2015-2016 UNITED STATES SUPREME COURT CONSTITUTIONAL CRIMINAL PROCEDURE CASES

2017 MACDL ADVANCED POST-CONVICTION LITIGATION SEMINAR

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Important 2015-2016 SCOTUS Constitutional Criminal Procedure Cases

- *Utah v. Strieff*
  - –
- *Birchfield v. North Dakota*
  - –
- *Caetano v. Massachusetts*
  - –
- *Bravo-Fernandez v. United States*
  - –
- *Turner v. United States*
  - – Δ

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Utah v. Strieff, 136 S. Ct. 2056 (2016) Future of the Exclusionary Rule

- Anonymous tip to police that particular house being used to sell drugs.
  - Cop watches house on and off from his car for about 3 hours over a week looking for suspicious activity.
  - Cop observes occasional short term foot traffic in and out of house; modestly suspicious stuff, but nothing big.
- Cop decides to stop the next person out of the house to ask some investigatory questions.
- Cop stops Δ in convenience store parking lot , demands identification, and runs warrant check. Cop discovers outstanding arrest warrant for an unpaid parking ticket and arrests Δ.
- Δ searched incident to arrest on outstanding warrant and cop finds drugs.

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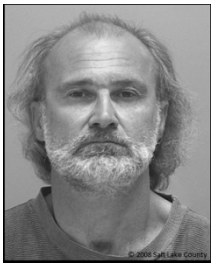

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Utah v. Strieff, 136 S. Ct. 2056 (2016)
Future of the Exclusionary Rule

- Δ Δ evidence. Conditional guilty plea.
- SCOTUS grants certiorari:
  - outstanding arrest warrant be suppressed because the warrant was discovered during an investigatory stop later found to be unlawful?
- Question Reframed in Fourth Amendment Jurisprudence:
  - Does the attenuation doctrine apply where an unconstitutional detention leads to the discovery of a valid arrest warrant?

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Future of the Exclusionary Rule

- State concedes no individualized reasonable suspicion to stop Δ under *Terry v. Ohio.*
  - Δ
  - Δ be the first person to leave a house that the cop thought might contain "drug activity".
- State argues exclusionary rule does not apply.
  - Arrest warrant was intervening event that broke chain of causation between illegal stop and discovery of drugs during search incident to arrest pursuant to valid warrant.
  - State claims Δ arrested based on lawful warrant rather than based on the unlawful investigatory stop and drugs found incident to arrest on that warrant.

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Utah v. Strieff, 136 S. Ct. 2056 (2016)
Future of the Exclusionary Rule

- Exclusionary rule encompasses primary evidence and derivative evidence:
  - result of an illegal search and seizure.
  - Derivative Evidence – Evidence later discovered and found to be derivative of an illegality, the so called "fruit of the poisonous tree".

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Future of the Exclusionary Rule

- Three relevant exceptions to the exclusionary rule:
  - *Independent source doctrine* – admits evidence discovered during an illegal search if police independently acquire the same evidence based upon activities or knowledge untainted by the initial illegality.
  - *Inevitable Discovery Doctrine* – admits evidence that would have been discovered even without the unconstitutional taint.
  - *Attenuation Doctrine* – admits evidence when the connection between the unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance.

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Future of the Exclusionary Rule

- Attenuation Doctrine Analysis
  - Is the discovery of a valid arrest warrant a sufficient intervening event to break the causal chain between the initial unlawful stop and the discovery of drugs on the Δ?

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Utah v. Strieff, 136 S. Ct. 2056 (2016) Future of the Exclusionary Rule

- Court relied upon *Brown v. Illinois*, 422 U.S. 590 (1975) (following unlawful arrest, Δ's incustody statements not automatically admissible because given *Miranda* warnings).
- *Miranda* warnings as the potentially intervening circumstance to purge the taint of an illegal arrest?
- *Brown's* three factor test:
  - The temporal proximity of unconstitutional police conduct and discovery of evidence.
  - The presence of intervening circumstances.
  - The purpose or flagrancy of the official misconduct.

