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RECENT DECISIONS IN THE UNITED STATES SUPREME COURT AND THE GEORGIA APPELLATE COURTS

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Jones v. United States
132 S. Ct. 945 (2012)

Holding: (*Scalia*, C.J. Roberts, Thomas, Kennedy): The placement of a GPS monitoring device on the defendant's car amounts to a search, because it
(1) was a "trespass" and
(2) was done for the purpose of obtaining information.

Four other Justices (*Alito*, Breyer, Kagan, Ginsburg): The monitoring of a suspect's vehicle for an extended period of time amounts to a search, regardless of whether there was a trespass.

Justice Sotomayor: Both Scalia and Alito are correct. In addition, (1) the notion of "secrecy" is not an indispensable component of "privacy" for Fourth Amendment purposes; (2) The "third-party" rule which provides that information shared with a company (phone records, bank records) is not subject to Fourth Amendment protection is not viable in the digital world where *everything* is shared with internet or cell phone providers.

> Awareness that the Government may be watching chills associational and expressive freedoms. And the Government's unrestrained power to assemble data that reveal private aspects of identity is susceptible to abuse. The net result is that GPS monitoring—by making available at a relatively low cost such a substantial quantum of intimate information about any person whom the Government, in its unfettered discretion, chooses to track—may "alter the relationship between citizen and government in a way that is inimical to democratic society." *United States v. Jones*, 132 S. Ct. 945, 956, 181 L. Ed. 2d 911 (2012) (Sotomayor, J., concurring).
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> Perhaps most significant, cell phones and other wireless devices now permit wireless carriers to track and record the location of users—and as of June 2011, it has been reported, there were more than 322 million wireless devices in use in the United States. For older phones, the accuracy of the location information depends on the density of the tower network, but new "smart phones," which are equipped with a GPS device, permit more precise tracking. For example, when a user activates the GPS on such a phone, a provider is able to monitor the phone's location and speed of movement and can then report back real-time traffic conditions after combining ("crowdsourcing") the speed of all such phones on any particular road. Similarly, phone-location-tracking services are offered as "social" tools, allowing consumers to find (or to avoid) others who enroll in these services. The availability and use of these and other new devices will continue to shape the average person's expectations about the privacy of his or her daily movements.

United States v. Jones, 132 S. Ct. 945, 963, 181 L. Ed. 2d 911 (2012) (Alito, J., concurring).

> But the use of longer term GPS monitoring in investigations of most offenses impinges on expectations of privacy. For such offenses, society's expectation has been that law enforcement agents and others would not—and indeed, in the main, simply could not—secretly monitor and catalogue every single movement of an individual's car for a very long period. In this case, for four weeks, law enforcement agents tracked every movement that respondent made in the vehicle he was driving. We need not identify with precision the point at which the tracking of this vehicle became a search, for the line was surely crossed before the 4–week mark. Other cases may present more difficult questions. But where uncertainty exists with respect to whether a certain period of GPS surveillance is long enough to constitute a Fourth Amendment search, the police may always seek a warrant. We also need not consider whether prolonged GPS monitoring in the context of investigations involving extraordinary offenses would similarly intrude on a constitutionally protected sphere of privacy. In such cases, long-term tracking might have been mounted using previously available techniques.
> For these reasons, I conclude that the lengthy monitoring that occurred in this case constituted a search under the Fourth Amendment. I therefore agree with the majority that the decision of the Court of Appeals must be affirmed. *United States v. Jones*, 132 S. Ct. 945, 964, 181 L. Ed. 2d 911 (2012) (Alito, J., concurring).

<u>*The Third Party Rule Comes Under Scrutiny*</u>. *A person sharing information with a third party – for example, a bank, or phone company – cannot make a Fourth Amendment claim to protection of that information*:

> More fundamentally, it may be necessary to reconsider the premise that an individual has no reasonable expectation of privacy in information voluntarily disclosed to third parties. *E.g., Smith,* 442 U.S., at 742, 99 S.Ct. 2577; *United States v. Miller,* 425 U.S. 435, 443, 96 S.Ct. 1619, 48 L.Ed.2d 71 (1976). This approach is ill suited to the digital age, in which people reveal a great deal of information about themselves to third parties in the course of carrying out mundane tasks. People disclose the phone numbers that they dial or text to their cellular providers; the URLs that they visit and the e-mail addresses with which they correspond to their Internet service providers; and the books, groceries, and medications they purchase to online retailers. Perhaps, as Justice ALITO notes, some people may find the "tradeoff" of privacy for convenience "worthwhile," or come to accept this "diminution of privacy" as "inevitable," *post,* at 962, and perhaps not. I for one doubt that people would accept without complaint the warrantless disclosure to the Government of a list of every Web site they had visited in the last week, or month, or year. But whatever the societal expectations, they can attain constitutionally protected status only if our Fourth Amendment

> jurisprudence ceases to treat secrecy as a prerequisite for privacy. I would not assume that all information voluntarily disclosed to some member of the public for a limited purpose is, for that reason alone, disentitled to Fourth Amendment protection. *United States v. Jones*, 132 S. Ct. 945, 957, 181 L. Ed. 2d 911 (2012) (Sotomayor, J., concurring).

