 493-5668
E-mail: cap@cap-press.com
www.cap-press.com

This Supplement brings up to date all U.S. Supreme Court decisions on the Fourth Amendment through June 30, 2019 – the end of the Court's 2018 term.

Section xxv. About the Authors

Add the following paragraphs to the end of this section:

Thomas Regnier holds a Juris Doctor degree from the University of Miami School of Law where he graduated Summa Cum Laude and Order of the Coif; he was the Senior Articles Editor of the University of Miami Law Review. He also holds a Master of Laws degree from Columbia Law School, where he was a Harlan F. Stone Scholar. He served as a judicial law clerk for Judge Harry Leinenweber of the U.S. District Court for the Northern District of Illinois and Judge Melvia Green of the Third District Court of Appeal of Florida.

He worked for five years as an Assistant Public Defender for the Eleventh Judicial Circuit in Miami, where he did appellate work (2004-2008, 2011-2012), and for three years as an appellate lawyer for Conroy Simberg in Hollywood, Florida (2012-2015) He is currently a solo practitioner in Sunrise, Florida (2015 to date) where he specializes in appeals.

He has taught a variety of courses as an adjunct professor at the University of Miami School of Law and at John Marshall Law School in Chicago, Illinois. These courses include a seminar on the Fourth Amendment, Shakespeare and the Law, Lawyering Skills, and Legal Research and Writing. He is the author of articles in several different law reviews around the country, including *The "Loyal Foot Soldier": Can the Fourth Amendment Survive the Supreme Court's War on Drugs?,"* 72 UMKC L. Rev. 631 (2004).

He is a member of the Florida Bar, the U.S. Supreme Court Bar, the Eleventh Circuit Court of Appeals Bar, and the bars of the U.S. District Courts for the Southern and Middle Districts of Florida.

Chapter 1. Introduction to Fourth Amendment Law

Section 3. Growth and Complexity of Fourth Amendment Law

p. 13. Strike the 1st complete paragraph with accompanying footnotes and add:

Over 450 cases on the Fourth Amendment were decided by the U.S. Supreme Court from 1791-2019**. Fn. 46**. Only five of these cases were decided prior to 1900, **Fn. 47**, and only 91 were decided in the twentieth century prior to the landmark decision of *Mapp v. Ohio* **Fn. 48** in 1961, which applied the Fourth Amendment exclusionary rule to the states. The balance, over 350 cases or nearly 80% of the total, are post-*Mapp* decisions rendered during a 57 year period 1961-2019. **Fn. 49.** No doubt this trend will continue well into the twenty-first century. As Dean Erwin Griswold has accurately observed:

> For more than a century, this provision [the Fourth Amendment] was a sleeping giant. . . . Except for the Boyd case, virtually no search and seizure cases were decided by the Supreme Court for the first 110 years of our existence under the Constitution, that is, up to the year 1900. . . . Except for a few cases arising out of the federal courts, the active history of the Fourth Amendment did not begin until 1961, when the Court decided the case of Mapp . Ohio. . . . The result has been — as in so many areas in recent years — a great torrent of litigation. **Fn. 50**

Fn. 46. The exact count is 459 and is current through June 30, 2019. The count, however, includes some older wiretapping, electronic eavesdropping, and search warrant execution cases which have Fourth Amendment implications but technically were decided under federal statutes. All references to Fourth Amendment case counts should be read with this caveat in mind.

Fn. 47. The two most important cases were: Boyd v. United States, 116 U.S. 616, 29 L.Ed. 746, 6 S.Ct. 524 (1886); In re Jackson, 96 U.S. 727, 24 L.Ed. 877 (1877). The remaining cases were of lesser significance: Murray v. Hoboken Land & Imp. Co., 59 U.S. 272, 18 How. 272, 15 L.Ed. 372 (1855); Ex Parte Burford, 7 U.S. 448, 3 Cranch 448, 2 L.Ed. 495 (1806). There were no Fourth Amendment decisions rendered in the brief period between 1791–1800.

Fn. 48. 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961).

Fn. 49. In the preface to the first edition of his Fourth Amendment treatise published in 1978, Professor LaFave notes that "[a]t least in the years following the Supreme Court's landmark decision in Mapp v. Ohio in 1961, it is beyond question that the Fourth Amendment has been the subject of more litigation than any other provision of the Bill of Rights." 1 Wayne LaFave, Search and Seizure v (1st ed. 1978). Moreover, in the fifth edition of the same treatise published in 2012, Professor LaFave comments that the flow of Fourth Amendment decisions "has in no sense diminished over the past thirty-four years." 1 Wayne LaFave, Search and Seizure: v (5th ed. 2012).

Fn. 50. Erwin Griswold, Search and Seizure: A Dilemma of the Supreme Court 2, 7 (1975).

Part II. Substantive Law of the Fourth Amendment

Chapter 7. Interpretation of the Fourth Amendment

Section 2. The Historical Approach: The Original Understanding of the Framers

c. Post-Boyd cases utilizing the historical approach

(1) Historical analysis cases

Fn. 28, p. 94

Carpenter v. United States, 585 U.S. ___, 138 S.Ct. 2206, 201 L.Ed.2d 507 (2018) (warrantless governmental search of cell cite location records in the possession of wireless cell phone companies revealing the defendant's physical location over a period of 127 days struck down as contrary to the Framer's purpose in adopting the Fourth Amendment, namely, to safeguard the privacy and security of the people against arbitrary invasion by the government as exemplified by the general writs of assistance regime, against which the American Revolution was fought.)

Section 3. The Balancing of the Interests Approach

b. General applications of the balancing approach

(2) Unusual Searches and seizures

p. 103, last line, after "the inspection of Presidential papers and materials," add:

the taking of breath and blood samples from a motorist arrested for drunk driving, **Fn. 68a**

Fn. 68a. Birchfield v. North Dakota, 579 U.S. ____, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016).

c. Related Balancing approaches in the administration of the exclusionary rule

p. 105, end of 1st complete paragraph, add

Indeed, the Court engages in a balancing analysis utilizing these same three factors to determine whether any evidence discovered during an illegal search or seizure was the "fruit" of that illegality. **Fn. 81a**

Fn. 81a

Utah v. Strieff, 579 U.S. ___, 136 S.Ct., 2056, 2061, 195 L.Edd.2d 400 (2016).

Section 4. Common Law Reasoning Approach

b. History of prior court decisions

Fn. 84, p. 106

Manuel v. City of Joliet, 580 U.S. ____, 137 S.Ct. 911, 197 L.Ed.2d 312 (2017) (applying Gerstein v. Pugh, 420 U.S. 103, 111 S.Ct. 854, 43 L.Ed.2d 54 (1975) and Albright v. Oliver, 510 U.S. 266, 274, 114 S.Ct. 807, 127 L.Ed.2d (1994) (plurality opinion))

Fn. 85, p. 107

Grady v. North Carolina, 575 U.S. ___, 135 S.Ct. 1368, 191 L.Ed.2d 430 (2015) (applying the rule announced in United States v. Jones, 565 U.S. ___ , 132 S.Ct. 945, 181 L.Ed.2d 911 (2012,) and Florida v. Jardines, 569 U.S. ___, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013), that physically intruding into a constitutionally protected area by a government official without consent to obtain

private information constitutes a search within the meaning of the Fourth Amendment); Rodriguez v. United States, 575 U.S. ___, 135 S.Ct. 1609, 191 L.Ed.2d 492 (2015) (applying a rule announced in Illinois v. Caballes, 543 U.S. 405, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005), that the valid traffic stop becomes unlawful if it is prolonged beyond the time reasonably required to complete the mission of issuing a traffic ticket to the driver).

Part II. Substantive Law of the Fourth Amendment, cont'd

Subpart A. The "Standing" Requirement

Introductory Note

Fn. 2, p. 113

"The concept of standing in Fourth Amendment cases can be a useful shorthand for capturing the idea that a person must have a cognizable Fourth Amendment interest in the place searched before seeking relief for an unconstitutional search, but it should not be confused with Article III standing, which is jurisdictional and must be assessed before reaching the merits." Byrd v. United States, 584 U.S. ___, 138 S.Ct. 1518, 1530, 200 L.Ed.2d 805, 818 (2018). For that reason, a trial court may deny the merits of a Fourth Amendment claim without ever reaching the Fourth Amendment standing issue. Id. See Ch. 17, Sec. 6a of this supplement.

Chapter 8. Preliminary Elements: Personal Standing and Governmental Action

Section 2. Governmental Action Element

b. Governmental agent may be criminal or civil official

Fn. 41, p. 121

"It is well settled . . . that the Fourth Amendment's protection extends beyond the sphere of criminal investigations, and the government's purpose in collecting information does not control whether the method of collection constitutes a search. A building inspector who enters a building simply to ensure compliance with civil safety regulations has undoubtedly conducted a search under the Fourth Amendment." Grady v. North Carolina, 575 U.S. ___, 135 S.Ct. 1368, 1371, 191 L.Ed.2d 430 (2015).

Chapter 10. Search or Seizure Element: Searches of Persons, Houses, Papers or Effects

Section 2. General Test: Governmental Invasion of One's Reasonable Expectation of Privacy & Trespass Addendum

Fn. 16, p. 138

Grady v. North Carolina, 575 U.S. ___, 135 S.Ct. 1368, 1370, 191 L.Ed.2d 430 (2015) (an electronic monitoring device placed on the ankle of a recidivist sex offender pursuant to court order to track the offender's movements constitutes a trespassory search of the person under the Fourth Amendment) ("In light of these decisions, it follows that a State also conducts a search when it attaches a device to a person's body, without consent, for the purpose of monitoring that individual's movements.") .

Section 3. First Component of a Katz Fourth Amendment "Search": Complaining Party Must Have a Reasonable Expectation of Privacy as to Protected Interests

a. Reasonable expectation of privacy as to one's "person"

(2) Nature of the search of a person: examples

p. 143, end of 2d complete sentence ending with ". . . Fourth Amendment search of the person," add, new footnote.