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- Temporal Presence – minutes after the illegal stop; short interval favors suppression.
  - *Brown*
- Intervening Circumstances – valid arrest warrant predated and entirely unconnected to stop; favors admissibility of evidence.
- Purpose and Flagrancy of Misconduct – at most negligent because cop did not know if Δ was short term visitor consummating a drug transaction and cop demanded Δ speak with him rather than merely asking whether Δ whether he would speak with him. Favors admissibility of evidence.
  -
    cops from approaching an individual and asking a few questions.
  - No evidence unlawful stop was part of any systemic or recurrent police misconduct.

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Utah v. Strieff, 136 S. Ct. 2056 (2016) Future of the Exclusionary Rule

- SCOTUS holds:
  - Δ
    critical intervening circumstance that is wholly independent of the illegal stop.
  - The discovery of the arrest warrant broke the causal chain between the unconstitutional stop and the discovery of the evidence because it compelled the cop to arrest Δ.
  - The drugs discovered incident to Δ's arrest are admissible evidence.

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Utah v. Strieff, 136 S. Ct. 2056 (2016) Future of the Exclusionary Rule

- SCOTUS weakens the exclusionary rule – big win for the police.
  - Traditional *Wong Sun* fruit of the poisonous tree doctrine, a proximate cause inquiry, lives on where:
    - » Direct connection between unlawful stop and contraband obtained from search incident to arrest.
    - » Initial stop unlawful so that taints the fruits of search incident to arrest.
    - » But new exception for searches of people with outstanding warrants.
- First SCOTUS decision in 5 years on exclusionary rule but opinion claims not to break new doctrinal ground.

Utah v. Strieff, 136 S. Ct. 2056 (2016) Future of the Exclusionary Rule

- SCOTUS recently said in *Davis v. United States* (2011) exclusionary rule is a "bitter pill" applied only "when necessary," as a "last resort" when "the deterrence benefits of suppression" will "outweigh its heavy costs". Here Court says it applying cost/benefit analysis.
- Exclusionary rule argument against suppression: Police most culpable and most easily deterred about reasonably foreseeable consequences of their acts that are proximately caused by them.
- Court has gone out of its way in recent decades to make clear the officer's intent is irrelevant to a Fourth Amendment violation – objective reasonableness standard.
  - Must defense counsel now make a record of the purpose and flagrancy of the violation for Fourth Amendment purposes at least where the government claims attenuation?

Utah v. Strieff, 136 S. Ct. 2056 (2016) Future of the Exclusionary Rule

- But consider police incentives if attenuation excuses unlawful stop in many communities with large numbers of outstanding warrants , e.g., Ferguson, Missouri (population 21,000 & 16,000 people with warrants, e.g., 75% have outstanding warrants).
- Significant policy issues: The majority and dissenting opinions have markedly different perspectives regarding the social tension about policing particularly in minority communities.
  - Sotomayor dissent cites examples of New Orleans, Newark, St. Louis (where police routinely stop people on the street, bus stops, or even in court for no reason other to check on outstanding warrants.
    - » a criminal."
  - Kagan dissent says the decision practically invites police officers to make illegal stops. If in doubt about reasonable suspicion, make the stop but run warrant check; if anything is found, the in a subsequent search, it likely would be admissible evidence. Unlawfully stopped citizens unlikely to sue.

Birchfield v. North Dakota
Search Warrants for BAC Testing

- Is a search warrant required incident to arrest for blood alcohol content (BAC) testing for OUI of intoxicating liquor?
  - Breath Testing
  - Blood Testing
- Broader implications -- Not just testing for drunk driving (e.g., OUI based upon substance abuse)
  - New Massachusetts marijuana statute

Birchfield v. North Dakota, 136 S. Ct. 2160 (2016)
Search Warrants for BAC Testing

- Narrow legal question presented: Can states *criminalize* the refusal to take a breath or blood test incident to OUI arrest?
  - In some states, the civil or administrative penalty for refusing BAC test is significantly less than (or even inconsequential) compared to OUI conviction.
  - So some states criminalized the mere refusal to submit to BAC testing.