Fn. 33a.

As an aside, under the trespass definition, it has also been held a Fourth Amendment search of the person when "a State . . . attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements." Grady v. North Carolina, 575 U.S. ___, 135 S.Ct. 1368, ____, 191 L.Ed.2d 430 (2015) (an electronic monitoring device placed on the ankle of a recidivist sex offender pursuant to court order to track the offender's movements held a Fourth Amendment search of the person).

See Section 2 of this chapter for a discussion of the trespass definition of a Fourth Amendment search.

b. Reasonable expectation of privacy as to one's "house": complaining party's substantial connection thereto

(1) Residential premises: curtilage vs. "open fields"

Fn. 61, p. 148

"When it comes to the Fourth Amendment, the home is the first among equals. At the Amendment's very core stands the right of a man to retreat to his own home and there be free from unreasonable governmental intrusion. To give practical effect to that right, the Court considers the curtilage—the area immediately surrounding the home and associated with the home—to be part of the home itself for Fourth Amendment purposes. The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened.

When a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred. Such conduct is presumptively

unreasonable absent a warrant." Collins v. Virginia, 584 U.S. ___, 138 S.Ct. 1663, 1670, 201 L.Ed.2d 9, 18-19 (2018) (internal citations and quotations omitted).

Amend the first sentence to the first complete paragraph on page 148 to read:

In addition, the immediate area surrounding the home is considered part of the curtilage—including the front porch, an adjoining garden, immediate areas adjacent to the windows in the home, and a small bricked enclosure abutting the home at the top of the front driveway. **Fn. 62**

Fn. 62, p. 148

Collins v. Virginia, 584 U.S. ___, 138 S.Ct. 1663, 201 L.Ed.2d 9 (2018) (a police officer invaded the curtilage of a person's home by entering a small bricked enclosure abutting the home at the top of the home's front driveway to search a motor vehicle parked in the enclosure and visible from the public street) (the officer walked 30 feet or so up the driveway to reach the enclosure and search the motorcycle).

"Just like the front porch, side garden, or area outside the front window, the driveway enclosure where Officer Rhodes searched the motorcycle constitutes an area adjacent to the home and to which the activity of home life extends, and so is properly considered curtilage." Collins v. Virginia, 138 S.Ct. at 1671, 201 L.Ed.2d at 19 (2018) (internal citations and quotations omitted).

"The driveway was private, not public, property, and the motorcycle was parked in the portion of the driveway beyond where a neighbor would venture, in an area 'intimately linked to the home . . . where privacy expectations are most heightened.'" (citation omitted). ." Collins v. Virginia, 138 S.Ct. at 1673, n. 3, 201 L.Ed.2d at 21, n. 3.

"[I]t is not dispositive that Officer Rhodes did not observe anything along the way to the motorcycle that he could not have seen from the street. Law enforcement officers need not shield their eyes when passing by a home on public thoroughfares, but the ability to observe an area protected by the Fourth Amendment does not give officers the green light physically to intrude on it." Collins v. Virginia, 138 S.Ct. at 1673, n. 3, 201 L.Ed.2d at 21, n. 3. (internal citations and quotations omitted).

c. Reasonable expectation of privacy as to one's "papers or effects": complaining party's substantial connection thereto

(2) Complaining party's substantial connection thereto [p. 156]

Add an additional paragraph after the end of first incomplete paragraph on page 157:

Moreover, where the person complaining is driving a rental car with the consent of the lessee, that person as a general rule has a reasonable expectation of privacy in the car, even though such person is not listed as an authorized driver in the car rental agreement. On the other hand, a person who steals a rental car has no reasonable expectation of privacy in the car. **Fn. 113a.**

Fn. 113a. "This Court now holds that as a general rule someone in otherwise lawful possession and control of a rental car has a reasonable expectation of privacy in it even if the rental agreement

does not list him or her as an authorized driver. * * * No matter the degree of possession or control, the car thief would not have a reasonable expectation of privacy in a stolen car."

Byrd v. United States, 584 U.S. ___, 138 S.Ct. 1518, 1524, 1529, 200 L.Ed.2d 805, 810, 817(2018) (police stopped a rental car driven by the defendant with the consent of the lessee; the rental agreement did not list the defendant as an authorized driver and provided for the loss of car insurance if an unauthorized driver drove the car; the denial of defendant's motion to suppress the fruits of the car search reversed; case remanded to lower court to determine government contentions that: (a) whether one who intentionally uses a 3d party to rent a car in order to commit a crime has a reasonable expectation of privacy in the car, and (b) whether there was probable cause to search the car in this case in any event, which in itself would require the denial of the motion to suppress).

Section 4. Second Component of a Katz Fourth Amendment "Search"

a. Non-consensual and consensual entry onto protected premises or property

Fn. 128, p. 160

This permitted activity is often referred to as a "knock and talk." It does not constitute a Fourth Amendment search of the home and thus does not trigger the Amendment's protection. Carroll v. Carman, 574 U.S. _____, 135 S. Ct. 348, 190 L.Ed.2d 311 (2014).

As yet, however, it is not "clearly established" Fourth Amendment law that the police officer has only an implied invitation to approach *the front door* to a private residence, as opposed to any other entrance open to visitors, if the officer wants to talk to people inside the residence. Carroll v. Carman, 574 U.S. _____, 135 S. Ct. 348, 190 L.Ed.2d 311 (2014) (in 42 U.S.C. sec. 1983 civil rights suit, defendant police officer had a qualified immunity from such suit when he approached a private residence at a ground-level deck with sliding glass doors to talk to occupants therein; this entrance, according to the officer, looked like "a customary entrance" to the home).

Section 5. Special Search or Seizure Element Problems

a. Narcotic "dog sniffs" of luggage, cars or homes

Fn. 166, p. 167

Rodriguez v. United States, 575 U.S. ___, 135 S.Ct. 1609, 191 L.Ed.2d 492 (2015) (valid traffic stop becomes an unreasonable seizure of the driver and car if the stop is prolonged beyond the time reasonably required to issue a ticket to the driver and conduct other routine traffic tasks; dog sniff conducted thereafter is tainted); see also Ch. 12, sec. 1(a) of this supplement for a further discussion of this issue.

Change the title to subsection b, p. 165 to read:

b. Wiretapping, electronic eavesdropping, and related issues

p. 166, add new paragraph:

For example, the Court has faced the issue of whether a Fourth Amendment search occurs when the government accesses historical cellphone records that provide a comprehensive chronicle of a cellphone user's past physical movements and locations whenever the cell phone user makes a telephone call. Although these records are held by wireless cell phone companies, the Court concluded that a Fourth Amendment search occurs under these circumstances—that, given the vast amount of information that these records reveal, a cell phone user has a reasonable expectation of privacy in his or her physical movements and locations as revealed by these records. **Fn. 164a**

Fn. 164a. Carpenter v. United States, 585 U.S. ___, 138 S.Ct. 2206, 201 L.Ed.2d 507 (2018) (warrantless governmental search of cell cite location records in the possession of wireless cell phone companies, revealing the defendant's physical location over a period of 127 days and covering 12,898 location points, held a search of the defendant within the meaning of the Fourth Amendment).

"[W]e hold that an individual maintains a legitimate expectation in the record of his physical movements as captured through CSLI [Cell Site Location Information]. The location information obtained from Carpenter's wireless carriers was the product of a search." Carpenter v. United States, 585 U.S. ___, 138 S.Ct. 2206, 201 L.Ed.2d at 521 (2018).

"We decline to grant the state unrestricted access to a wireless carrier's database of physical location information. In light of the deeply revealing nature of CSLI, its depth, breadth, and comprehensive reach, and the inescapable and automatic nature of its collection, the fact that such information is gathered by a third party does not make it any less deserving of Fourth Amendment protection. The Government's acquisition of cell-site records here was a search under that Amendment." Carpenter v. United States, 585 U.S. ___, 138 S.Ct. 2206, 201 L.Ed.2d at 528 (2018).

Subpart B. The "Unreasonableness" Requirement

Chapter 11. General Rules and Principles of Unreasonableness

Section 1. Search Warrant Requirement Rule

Fn. 1, p. 173, after Kentucky v. King, add:

City of Los Angeles v. Patel, 576 U.S. ___, 135 S.Ct. 2443, 2452, 192 L.Ed.2d 435 (2015) ("Based on this text [the Fourth Amendment], the Court has repeatedly held that 'searches conducted outside the judicial process, without prior approval by [a] judge or [a] magistrate judge, are per se unreasonable . . . subject only to a few specifically established and well delineated exceptions.' This rule 'applies to commercial premises as well as to homes.'" (internal citations omitted).

Collins v. Virginia, 584 U.S. ___, 138 S.Ct. 1663, 1670, 201 L.Ed.2d 9, 18-19 (2018) ("When a law enforcement officer physically intrudes on the curtilage [of a home] to gather evidence, a

search within the meaning of the Fourth Amendment has occurred. Such conduct is presumptively unreasonable absent a warrant)."

Fn. 1, p. 173, add:

See also City of Los Angeles v. Patel, 576 U.S. ___, 135 S.Ct. 2443, 2452, 192 L.Ed.2d 435 (2015) (Scalia, J. dissenting) "The Fourth Amendment provides, in relevant part, that '[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrant shall issue, but upon probable cause." Grammatically, the two clauses of the Amendment seem to be independent—and directed at entirely different actors. But in an effort to guide courts in interpreting the Search and Seizure Clause's indeterminate reasonableness standard, we have used the Warrants Clause as a guidepost for assessing the reasonableness of a search, and have erected a framework of presumptions applicable to broad categories of searches conducted by executive officials. Our case law has repeatedly recognized, however, that these are mere presumptions, and the only constitutional requirement is that the search be reasonable."

Section 2. General Definition of "Unreasonableness": Balancing Test

Fn. 20, p. 178

"The Fourth Amendment prohibits only *unreasonable* searches. The reasonableness of a search depends on the totality of the circumstances, including the nature and purpose of the search and the extent to which the search intrudes upon reasonable privacy expectations." Grady v. North Carolina, 575 U.S. ___, 135 S.Ct. 1368, ____, 191 L.Ed.2d 430 (2015) (emphasis in the original).

Chapter 12. Seizures of Persons or Property.

Section 1. Seizures of persons

a. Two types of seizures of the person: temporary detentions and arrests

p. 194, add new paragraphs after 1st incomplete paragraph

In a lawful temporary traffic stop, the police may conduct any routine tasks associated with the purpose of the stop, including: determining whether to issue a traffic ticket or warning; checking the driver's license, car registration, car insurance, and outstanding warrants. But a traffic stop prolonged beyond the time reasonably required to perform these tasks renders the seizure of the driver unreasonable and taints a narcotics dog sniff conducted of the car *thereafter***. Fn. 16a**.

As an aside, a dog sniff conducted *while* these routine procedures are reasonably being performed is permissible under the Fourth Amendment because (a) the driver is lawfully detained during this time, thus the detention cannot taint the dog sniff, and (b) the dog sniff is not considered a Fourth Amendment search and need not be reasonably related to the purpose of the traffic stop. **Fn 16b**.

Fn. 16a.

"In Illinois v. Caballes, 543 U.S. 405 (2005), this Court held that a dog sniff conducted during a lawful traffic stop does not violate the Fourth Amendment's proscription of unreasonable seizures. This case presents the question whether the Fourth Amendment tolerates a dog sniff conducted after the completion of a traffic stop. We hold that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitutional shield against unreasonable seizures. A seizure justified only by a police-observed traffic violation, therefore, "become[s] unlawful if it is prolonged beyond the time required to complete th[e] mission" of issuing a ticket for the violation. Id. at 407. The Court has so recognized in Caballes, and we adhere to that decision." Rodriguez v. United States, 575 U.S. ___, 135 S.Ct. 1609, 1612 191 L.Ed.2d 492 (2015) (a dog sniff conducted 7-8 minutes after time for traffic stop was completed disapproved as not part of the traffic stop procedures; a "de minimis" Fourth Amendment intrusion rule rejected).

"A seizure for a traffic violation justifies a police investigation of that violation. A relatively brief encounter, a routine traffic stop is more analogous to a so-called Terry stop than a formal arrest. [citations and internal quotation marks omitted]. Like a Terry stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure's 'mission'—to address the traffic violation that warranted the stop, and attend to related safety concerns. (citations omitted). Because addressing the infraction is the purpose of the stop, it may last no longer than is necessary to effectuate that purpose. Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed." Rodriguez v. United States, 135 S.Ct. at 1613

"Beyond determining whether to issue a traffic ticket, an officer's mission includes ordinary inquiries incident to [the traffic] stop. Typically such inquiries involve checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the automobile's registration and proof of insurance. These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly.

"A dog sniff, by contrast, is a measure aimed at detecting evidence of ordinary criminal wrongdoing. Candidly, the Government acknowledged at oral argument that a dog sniff, unlike the routine measures just mentioned, is not an ordinary incident of a traffic stop. Lacking the same close connection to roadway safety as the ordinary inquiries, a dog sniff is not fairly characterized as part of the officer's traffic mission." Rodriguez v. United States, 135 S.Ct. at 1615 (internal citations, quotations and quotation marks omitted).

Fn. 16b. Illinois v. Caballes, 543 U.S. 405, 125 S.Ct. 834,150 L.Ed.2d 842 (2005); see Ch. 10, sec. 2(c) for further discussion of this issue.

c. Probable cause justifies custodial arrest for any offense; no limitation for minor offenses or where the arrest is unlawful under state law

Fn. 28, p. 197. Add the following :

"History shows that governments sometimes seek to regulate our lives finely, acutely, thoroughly and exhaustively. In our own time and place, criminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something." Nieves v. Bartlett, 587 U.S. ___, 139 S.Ct. 1715, 1730, 204 L.Ed.2d. 1, 19 (2019) (Gorsuch, J. concurring in part, dissenting in part).

e. Probable cause and reasonable suspicion: an overview

Fn. 52, p. 202, Probable cause standard

'To determine whether an officer had probable cause for an arrest, we examine the events leading up to the arrest, and then decide whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to probable cause. Because probable cause deals with probabilities and depends on the totality of the circumstances, it is a fluid concept that is not readily, or even usefully, reduced to a neat set of rules. It requires only a probability or substantial chance of criminal activity, not an actual showing of such activity. * * *

The totality of the circumstances require courts to consider the whole picture. Our precedents recognize that the whole is greater than the parts—especially when the parts are viewed in isolation." District of Columbia v. Wesby, 583 U.S. ___, 138 S.Ct. 577, 586, 199 L.Ed.2d 453, 463 (2018) (internal citations and quotations omitted).

p. 205, first complete paragraph, end of 1st sentence, add:

Fn. 59b

"History shows that governments sometimes seek to regulate our lives finely, acutely, thoroughly and exhaustively. In our own time and place, criminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something." Nieves v. Bartlett, 587 U.S. ___, 139 S.Ct. 1715, 1730, 204 L.Ed.2d. 1, 19 (2019) (Gorsuch, J. concurring in part, dissenting in part).

See Justice Sotomayor's summary of the wide-ranging power the courts have given the police over people who walk, or who drive vehicles, on the public streets:

> Although many Americans have been stopped for speeding or jaywalking, few may realize how degrading a stop can be when the officer is looking for more. This Court has allowed an officer to stop you for whatever reason he wants—so long as he can point to a pretextual justification after the fact. Whren v. United States, 517 U.S. 806, 813 (1996). That justification must provide specific

reasons why the officer suspected you were breaking the law, Terry, 392 U. S., at 21, but it may factor in your ethnicity, United States v. Brignoni-Ponce, 422 U. S. 873, 886–887 (1975), where you live, Adams v. Williams, 407 U. S. 143, 147 (1972), what you were wearing, United States v. Sokolow, 490 U. S. 1, 4–5 (1989), and how you behaved, Illinois v. Wardlow, 528 U. S. 119, 124–125 (2000). The officer does not even need to know which law you might have broken so long as he can later point to any possible infraction—even one that is minor, unrelated, or ambiguous. Devenpeck v. Alford, 543 U. S. 146, 154–155 (2004); Heien v. North Carolina, 574 U. S. ___ (2014).

The indignity of the stop is not limited to an officer telling you that you look like a criminal. See Epp, Pulled Over, at 5. The officer may next ask for your "consent" to inspect your bag or purse without telling you that you can decline. See Florida v. Bostick, 501 U. S. 429, 438 (1991). Regardless of your answer, he may order you to stand 'helpless, perhaps facing a wall with [your] hands raised.' Terry, 392 U. S., at 17. If the officer thinks you might be dangerous, he may then "frisk" you for weapons. This involves more than just a pat down. As onlookers pass by, the officer may 'feel with sensitive fingers every portion of [your] body. A thorough search [may] be made of [your] arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet.' Id., at 17, n. 13.

The officer's control over you does not end with the stop. If the officer chooses, he may handcuff you and take you to jail for doing nothing more than speeding, jaywalking, or 'driving [your] pickup truck . . . with [your] 3-year-old son and 5-year-old daughter . . . without [your] seatbelt fastened.' Atwater v. Lago Vista, 532 U. S. 318, 323–324 (2001). At the jail, he can fingerprint you, swab DNA from the inside of your mouth, and force you to 'shower with a delousing agent" while you 'lift [your] tongue, hold out [your] arms, turn around, and lift [your] genitals.' Florence v. Board of Chosen Freeholders of County of Burlington, 566 U. S. ___, ___–___ (2012) (slip op., at 2–3); Maryland v. King, 569 U. S. ___, ___ (2013) (slip op., at 28). Even if you are innocent, you will now join the 65 million Americans with an arrest record and experience the 'civil death' of discrimination by employers, landlords, and whoever else conducts a background check. Chin, The New Civil Death, 160 U. Pa. L. Rev. 1789, 1805 (2012); see J. Jacobs, The Eternal Criminal Record 33–51 (2015); Young & Petersilia, Keeping Track, 129 Harv. L. Rev. 1318, 1341–1357 (2016). And, of course, if you fail to pay bail or

> appear for court, a judge will issue a warrant to render you 'arrestable on sight' in the future. A. Goffman, On the Run 196 (2014).

Utah v. Strieff, 579 U.S. ___, 136 S.Ct. 2056, 2069-2070, 195 L.Ed.2d 400 (2015) (Sotomayor, J., concurring in part, dissenting in part).

m. Excessive force in effecting lawful arrest or temporary detention

p. 225, last paragraph, add:

Fn. 140, p. 225

"Our case law sets forth a settled and exclusive framework for analyzing whether the force used in making a seizure complies with the Fourth Amendment. As in other areas of our Fourth Amendment jurisprudence, determining whether the force used to effect a particular seizure is 'reasonable' requires balancing the individual's Fourth Amendment interests against the relevant government interests. The operative question in excessive force cases is whether the totality of the circumstances justifies a particular search or seizure.

"The reasonableness of the use of force is evaluated under an 'objective' inquiry that pays careful attention to the facts and circumstances of each particular case. And the reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than by the 20/20 vision of hindsight. Excessive force claims . . . are evaluated for objective reasonableness based on the information the officers had when the conduct occurred. That inquiry is dispositive: When an officer carries out a seizure that is reasonable, taking into account all relevant circumstances, there is no valid excessive force claim." City of Los Angeles v. Mendez, 581 U.S. ___,137 S.Ct. 1539, 1546-1547, 198 L.Ed.2d 52, 60 (2017) (internal citations and quotations omitted).

h. Officer's subjective intent: pretext arrest and stated offense

Fn. 86, p. 212.