Birchfield v. North Dakota, 136 S. Ct. 2160 (2016)
Search Warrants for BAC Testing

- G.L. c. 94, § 24(f)(1) Massachusetts implied consent statute.
  - Loss of license for refusal to submit to breath or blood test upon arrest for OUI of intoxicating liquor.
    - » Automatic license suspension for at least 180 days up to lifetime license suspension based on the number of prior convictions or assigned programs.
    - » Administrative penalty in some cases can be sufficiently draconian to incent Δs' submission to test.
  - But no criminal penalty for mere refusal to take breath or blood test in Massachusetts.

Birchfield v. North Dakota, 136 S. Ct. 2160 (2016)
Search Warrants for BAC Testing

- 3 Cases Consolidated at SCOTUS
  - : Δ drove off North Dakota highway into a ditch; screening test estimated 3X legal limit; Δ refused to take warrantless test; sentenced to jail and fines for refusal to submit to blood test under North Dakota criminal statute; one prior OUI conviction.

Birchfield v. North Dakota, 136 S. Ct. 2160 (2016)
Search Warrants for BAC Testing

- 3 Cases Consolidated at SCOTUS
  - : Δ arrested after trying to pull boat out of water at boat launch in Minnesota; Δ denies driving the truck but standing in his underwear holding keys; Δ refused warrantless *breath* test; crime to refuse breath test in Minnesota; Δ had 4 prior OUI convictions.

Birchfield v. North Dakota, 136 S. Ct. 2160 (2016)
Search Warrants for BAC Testing

- 3 Cases Consolidated at SCOTUS
  - : Δ stopped after cop observes him unable to make turn into driveway and he almost hit a stop sign; Δ smells of alcohol and struggles to keep balance once outside of car; cop observes empty wine glass in center console of car; Δ taken to hospital where cop advises him of North Dakota criminal penalty to refuse test; Δ *submits* to blood test and tests 3X legal limit; Δ's license administratively suspended for 2 years; Δ claims his consent to blood test coerced by officer's warning that refusal itself is a crime.

Birchfield v. North Dakota, 136 S. Ct. 2160 (2016)
Search Warrants for BAC Testing

- SCOTUS holds:
  - Warrantless *breathalyzer tests* after OUI arrest are ok as warrantless searches incident to arrest, but warrant required for *blood tests* absent some other Fourth Amendment exception (like proven exigent circumstances).

Birchfield v. North Dakota, 136 S. Ct. 2160 (2016)
Search Warrants for BAC Testing

- Fourth Amendment prohibits unreasonable searches.
- Breath test and blood test are searches under Fourth Amendment.
- Text of Fourth Amendment does not say when search warrants must be obtained, but search warrant must usually be obtained unless there is an exception to search warrant requirement.
- Exigent circumstances exception allows warrantless search when emergency leaves insufficient time for police to get a warrant.

Birchfield v. North Dakota, 136 S. Ct. 2160 (2016)
Search Warrants for BAC Testing

- *Schmerber v. California* (1966) – drunk driving may present exigent circumstances for warrantless blood test for drunk driving.
- *Missouri v. McNelly* (2013) – no automatic exigent circumstances for BAC testing for drunk driving arrest on Government theory BAC evidence is inherently evanescent.

Birchfield v. North Dakota, 136 S. Ct. 2160 (2016)
Search Warrants for BAC Testing

- *Riley v. California* (2014) – Cell phone search case:
  - Absent more precise guidance from founding era, "we generally determine whether to exempt a given type of search from warrant requirement by assessing . . . the degree to which it intrudes upon individual's privacy and . . . the degree to which it is needed for the promotion of legitimate government interests."