"In the Fourth Amendment context, however, we have almost uniformly rejected invitations to probe subjective intent. Police officers conduct approximately 29,000 arrests every day – a dangerous task that requires making quick decisions in circumstances that are tense, uncertain, and rapidly involving. To ensure that officers may go about their work without undue apprehensive of being sued, we generally review their conduct under objective standards of reasonableness. Thus, when reviewing an arrest, we ask whether the circumstances viewed objectively justify the challenged action, and if so, conclude that the action was reasonable whatever the subjective intent motivating the relevant officials. A particular officer's state of mind is simply irrelevant and it provides no basis for invalidating the arrest." Nieves v. Bartlett, 587 U.S. ___, 139 S.Ct. 1715, 1724, 204 L.Ed. 2d 1, 19 (2019) (internal citations and quotation marks omitted).

Chapter 13. Searches Conducted with a Search Warrant.

Fn. 4, p. 238.

"Search warrants protect privacy in two main ways. First, they ensure that a search is not carried out unless a neutral magistrate makes an independent determination that there is probable cause to believe that evidence will be found. Second, if the magistrate finds probable cause, the warrant limits the intrusion on privacy by specifying the scope of the search—that is, the area that can be searched and the items that can be sought". Birchfield v. North Dakota, 579 U.S. ____, 136 S.Ct. 2160, 2181, 195 L.Ed.2d 560 (2016).

Chapter 14. Warrantless Searches and Criminal Exceptions to the Search Warrant Requirement Rule

Section 2. Search Incident to a Lawful Arrest

b. Rationale for exception

p. 269, last sentence on page, add new footnote.

Fn. 15a

For a thorough discussion of the historical background, rationale, and development of the search incident to a lawful arrest doctrine, see Birchfield v. North Dakota, 579 U.S. ____, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016).

c. Search of person: purpose of search irrelevant

p. 270, end of 1st paragraph, add new paragraph:

Nor, *based on this exception*, may law enforcement officers require a motorist lawfully arrested for drunk driving to submit to a warrantless blood draw to measure the level of alcohol in the person's bloodstream. This result is different, however, for the less intrusive breathalyzer test required of such a motorist—this test being justified as a search incident to a lawful arrest. **Fn.18a**

Fn. 18a.

Birchfield v. North Dakota, 579 U.S. ____, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016) (a. misdemeanor conviction reversed as against a motorist lawfully arrested for drunk driving who refused to submit to a blood draw; b. dismissal of misdemeanor charge reversed as against a motorist lawfully arrested for drunk driving who refused to submit to a breathalyzer test; c. two year suspension of driver's license reversed as against a motorist lawfully arrested for drunk driving who submitted to a blood draw showing his blood alcohol level above the legal limit, after being told that his refusal to submit to the test was a crime).

"Because breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, we conclude that a breath test, but not a blood test, may be administered incident to a lawful arrest for drunk driving. As in all cases involving reasonable searches, a warrant is not needed in this situation." 136 S.Ct. at 2185.

Cautionary note. Apart from the search incident to a lawful arrest exception, a warrantless blood draw may be justified in a drunk driving case under the exigent circumstance exception to the search warrant requirement rule. Mitchell v. Wisconsin, 588 U.S. ___, 139 S.Ct. 2525, 204 L.Ed.2d 1040 (2019) (plurality opinion) (a warrantless blood draw of a lawfully arrested drunk driver who becomes unconscious during arrest *held* presumptively reasonable under the 4th Amendment based on the exigent circumstances exception to the search warrant requirement rule). For a further discussion of this issue, see Section. 6e of this chapter.

Section 4. Moving Vehicle Exception: Carroll Doctrine

c. Rationale for exception

Fn. 62, p. 282

"The ready mobility of vehicles served as the core justification for the [moving vehicle] exception for many years. Later cases then introduced an additional rationale based on the pervasive regulation of vehicles capable of traveling on the public highways." Collins v. Virginia, 584 U.S. ___, 138 S.Ct. 1663, 1669, 201 L.Ed.2d 9, 18 (2018) (internal citations and case quotations marks omitted).

e. Place for search of the vehicle

At the end of this subsection at page 285, add the following:

On the other hand, law enforcement agents may not enter a home or its curtilage to search a moving vehicle located therein based on the moving vehicle exception to the search warrant requirement rule—even where the vehicle is visible from the public street. **Fn. 71a.**

Fn. 71a. "This case presents the question whether the [moving vehicle] exception [to the search warrant requirement of] the Fourth Amendment permits a police officer, uninvited and without a warrant, to enter the curtilage of a home in order to search a vehicle parked therein. It does not." * * *

"For the foregoing reasons, we conclude the [moving vehicle] exception does not permit an officer without a warrant to enter a home or its curtilage to enter a home or its curtilage to search a vehicle therein." Collins v. Virginia, 584 U.S. ___, 138 S.Ct. 1669, 201 L.Ed.2d 16, 24 (2018) (police officers, without a warrant or consent, entered the front driveway of a home and searched a motorcycle visible from the public street, but located in a small brick enclosure abutting the home at the top of the driveway; held: the motor vehicle exception to the search warrant requirement rule was inapplicable; case remanded to the Virginia Supreme Court to determine whether the exigent circumstances exception to the search warrant requirement rule justified the search).

"Just like the front porch, side garden, or area outside the front window, the driveway enclosure where Officer Rhodes searched the motorcycle constitutes an area adjacent to the home and to which the activity of home life extends, and so is properly considered curtilage." Collins v. Virginia, 138 S.Ct. at 1671, 201 L.Ed.2d at 19 (2018) (internal citations and quotation marks omitted).

"The driveway was private, not public, property, and the motorcycle was parked in the portion of the driveway beyond where a neighbor would venture, in an area 'intimately linked to the home . . . where privacy expectations are most heightened.'" (citation omitted). Collins v. Virginia, 138 S.Ct. at 1673, n. 3, 201 L.Ed.2d at 21, n. 3.

"[I]t is not dispositive that Officer Rhodes did not observe anything along the way to the motorcycle that he could not have seen from the street. Law enforcement officers need not shield their eyes when passing by a home on public thoroughfares, but the ability to observe an area protected by the Fourth Amendment does not give officers the green light physically to intrude on it." Collins v. Virginia, 138 S.Ct. at 1673, n. 3, 201 L.Ed.2d at 21, n. 3. (internal citations and quotation marks omitted).

"The ability to observe inside curtilage from a lawful vantage point is not the same as the right to enter curtilage without a warrant for the purpose of conducting a search to obtain information not otherwise accessible. So long as it is curtilage, a parking patio or carport into which an officer can see from the street is no less entitled to protection from trespass and a warrantless search than a fully enclosed garage." Collins v. Virginia, 138 S.Ct. at 1675, 201 L.Ed.2d at 23-24 (internal citations omitted.

Section 5. Consent Search

b. Application of the general rule

Fn. 93, p. 290.

As an aside, a motorist's decision to drive on the public roads does not constitute an "implied consent" to having his blood drawn when lawfully arrested for drunk driving where the state attaches a criminal penalty for refusing such a draw. Civil penalties may be assessed for such a refusal [i.e. loss of driver's license], but not criminal ones. Birchfield v. North Dakota, 579 U.S. ____, 136 S.Ct. 2160, 2185-2186, 195 L.Ed.2d 560 (2016) (misdemeanor conviction for refusal to submit to a blood draw in a drunk driving case reversed) ("[W]e hold that motorists cannot be deemed to have consented to a blood test on pain of having committed a criminal offense." 136 S.Ct. at 2186**).** But see Mitchell v. Wisconsin, 588 U.S. ___, 139 S.Ct. 2525, 204 L.Ed.2d 1040 (2019) (plurality opinion) (a lawfully arrested drunk driver who becomes unconscious during arrest may be subjected to a warrantless blood *without consent* based on the exigent circumstances exception to the search warrant requirement rule.)

Section 6. Exigent Circumstances Search

a. General Rule

Fn. 108, p. 294

See City and County of San Francisco v. Sheehan, 575 U.S. ___, 135 S.Ct. 1765, 1774-1775, 190 L.Ed.2d 434 (2015) "(Law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury. (internal citation and quotations omitted").

b. Hot pursuit of a fleeing felon

Fn. 112, p. 296, end of footnote:

There is, however, no absolute prohibition against the police entering a house to make a "hot pursuit" arrest for a misdemeanor as the law here is not "clearly established." See Stanton v. Sims, 571 U.S. ___, 134 S.Ct. 3, 187 L.Ed.2d 341 (2013) (defendant police officer entitled to qualified immunity against a 42 U.S.C. 1983 civil rights suit when he entered the curtilage of plaintiff's home in" hot pursuit" of a suspect to make a misdemeanor arrest for disobeying a lawful order of a police officer; officer swung open the gate to the yard, accidentally hit the plaintiff with the gate, and injured her; held: not "clearly established" Fourth Amendment law that a police officer may never enter a private home to make a "hot pursuit" arrest for a misdemeanor).

c. Life-Threatening or perilous situations

Fn. 115, p. 297, after Rayburn v. Huff

City and County of San Francisco v. Sheehan, 575 U.S. ___, 135 S.Ct. 1765, 190 L.Ed.2d 434 (2015) (qualified immunity shielded from civil rights suit two police officers who broke into a private room in a group home for mental patients and used non-deadly [pepper spray] and ultimately deadly force [multiple gun shots]to subdue a mentally unstable, knife-wielding mental patient therein who had threatened the life of the officers and a social worker at the home in two other earlier entries into the room).

e. Other searches

Add the following new paragraph at the end of this subsection on p. 301:

Moreover, the exigent circumstances exception "almost always" applies in the narrow circumstance where a motorist, lawfully arrested for drunk driving, is unconscious and therefore cannot be given a breath test; a warrant authorizing a blood draw is such a case is not required under the Fourth Amendment. This is so because the motorist's unconsciousness constitutes a medical emergency that requires that the motorist be taken to a hospital emergency room where ordinarily a blood draw is medically necessary for diagnostic purposes. Fn. 125a.

This rule, however, does not apply, if the defendant motorist can show that (1) his blood would never have been drawn if the police had *not* been seeking his blood alcohol content, i.e. if such a blood draw was medically unnecessary, and (2) it was unreasonable under the circumstances for the police to believe that a warrant application would have interfered with their other pressing

needs or duties. If that showing can be made, a warrant authorizing a blood draw is required under the Fourth Amendment. Fn. 125b.

Fn. 125a. "*Today, we consider what a police officer may do in a narrow but important category of cases: those in which the driver is unconscious and therefore cannot be given a breath test. In such cases, we hold that the exigent-circumstances rule almost always permits a blood test.* When a breath test is impossible, enforcement of the drunk-driving laws depends upon administration of a blood test. And when a police officer encounters an unconscious driver, it is very likely that the driver would be taken to an emergency room and his blood would be drawn for diagnostic purposes even if the police were not seeking BAC [blood alcohol content] information. In addition, police officers most frequently come upon unconscious drivers when they report to the scene of an accident, and under those circumstances, the officers' many responsibilities—such as attending to other injured drivers or passengers and preventing further accidents—may be incompatible with the procedures that would be required to obtain a warrant. Thus, when a driver is unconscious, the general rule is that a warrant is not needed. " Mitchell v. Wisconsin, 588 U.S. ___, 139 S.Ct. 2525, 2531, 204 L.Ed.2d 1040, 1043 (2019) (plurality opinion) (emphasis added) (lawfully arrested defendant for drunk driving becomes unconscious and is rushed to the hospital where his blood is drawn; *held* blood draw presumptively reasonable under the 4th Amendment based the exigent circumstances exception to the search warrant requirement rule; case remanded for defendant to be given an opportunity to show that an exception to the exigent circumstances rule exists in this case).

Fn. 125b." When the police have probable cause to believe a person has committed a drunk-driving offense and the driver's unconsciousness or stupor requires him to be taken to the hospital or similar facility before police have a reasonable opportunity to administer a standard evidentiary breath test, they may *almost always* order a warrantless blood test to measure the driver's BAC [blood alcohol content] without offending the Fourth Amendment. *We do not rule out the possibility that in an unusual case a defendant would be able to show that his blood would not have been drawn if police had not been seeking BAC [blood alcohol content] information, and that police could not have reasonably judged that a warrant application would interfere with other pressing needs or duties. Because Mitchell did not have a chance to attempt to make that showing, a remand for that purpose is necessary.*" Mitchell v. Wisconsin, 588 U.S. ___, 139 S.Ct. 2525, 2539, 204 L.Ed.2d 1040, 1052 (2019) (plurality opinion) (emphasis added) (factual summary same as above).

See Schmerber v. California, 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966), as interpreted in Mitchell v. Wisconsin, 588 U.S. ___, 139 S.Ct. 2525, 253, 204 L.Ed.2d 1050- 1051 (2019), Missouri v. McNeely, 569 U.S. ___, 133 S.Ct. 1552, 1558-1560, 185 L.Ed.2d 696 (2013) (warrantless blood draw upheld in Schmerber under the circumstances of that case, namely, that there was no time for police to get a warrant without undermining the efficacy of the blood test).

Also see Section 2c of this chapter for a discussion of whether blood draws and breathalyzer tests in drunk driving cases are justified under the search incident to a lawful arrest exception to the search warrant requirement rule.

Chapter 15. Warrantless Searches and Civil or Special Needs Exceptions to the search warrant requirement Rule

Section 2. Primary Civil or Special Needs Exceptions

c. Administrative inspection search

(2) Statutory inspections programs of particular businesses

Fn. 45, p. 312

"Over the past 45 years, the Court has identified only four industries that 'have such a history of government oversight that no reasonable expectation of privacy . . . could exist for a proprietor over the stock of such an enterprise ' [namely]. . . liquor sales . . . firearms dealing . . . mining . . . or running an automobile junkyard. [citations omitted]." City of Los Angeles v. Patel, 576 U.S. ___, 135 S.Ct. 2443, 2454, 192 L.Ed.2d 435 (2015) (internal citations omitted) (the hotel industry held not a "closely regulated" industry).

The lower federal and state courts have identified the following industries as "closely regulated"—pharmacies, massage parlors, commercial-fishing operations, day-care facilities, jewelers, barbershops, and rabbit dealers. City of Los Angeles v. Patel, 576 U.S. ___, 135 S.Ct. 2443, 192 L.Ed.2d 435 (2016) (Scalia, J. dissenting). The U.S. Supreme Court, however, has not passed on these lower court decisions.

p. 312, end of 2d paragraph, add this sentence:

The Court has also struck down a statute authorizing a warrantless inspection of a hotel operator's guest registry for failure to give the operator an opportunity to obtain a precompliance review of the inspection before a neutral decisionmaker—concluding that the hotel industry is not "closely regulated." **Fn. 50b**

Fn. 50b.

City of Los Angeles v. Patel, 576 U.S. ___, 135 S.Ct. 2443, 192 L.Ed.2d 435 (2015).

p. 312, new sub-section:

(4) Precompliance Review Hearing

An administrative inspection of a business —at least one that is that is not "closely regulated"— can only take place, as a general rule, where the business owner or operator is given an *opportunity* to obtain a precompliance review of the inspection before a neutral decision-maker. This would be the case, for example, if a subpoena is issued for such an inspection and the owner or operator of the business is authorized to move to quash the subpoena and be heard in court before the inspection takes place. There are, however, exceptions to this rule where: (1) the owner or operator of such business consents to the inspection, or (2) exigent circumstances exist that compel an emergency inspection**. Fn. 53a**

Fn. 53a.

City of Los Angeles v. Patel, 576 U.S. ___, 135 S.Ct. 2443, 192 L.Ed.2d 435 (2015) (municipal ordinance authorizing a warrantless administrative inspection of a hotel's guest registry held (1) facially invalid under the Fourth Amendment for failure to give the hotel owner or operator an opportunity to have a precompliance review of the inspection before a neutral decisionmaker; and (2) not otherwise justified under the administrative inspection exception to the search warrant requirement rule as (a) hotel industry is not "closely regulated" and (b) statute fails to satisfy other requirements for this exception).

"Respondents brought a Fourth Amendment challenge to a provision of the Los Angeles Municipal Code that compels '[e]very operator of a hotel to keep a record' containing specified information concerning guests and to make this record 'available to any officer of the Los Angeles Police Department for inspection' on demand. [citation omitted]. . . . We hold facial challenges can brought under the Fourth Amendment. We further hold that the provision of the Los Angeles Municipal Code that requires hotel operators to make their registries available to the police on demand is facially unconstitutional because it penalizes them for declining to turn over their records without affording them an opportunity for precompliance review." City of Los Angeles v. Patel, 576 U.S. ___, 135 S.Ct. 2443, 2447, 192 L.Ed.2d 435 (2015) .

"The Court has held that absent consent, exigent circumstances and the like, in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker. . . . And, we see no reason why this minimal requirement is inapplicable here." City of Los Angeles v. Patel, 576 U.S. ___, 135 S.Ct. 2443, 2452, ____, 192 L.Ed.2d 435 (2015) .

"To be clear, we hold only that the hotel owner must be given an *opportunity* to have a neutral decision-maker review an officer's demand to search the registry before he or she faces penalties for failing to comply. Actual review need only occur in those rare instances where a hotel owner objects to turning over the registry. . . . For instance, respondents accept that the searches authorized by sec. 41.49(3)(a) would be constitutional if they were performed pursuant to an administrative subpoena. These subpoenas, which are typically a simple form, can be issued by the individual seeking the record—here, officers in the field—without probable cause that a regulation is being infringed. * * * [W]here a subpoenaed hotel operator believes that an attempted search is motivated by illicit purposes, respondents suggest it would be sufficient, if he or she could move to quash the subpoena before any search takes place. [citation omitted]. A neutral decisionmaker, including an administrative law judge, would then review the subpoenaed party's objections before deciding whether the subpoena is enforceable." City of Los Angeles v. Patel, 576 U.S. ___, 135 S.Ct. 2443, 2453, 192 L.Ed.2d 435 (2015)

See Chapter 14, Sec, 5 & 6 for a discussion the consent and exigent circumstances exception to the search warrant requirement.

Chapter 16. Special Unreasonableness Requirement Problems

Section 4. Subpoena Duces Tecum

b. General reasonableness standards

p. 350, add the following new paragraph to end of this subsection:

The Court has also held that a subpoena duces tecum may *not* be used to access records in which a person has a reasonable expectation of privacy. A search warrant is generally required to seize such records, absent an exception to the search warrant requirement rule. **Fn. 119a.**

Fn. 119a. Carpenter v. United States, 585 U.S. ___, 138 S.Ct. 2206, 201 L.Ed.2d 507 (2018) (warrantless governmental search of cell-site location records in the possession of wireless cell phone companies revealing the defendant's physical location with his cell phone over a period of 127 days required a search warrant to obtain based on probable cause; a court order resembling a subpoena duces tecum was not constitutionally permissible to access these records).

"The Government acquired the cell-site records pursuant to a court order issued under the Stored Communications Act, which required the Government to show 'reasonable grounds' for believing that the records were 'relevant and material to an ongoing investigation.' That showing falls short of the probable cause required for a warrant. The Court usually requires some quantum of individualized suspicion before a search may take place. Under the standard in the Stored Communications Act, however, law enforcement need only show the that the cell-site evidence might be pertinent to an ongoing investigation—a 'gigantic' departure from the probable cause rule, as the Government explained below. Consequently, an order issued under Section 2703(d) of the Act is not a permissible mechanism for accessing historical cell-site records. Before compelling a wireless carrier to turn over a subscriber's CSLI, the Government's obligation is a familiar one—get a warrant." Carpenter v. United States, 201 L.Ed.2d at 525-526.