Birchfield v. North Dakota, 136 S. Ct. 2160 (2016)
Search Warrants for BAC Testing

- Previously held breath tests do not implicate significant privacy concerns.
- The physical intrusion is almost negligible.
- Previously upheld warrantless searches for DNA and finger nail scrapings; breath test is no more intrusive.
- Breath test not likely to cause any great enhancement in embarrassment inherent in any arrest.

Birchfield v. North Dakota, 136 S. Ct. 2160 (2016)
Search Warrants for BAC Testing

- Blood tests are different from breath tests
  - Blood draws are "significant bodily intrusions".
  - Require piercing of skin and extract a part of the subject's body.
  - Process is significantly more intrusive "than blowing into a tube".

Birchfield v. North Dakota, 136 S. Ct. 2160 (2016) Search Warrants for BAC Testing

- Government's need for BAC testing for persons arrested for drunk driving:
  - States have concluded implied consent laws have consequences that are insufficient to incent BAC testing.
  - License suspensions alone are unlikely to persuade those with high BAC readings and recidivists to consent to BAC tests.
  - Laws making it a crime to refuse to submit to BAC testing serve very important function.

Birchfield v. North Dakota, 136 S. Ct. 2160 (2016) Search Warrants for BAC Testing

- SCOTUS weighing under *Riley* of individual privacy interests against Government law enforcement interests:
  - Because breath tests are significantly less intrusive than blood tests and in most cases amply serve law enforcement interests, breath test but not blood test may be administered a search incident to arrest without search warrant in all cases.

Birchfield v. North Dakota, 136 S. Ct. 2160 (2016) Search Warrants for BAC Testing

- SCOTUS concludes:
  - State cannot insist on an intrusive *blood* test and impose criminal penalties on refusal to submit to test.
  - There is a limit to consequences which drivers may be deemed to have consented when they are licensed to drive on public roads.

Birchfield v. North Dakota, 136 S. Ct. 2160 (2016)
Search Warrants for BAC Testing

- *Birchfield* – Δ's conviction reversed for refusal to take blood test; no indication that breath test would have been insufficient for state's interests; no exigent circumstances in record.
- *Bernard* – Δ had no right to refuse breath test; permissible search incident to arrest, Δ can be criminally sanctioned for refusal to take breath test.
- *Beylund* – Δ not criminally prosecuted for refusing to take a blood test; remanded to determine whether Δ gave adequate consent to blood test under statute.

2016 SCOTUS Brief Mentions

- *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016)
  - Lack of common use of stun guns at the time of Second Amendment's enactment, unusual nature of stun guns as modern invention, and lack of ready adaptability of stun guns for use in military did not preclude stun guns from being protected by the Second Amendment right to bear arms.
    - » SJC ruling that because stun guns were not in common use at time of Second Amendment's enactment borders on frivolous.

2016 SCOTUS Brief Mentions

- *Bravo-Fernandez v. United States*, 137 S. Ct. 352 (2016)
  - Issue-preclusion component of Double Jeopardy Clause does not bar retrial after jury has returned irreconcilably inconsistent verdicts of conviction and acquittal (inconsistent verdicts based on same critical findings of facts) AND the convictions are later vacated for legal errors unrelated to the inconsistency.

UPCOMING SCOTUS ATTRACTIONS

- *Turner v. United States*, No. 15-1503 (to be argued 3/29/17)
  - Standard for disclosure of favorable evidence to Δ under *Brady v. Maryland*.
  - Should prosecutors be required to disclose ALL evidence favorable to Δ regardless of materiality v. should prosecutors get to decide what favorable evidence to disclose based upon their view of materiality of favorable evidence ("any reasonable likelihood it could have affected the judgment of the jury")?
  - Will SCOTUS issue narrow ruling based on terrible facts of case v. will SCOTUS chart a new course for rules under *Brady* regarding disclosure of evidence favorable to Δ?

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