Change the title to Section 8, p. 359

Section 8. Cell Phone Searches and Records

Add new paragraph, p. 361

A search warrant is generally required in order for law enforcement officials to obtain cellphone location records held by a third party wireless carrier which reveal the physical location of a cellphone user when making a phone call. The warrant must be supported by probable cause, and cannot be constitutionally obtained based on the showing required for a subpoena duces tecum; namely, reasonable grounds to believe that the records are relevant and pertinent to an ongoing criminal investigation. Nonetheless, the exigent circumstances exception to the search warrant requirement rule may be applicable in a given case, depending on the facts and circumstances, which would authorize such a search without a warrant. **Fn. 160a.**

Fn. 160a. Carpenter v. United States, 585 U.S. ___, 138 S.Ct. 2206, 201 L.Ed.2d 507 (2018) (warrantless governmental search of cell-site location records in the possession of wireless cell phone companies revealing the defendant's physical location with his cell phone over a period of 127 days required a search warrant to obtain based on probable cause; the order issued by a federal court directing the production of such records pursuant to a congressional statute, which required only a showing that there were "reasonable grounds" for believing that the records sought "were relevant and material to an ongoing investigation," did not meet this constitutional requirement).

"Having found that the acquisition of [the defendant's] CSLI [Cell Site Location Information]was a search, we also conclude that the Government must generally obtain a search warrant supported by probable cause before acquiring such records." Carpenter v. United States, 201 L.Ed.2d at 525.

"The Government acquired the cell-site records pursuant to a court order issued under the Stored Communications Act, which required the Government to show 'reasonable grounds' for believing that the records were 'relevant and material to an ongoing investigation.' That showing falls short of the probable cause required for a warrant. The Court usually requires some quantum of individualized suspicion before a search may take place. Under the standard in the Stored Communications Act, however, law enforcement need only show the that the cell-site evidence might be pertinent to an ongoing investigation—a 'gigantic' departure from the probable cause rule, as the Government explained below. Consequently, an order issued under Section 2703(d) of the Act is not a permissible mechanism for accessing historical cell-site records. Before compelling a wireless carrier to turn over a subscriber's CSLI, the Government's obligation is a familiar one—get a warrant. Carpenter v. United States, 201 L.Ed.2d at 525-526.

"Further, even though the Government will generally need a warrant to access CLSI, case-specific exceptions may support a warrantless search of an individual's cell-site records under certain circumstances. One well-recognized applies when the exigencies of the situation make the needs of law enforcement so compelling that a warrantless search is objectively reasonable under the Fourth Amendment. Such exigencies include the need to pursue a fleeing suspect, protect individuals who are threatened with imminent harm, or prevent the imminent destruction of evidence.

As a result, if law enforcement is confronted with an urgent situation, such fact-specific threats will likely justify the warrantless collection of CSLI. Lower courts, for instance, have approved warrantless searches related to bomb threats, active shootings, and child abductions. Our decision today does not call into doubt warrantless access to CSLI in such circumstances. While police must get a warrant when collecting CSLI to assist in the mine-run criminal investigation, the rule we set forth does not limit their ability to respond to an ongoing emergency. Carpenter v. United States, 201 L.Ed.2d at 527 (internal citations and quote marks omitted).

Part II. Substantive Law of the Fourth Amendment, cont'd

Subpart C. Enforcement of the Fourth Amendment

Chapter 17. Historical Development, Nature and Purpose and Substantive Law of the Exclusionary Rule

Section 2. Nature and Purpose of the Exclusionary Rule

Fn. 52, p. 374

But see Collins v. Virginia, 584 U.S. ___, 138 S.Ct. 1663, 1675, 201 L.Ed.2d 9, 24 (2018) (Thomas, J. concurring) (expressing the view that the exclusionary rule has no historical basis; that the rule should not be enforced against the states under the Due Process Clause of the Fourteen Amendment; and that Mapp v. Ohio should be overruled); see also Justice Alito's dissenting opinion which appears to agree with this view. Collins v. Virginia, 138 S.Ct. at 1680, 201 L.Ed.2d at 29.

Section 3. Fruit of the Poisonous Tree Doctrine

a. General rule

Fn. 53, p. 374

"Under the Court's precedents, the exclusionary rule encompasses both the primary evidence obtained as a direct result of an illegal search or seizure and, relevant here, evidence later discovered and found to be derivative of an illegality, the so-called fruit of the poisonous tree." Utah v. Strieff, 579 U.S. ____, 136 S.Ct. 2056, 2061, 195 L.Ed.2d 400 (2016) (internal citations and quotations omitted).

p. 375. End of subsection 3a, new paragraph.

The Court engages in a balancing analysis in determining whether the evidence discovered during an illegal search or seizure was the "fruit" of that illegality—or whether the causal chain that led to this evidence has been broken. Three factors are necessarily involved : (1) the temporal proximity between the initial illegality and the evidence seized, (2) the presence of intervening circumstances, and (3) the purpose and flagrancy of the initial illegality**. Fn. 55a.**

"It remains for us to address whether the discovery of a valid arrest warrant was a sufficient intervening event to break the causal chain between the unlawful stop and the discovery of drug-related evidence on Strieff's person.

The three factors articulated in Brown v. Illinois, 422 U. S. 590 (1975), guide our analysis. First, we look to the 'temporal proximity' between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search. Second, we consider 'the presence of intervening circumstances.' Third, and particularly significant, we examine 'the purpose and flagrancy of the official misconduct.' (internal citations omitted)." Utah v. Strieff, 579 U.S. ___, 136 S.Ct. 2056, 2061, 195 L.Ed.2d 400 (2016)

b. Examples of derivative fruits of an unreasonable search or seizure

(5) Contrary examples

p. 378 , after 1st compete paragraph, add a new paragraph:

Valid warrant discovered during illegal stop. Where a law enforcement officer makes a non-flagrant but illegal investigatory stop of a suspect, and during the stop discovers a valid outstanding arrest warrant against the suspect, any evidence seized incident to the arrest of the suspect is not subject to the Fourth Amendment exclusionary rule. This is so because the discovery of the warrant, under these circumstances, attenuated the connection between the illegal stop and the evidence seized so as to purge the taint of the initial illegality. **Fn. 73a.**

This result, however, might be different if the express purpose of the stop was to conduct a "fishing expedition" for possible evidence of a crime. **Fn. 73b.** For example, where police officer randomly stops an automobile for a driver's license, car registration, or warrants check to see if any laws have been broken **Fn. 73c** —or where a police officer randomly stops a person on the street for an ID and conducts a warrants check for the same purpose. **Fn. 73d.** Such clearly illegal stops could be considered flagrant in nature—and consequently the later discovery of an outstanding warrant might be considered tainted by the prior illegal stop. The Court, however, has yet to address these issues. **Fn. 73e.**

Fn. 73a.

"To enforce the Fourth Amendment's prohibition against 'unreasonable searches and seizures,' this Court has at times required courts to exclude evidence obtained by unconstitutional police conduct. But the Court has also held that, even when there is a Fourth Amendment violation, this exclusionary rule does not apply when the costs of exclusion outweigh its deterrent benefits. In some cases, for example, the link between the unconstitutional conduct and the discovery of the evidence is too attenuated to justify suppression. The question in this case is whether this attenuation doctrine applies when an officer makes an unconstitutional investigatory stop; learns during that stop that the suspect is subject to a valid arrest warrant; and proceeds to arrest the suspect and seize incriminating evidence during a search incident to that arrest. We hold that the evidence the officer seized as part of the search incident to arrest is admissible because the officer's discovery of the arrest warrant attenuated the connection between the unlawful stop and the evidence seized incident to arrest. * * *

"It remains for us to address whether the discovery of a valid arrest warrant was a sufficient intervening event to break the causal chain between the unlawful stop and the discovery of drug-related evidence on Strieff's person. The three factors articulated in Brown v. Illinois, 422 U. S. 590 (1975), guide our analysis. First, we look to the 'temporal proximity' between the unconstitutional conduct and the discovery of evidence to determine how closely the discovery of evidence followed the unconstitutional search. Second, we consider 'the presence of intervening circumstances.' Third, and particularly significant, we examine 'the purpose and flagrancy of the official misconduct.' (internal citations omitted)." * * *

"Applying these factors, we hold that the evidence discovered on Strieff's person was admissible because the unlawful stop was sufficiently attenuated by the preexisting arrest warrant. Although the illegal stop was close in time to Strieff's arrest, that consideration is outweighed by two factors supporting the State. The outstanding arrest warrant for Strieff's arrest is a critical intervening

circumstance that is wholly independent of the illegal stop. The discovery of that warrant broke the causal chain between the unconstitutional stop and the discovery of evidence by compelling Officer Fackrell to arrest Strieff. And, it is especially significant that there is no evidence that Officer Fackrell's illegal stop reflected flagrantly unlawful police misconduct."

Utah v. Strieff, 579 U.S. ____, 136 S.Ct. 2056, 2059, 2061, 2063, 195 L.Ed.2d 400 (2016) (investigatory stop of defendant who left a house that an anonymous tipster said was a drug house, conceded by the state to be an illegal stop; valid outstanding traffic warrant discovered during the stop when detaining officer relayed defendant's ID to a police dispatcher; defendant arrested pursuant to the warrant and searched incident to the arrest; illegal drugs and drug paraphernalia seized from defendant's person; defense motion to suppress this evidence properly denied).

Fn. 73b.

The Court in the Strieff case expressly notes that the detaining officer in the case did not stop the defendant as part of a suspicionless fishing expedition. "He [the defendant] asserts that Officer Fackrell stopped him solely to fish for evidence of suspected wrongdoing. But Officer Fackrell sought information from Strieff to find out what was happening inside a house whose occupants were legitimately suspected of dealing drugs. This was not a suspicionless fishing expedition in the hope that something might turn up." Utah v. Strieff, 579 U.S. ____, 136 S.Ct. 2056, 2064, 195 L.Ed.2d 400 (2016). If that were the case, however, this stop might have been considered flagrant.

Fn. 73c

The Court has squarely disapproved of these tactics. It is "clearly established" law that a police officer may not randomly stop cars on the street for driver's license and car registration checks. "[W]e hold that except in those situations in which there is at least articulable and reasonable suspicion that a motorist is unlicensed or that the automobile is unlicensed, or either the vehicle or an occupant is otherwise subject to seizure for violation of the law, stopping an automobile and detaining the driver in order to check his [or her] driver's license and the registration of the automobile is unreasonable under the Fourth Amendment. . . . We hold only that persons in automobiles on the public roadways may not for that reason alone have their travel and privacy interfered with at the unbridled discretion of the police." Delaware v. Prouse, 440 U.S. 648, 99 S.Ct. 1391, 59 L.Ed. 2d 660, 673-674 (1979). An officer who does so anyway is acting recklessly or with gross negligence and is subject to civil liability. See Chapter 17, Sec. 6g of this work.

Fn. 73d.

The Court has held that it is a violation of the Fourth Amendment for a police officer to randomly stop a person on the street for the sole purpose of making an ID check. "The application of [Texas statute] to detain appellant and require him to identify himself violated the Fourth Amendment because the officers lacked reasonable suspicion to believe appellant had engaged in criminal conduct. Accordingly, appellant may not be punished for refusing to identify himself, and the conviction is reversed." Brown v. Texas, 443 U.S. 47, 99 S.Ct. 2637, 2641, 61 L.Ed.2d 357 (1979) (statute made it an offense to refuse to give his or her name when requested by police). An officer

who engages in such behavior based on a whim or a hunch is violating "clearly established" Fourth Amendment law and is subject to civil liability. See Chapter 17, Sec. 6g of this work.

Fn. 73e.

Other issues also remain outstanding.

One central issue, which the Court expressly declines to decide in Strieff, is "whether the warrant's existence alone would make the initial stop constitutional even if Officer Fackrell was unaware of its existence." Utah v. Strieff, 136 S.Ct. at 2062.

Clearly, if Officer Fackrell actually knew of the warrant's existence, Strieff's arrest would be valid. But the police department as a whole already knew of the warrant's existence as this fact was in the police department's computer system. The police didn't learn about the warrant as a result of Strieff's invalid stop—they already knew. Presumably, a court clerk had previously informed the police of the warrant's existence.

So why can't the police knowledge of this warrant be imputed to Officer Fackrell? If we don't do that and base it all on Officer Fackrell's subjective knowledge, doesn't that result collide with the line of cases holding that probable cause to arrest must be based on an objective assessment of the totality of the circumstances and not the arresting officer's subjective intent? See e.g. Scott v. United States, 436 U.S. 128, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978); Chapter 12, Sec. 1h of this work.

More importantly, what happens if a court in a future case concludes that the discovery of the arrest warrant was the fruit of a *flagrantly unconstitutional* police stop? The arrest warrant would still seem to be perfectly valid; the flagrantly unconstitutional stop of the defendant would not seem to invalidate an otherwise properly-issued warrant. Accordingly, any arrest made pursuant to the warrant would therefore be lawful, and any search incident to the arrest would be equally valid. The flagrancy of the stop would seem to make no constitutional difference.

If this analysis is correct, doesn't that encourage the police to make flagrantly unconstitutional stops in the hope of discovering outstanding arrest warrants against the person stopped? The exclusionary rule will never apply in these situations as the arrest pursuant to the warrant will always be valid.

Adding to this problem is the ocean of outstanding arrest warrants that exist in the country. Justice Sotomayor in her dissent in Strieff notes that "[t]he States and Federal Government maintain a database with over 7.8 million outstanding warrants, the vast majority of which appear to be for minor offenses. Even these sources may not track the 'staggering' numbers of warrants, 'drawers and drawers' full, that many cities issue for traffic violations and ordinance infractions. The county in this case has had a 'backlog' of such warrants. The Department of Justice reported that in the town of Ferguson, Missouri, with a population of 21,000, 16,000 people had outstanding warrants against them." Utah v. Strieff, 136 S.Ct. at 2070 (Sotomayor, J. dissenting) (citations omitted).

But is the trouble not with Fourth Amendment doctrine upholding arrests based on such warrants, but with issuance of so many warrants in the first place? Are any of these warrants improperly issued? No doubt many are. For example, suppose the warrant issued was for failure of the defendant to appear in court to face a minor charge, such as a traffic violation, where the defendant was not given due process notice to appear in court at the proper time and place? Wouldn't that invalidate the warrant? Not all warrants that appear in a police department's computer system are validly-issued warrants.

We await the Court's future efforts to deal with these difficult issues.

Section 6. Miscellaneous Procedural and Appellate Considerations: Alternative Civil Remedy

g. Alternative civil remedy: Bivens suit and sec. 1983 suit

Fn. 175, p. 401

See also Lozman v. City of Riviera Beach, 585 U.S. ___, 138 S. Ct. 1945, 201 L.Ed.2d 342 (2018) (probable cause for arrest does not bar a claim for retaliatory arrest for exercising First Amendment free speech rights).

p. 401, add the following new paragraph:

A *Bivens* action, however, is limited to claims against individual federal officials for their own acts and is inapplicable to officials for the acts of their subordinates on a respondeat superior theory. **Fn. 178a** Nor does a *Bivens* action lie in a "new" context, that is where the action is different in a meaningful way from previous *Bivens* cases—as, for example, to claims made by aliens who were detained for national security reasons in the wake of the 9/11 attacks and ultimately deported. Congress, not the courts, should make the decision whether a tort action is available in this new context. **Fn. 178b.**

Fn. 178a. "[A] *Bivens* claim is brought against the individual officer for his or her own acts. The purpose of *Bivens* is to deter the officer. Bivens is not designed to hold officers responsible for the acts of their subordinates. Government officials may not be held liable for the unconstitutional conduct of their subordinates under a theory of respondeat superior." Ziglar v. Abbassi, 582 U.S. ___, 137 S.Ct. 1843, 1860,198 L.Ed.2d 290, 312 (2017) (internal citations and quotations omitted).

Fn. 178b. "After considering the special factors necessarily implicated by the detention policy claims [in this case], the Court now holds that those factors show that whether a damage action should be allowed is a decision for the Congress to determine, not the courts." Ziglar v. Abbassi, 582 U.S. ___, 137 S.Ct. 1843, 1860, 198 L.Ed.2d 290, 312(2017) (Bivens suit brought by six alien males of Arab or South Asian descent against federal executive and prison warden officials for their 3-8 month detention and mistreatment while in custody under a hold-until-cleared policy after the 9/11 attacks, following which they were deported, was subject to dismissal as an improper *Bivens* suit).

See also Hernandez v. Mesa, 582 U.S. ___, 137 S.Ct. 2003, 198 L.Ed.2d 625 (2017) (5th Circuit's affirmance of the dismissal a *Bivens* suit involving a cross-border shooting incident reversed and remanded to the 5th Circuit to determine whether special factors exist in this case under Ziglar v. Abbassi to bar a *Bivens* claim in this context).

Fn. 180, p. 402, after Brosseau v. Haugen:

Mullenix v. Luna, 577 U.S. ___, 136 S.Ct. 305, 193 L.Ed.2d 255 (2015) (same).

Fn. 186, p. 404.

Even where the police officer prevails on the qualified immunity issue, the officer may still be able to appeal the final judgment in the officer's favor where the officer has lost on the initial constitutional issue and the Court has held that the officer's conduct violated the Fourth Amendment. For a thorough discussion of this issue. See Camreta v. Greene, 563 U.S. ___, 131 S.Ct. 2020, 179 L.Ed.2d 118 (2011).

Fn. 188, p. 404.

See Sause v. Bower, 585 U.S. ___, 138 S.Ct. 2561, ___ L.Ed.2d ____ (2018) (liberally reading a pro se 42 Sec. 1983 complaint alleging that police prevented plaintiff from praying in her apartment while police were in the apartment stated a valid Fourth and First Amendment claim and was improperly dismissed).

See also Carroll v. Carman, 574 U.S. _____, 135 S. Ct. 348, 190 L.Ed.2d 311 (2014).

Fn. 189, p. 404

"Public officials are immune from suit under 42 U. S. C. §1983 unless they have violated a statutory or constitutional right that was clearly established at the time of the challenged conduct. An officer cannot be said to have violated a clearly established right unless the right's contours were sufficiently definite that any reasonable official in [his] shoes would have understood that he was violating it, meaning that existing precedent . . . placed the statutory or constitutional question beyond debate. This exacting standard gives government officials breathing room to make reasonable but mistaken judgments by protect[ing] all but the plainly incompetent or those who knowingly violate the law." City and County of San Francisco v. Sheehan, 575 U.S. ___, 135 S.Ct. 1765, 1774, 190 L.Ed.2d 434 (2015) (internal citations and quotations omitted) (qualified immunity shielded from suit two police officers who broke into a private room in a group home for mental patients and used non-deadly [pepper spray] and ultimately deadly force [multiple gun shots] to subdue a mentally unstable, knife-wielding mental patient therein who had threatened the life of the officers and a social worker at the home in two other earlier entries into the room).

"The doctrine of qualified immunity shields officials from civil liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. A clearly established right is one that is sufficiently clear that every reasonable official would have understood that what he is doing violates that right. We do not require a case directly on point, but existing precedent must have placed the statutory or constitutional question

beyond debate. Put simply, qualified immunity protects all but the plainly incompetent or those who knowingly violate the law.

"We have repeatedly told courts not to define clearly established law at a high level of generality. The dispositive question is whether the violative nature of particular conduct is clearly established. This inquiry "must be undertaken in light of the specific context of the case, not as a broad general proposition. Such specificity is especially important in the Fourth Amendment context, where the Court has recognized that it is sometimes difficult for an officer to determine how the relevant legal doctrine, here excessive force, will apply to the factual situation the officer confronts." Mullenix v. Luna, 577 U.S. ___, 136 S.Ct. 305, 308, 193 L.Ed.2d 255 (2015) (internal citations and quotations omitted) (in 42 U.S sec. 1983 action, qualified immunity shielded from suit a police officer who shot and killed a man in a high speed police chase on an interstate highway) ("The Court has thus never found the use of deadly force in connection with a dangerous car chase to violate the Fourth Amendment, let alone a basis for denying qualified immunity." 136 S.Ct. at ___).

"Qualified immunity attaches when an officer's conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. While this Court's case law does not require a case directly on point for a right to be clearly established, existing precedent must have placed the statutory or constitutional question beyond debate. In other words, immunity protects all but the plainly incompetent or those who knowingly violate the law.

"In the last five years, this Court has issued a number of opinions reversing federal courts in qualified immunity cases. The Court has found it necessary both because qualified immunity is important to society as a whole and because as immunity from suit, qualified immunity is effectively lost if a case is erroneously allowed to go to trial.

"Today, it is again necessary to reiterate the long-standing principle that 'clearly established law' should not be defined at a high level of generality. As this court explained decades ago, the clearly established law must be particularized to the facts of the case. Otherwise, plaintiffs would be able to convert the rule of qualified immunity into a rule of virtually unqualified liability simply by alleging violation of extremely abstract rights." White v. Pauly, 580 U.S. ___, 137 S.Ct. 550, 551-552, 196 L.Ed.2d 463, 468 (2017) (internal citations and quotations omitted) (qualified immunity shielded from 42 U.S.C.1983 suit involving shooting incident between police and occupants of a private home; officer arrived late on the scene as the home occupant announced they had guns and started firing at the police; officer fired back, killing one of the occupants; police were there to investigate a DUI offense).

See Kisla v. Hughes, 584 U.S. ___, 138 S.Ct. 1148, 200 L.2d 449 (2018) (police officers receive a report that a woman was engaging in erratic behavior with a knife; upon arrival on the scene, police observe the woman described in the report advancing on another woman with a knife; police order this woman to drop the knife; she refuses; police drop to the ground and shot the woman; Held: police officer was entitled to qualified immunity in 42 U.S.C. sec. 1983 suit).

See District of Columbia v. Wesby, 583 U.S. ___, 138 S.Ct. 577, 199 L.Ed.2d 453 (2018) (police arrest partygoers in vacant house engaged in a raucous late night strip joint activities for unlawful entry; court finds probable cause for the arrests and, in any event, qualified immunity in 42 U.S.C. sec. 1983 suit brought by partygoers against police.)

See Escondido v. Emmons, 585 U.S. ___, 139 S.Ct. 500, 202 L.Ed.2d 455 (2019) (Court reverses a 9th CCA reversal of a summary judgment for police officer based on qualified immunity in 42 U.S.C sec. 1983 claim alleging excessive use of force; Court remands case to the 9th CCA with directions to determine whether the officer's use of physical force in effecting this arrest constituted excessive force under clearly established 4th Amendment law based on the specific facts of the case).

See also Nieves v. Bartlett, 587 U.S. ___, 139 S.Ct. 1715, 204 L.Ed. 2d 1 (2019) (42. U.S.C. sec. 1983 claim that police violated plaintiff's First Amendment rights by arresting him in retaliation for plaintiff's exercise of protected First Amendment speech; *held* plaintiff must plead and prove there was no probable cause for the arrest, unless plaintiff presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the protected speech would *not* have been arrested, e.g., an arrest for an offense that is typically ignored by police such as jaywalking).

Fn.190, p. 404.

See also Stanton v. Sims, 571 U.S. ___, 134 S.Ct. 3, 187 L.Ed.2d 341 (2013) (defendant police officer entitled to qualified immunity in a 42 U.S.C. sec. 1983 civil rights suit).

p. 405. Add the following two new paragraphs preceding the last paragraph on that page.

A Fourth Amendment 42 U.S.C. Sec. 1983 claim lies for unlawful detention where a person has been detained under a magistrate's order finding probable cause based on fabricated evidence. This is so because the Fourth Amendment's protection for an arrested individual extends beyond the magistrate's order finding probable cause where that finding is based on fabricated evidence. In that event, the legal process has gone awry and the arrestee is being held without probable cause in violation of the arrestee's Fourth Amendment rights. **Fn 191a.**

A similar claim does *not* lie where police make a seizure of a person using reasonable force but commit a preceding Fourth Amendment violation that contributed to the need for such force. For example, where police unlawfully enter a home without a required search warrant and are immediately confronted with a person therein with a gun pointed at the police, the police may reasonably respond with deadly force; no 42 U.S.C. sec. 1984 claim lies for the use of such force under these circumstances. Nonetheless, such a claim does lie where the preceding Fourth Amendment violation was, under the circumstances, a "proximate cause" for the use of such deadly force. **Fn. 191b.**

Fn. 191a.

"[P]retrial detention can violate the Fourth Amendment not only when it precedes, but also when it follows, the start of legal process in a criminal case. The Fourth Amendment prohibits government officials from detaining a person in the absence of probable cause. (citation omitted). That can happen when the police hold someone without any reason before the formal onset of a criminal proceeding. But it also can occur when the legal process itself goes wrong—when, for example, a judge's probable-cause determination is predicated solely on a police officer's false statements. Then, too, a person is confined without constitutionally adequate justification. Legal process has gone forward, but it has done nothing to satisfy the Fourth Amendment's probable-cause requirement." Manuel v. City of Joliet, 580 U.S. ___, 137 S.Ct. at 918-919, 197 L.Ed.2d at 322 (2017) (Sec. 1983 Fourth Amendment complaint for unlawful detention, alleging that a county judge's order finding probable cause to hold the Petitioner Manuel for the possession of a single contraband pill of ecstasy based on fabricated police evidence, was held improperly dismissed by the U.S. District Court below.)

The Court expressly declines to decide whether Manuel's Fourth Amendment claim was barred by the applicable Illinois two year statute of limitations, and remands the case to the Seventh Circuit Court to consider the issue. The Court notes, however, that the weight of authority in the U.S. Circuit Courts of Appeal on this issue is that the statute of limitations for such a claim accrues on the "favorable termination" date—that is, on the date the court dismisses the criminal charges against the arrestee. Manuel v. City of Joliet, 580 U.S. ___,137 S.Ct. at 920-922, 197 L.Ed.2d at 323-326 (2017)

Fn. 191b.

"If law enforcement officers make a 'seizure' of a person using force judged to be reasonable based on a consideration of the circumstances relevant to that determination, may officers nonetheless be held liable for injuries caused by the seizure on the ground that they committed a separate Fourth Amendment violation that contributed to their need to use force? The Ninth Circuit has adopted a 'provocation rule' the imposes liability in such a situation. We hold that the Fourth Amendment provides no basis for such a rule. A different Fourth Amendment violation cannot transform a later reasonable use of force into an unreasonable seizure." City of Los Angeles v. Mendez, 581 U.S. ___, 137 S.Ct. 1539, 1543-1544, 198 L.Ed.2d 52, 57 (2017)

In *Mendez*, the police were armed with a felony arrest warrant for a parole violator who was believed armed and dangerous, and had information from a confidential informant that the parolee was living at a certain residence. The police opened the door to a metal residential shack on the premises of this residence and pulled back a blanket hiding the interior and were immediately confronted with a man with a gun pointed at one of the officers. The police opened fire and severely injured this man and another companion in the shack, neither of whom was the parole violator. The police committed a Fourth Amendment violation by entering the premises without search warrant. The Court held that a 42 U.S.C. 1984 claim by the two injured men in the shack based on an alleged unreasonable use of force in seizing them by the police did not lie, and a 4

million dollar judgment entered after trial in favor of these two men was reversed. The cause was remanded, however, for the 9th Circuit to determine whether the preceding police failure to secure a search warrant for the metal shack was, under the circumstances, a "proximate cause" for the police shooting in this case—disregarding the 9th Circuit's improper "provocation" rule).

p. 405, new subsection.

h. Declarative Decree and Injunction Action

The Court has entertained challenges against a legislative enactment for being facially invalid under the Fourth Amendment. in a declaratory decree action seeking an injunction against the enforcement of the statute. The statute, however, must be clear and unambiguous as well as unconstitutional in all applications that the statute authorizes. If the statute contains substantial ambiguity as to what conduct the statute authorizes, such an action does not lie. **Fn. 193.**

Fn. 193. For a thorough discussion of this subject with collected cases, see City of Los Angeles v. Patel, 576 U.S. ___, 135 S.Ct. 2443, 192 L.Ed.2d 435 (2016) (striking down a municipal ordinance authorizing administrative inspections of a hotel operator's guest registry as a violation of Fourth Amendment).

"Respondents brought a Fourth Amendment challenge to a provision of the Los Angeles Municipal Code that compels '[e]very operator of a hotel to keep a record' containing specified information concerning guests and to make this record 'available to any officer of the Los Angeles Police Department for inspection' on demand. [citation omitted]. . . . We hold facial challenges can brought under the Fourth Amendment. We further hold that the provision of the Los Angeles Municipal Code that requires hotel operators to make their registries available to the police on demand is facially unconstitutional because it penalizes them for declining to turn over their records without affording them an opportunity for precompliance review." City of Los Angeles v. Patel, 576 U.S. ___, 135 S.Ct. 2443, 2447, 192 L.Ed.2d 435 (2016).