Unanswered questions:

So now we know that placing a device on the car for the purpose of acquiring information qualifies as a search (SCALIA + SOTOMAYOR) and that following the car continuously for 28 days (even without the trespass) is a search (ALITO + SOTOMAYOR). So what?

A. When are such searches "reasonable"?
    a. Reasonable Suspicion?
    b. What is the minimum duration of monitoring that crosses the threshold into "search" territory? Alito does not say.
    c. What if there was no "trespass" but extensive monitoring, such as video surveillance? What would the Scalia plurality say about that?
    d. What is the relevance of the nature of the crime being investigated? Alito says that it is relevant. Relevant to what? Is it relevant in answering the question, "Was there a search?" Or is it relevant in answering the question, "Was the search reasonable?" In *Jones*, Alito suggests that it is relevant in deciding whether there was a reasonable expectation of privacy (i.e., whether there was a Fourth Amendment event).
    e. To what extent do society's evolving expectations govern the answer to this question, as suggested by Justice Alito and Justice Sotomayor? Fourth Amendment questions are often answered by gauging society's expectations (*see e.g., Georgia v. Randolph*, 126 S. Ct. 1515 (2006)). Given the speed of technological advances, how will the Court keep pace with society's similarly-evolving expectations of privacy?
B. When do such searches require a warrant? If this case had not involved a car (for which warrants are rarely required), would the Court have specifically said that a warrant was necessary (for example, if the GPS device had been placed in the defendant's overcoat)? In other words, if the police have probable cause that a car is being used for drug transactions, may they use a GPS on a car without obtaining a warrant? For an extended period of time, or just when the car is "probably" being used in a drug transaction?
C. What is probable cause in this situation?
    a. Necessity (like in wiretap cases)?
    b. Is in-home monitoring a possibility with a warrant?
D. Is the "third party rule" really at risk of being re-examined?

a. *Smith v. Maryland*, 442 U.S. 735 (1979) (the use of a pen register which tracks phone numbers being dialed and received, is not a search if the contents of communications are not revealed: "All telephone users realize that they must "convey" phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed. All subscribers realize, moreover, that the phone company has facilities for making permanent records of the numbers they dial, for they see a list of their long-distance (toll) calls on their monthly bills . . . even if petitioner did harbor some subjective expectation that the phone numbers he dialed would remain private, this expectation is not 'one that society is prepared to recognize as 'reasonable.'").
b. One Ninth Circuit case held that the police may examine the websites you visited (without a warrant, but with a pen register authorization), but not the articles you read on that website. *United States v. Forrester*, 512 F.3d 500 (9th Cir. 2007) (analogizing the warrantless review of the sites visited to a pen register on a phone – i.e., the police can review the numbers that you dialed, but not the content of your communication).
c. The Eleventh Circuit stands firm on the third party rule, as shown in *Rehberg v. Paulk*, 611 F.3d 828 (11th Cir. 2010), *aff'd on other grounds* --- S. Ct. --- (2012) (When an email is sent to another person, even if it is not received by the other person, the sender arguably loses any right of privacy because the contents are disclosed to the Internet service provider).
d. To what extent does the third-party rule apply to search warrants for stored emails? In other words, does the Fourth Amendment require a warrant and a showing of probable cause in order for the government to obtain access to emails stored by a provider? *See In re Applications for Search Warrants*, 2012 WL 4383917 (D.Kan. September 12, 2012); *United States v. Warshak*, 631 F.3d 266 (6th Cir. 2010). Both of these cases applied the Fourth Amendment.
e. Will the third party rule be divided into business record "sharing" (bank records) and cases involving more intimate "sharing" (cell site information, for example). A recent Florida decision applied *Smith* to cell site location information. *United States v. Madison*, 2012 WL 309535 (S.D.Fla. 2012).
f. Are the various statutes that were enacted to legislatively narrow what the government could obtain in light of *Smith* (i.e., the government is required to obtain a court order before a pen register may be used) now subject to constitutional attack, because *Smith* has questionable validity in the context of certain "third party" records, such as cell site location information?

WHAT IS A SEARCH IN THE CONTEXT OF THE NEW TECHNOLOGICAL AGE?

Consider *Kyllo*: Use of a heat-detecting device that was able to detect the amount of heat being generated *inside* the house, amounted to a search. *Scalia:* "It would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology. . . . The question we confront today is what limits there are upon this power of technology to shrink the realm of guaranteed privacy."

Consider *Quon*: *Kennedy:* "The Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer. The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear. . . Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior." 130 S. Ct. 2619 (2010).

The GPS device in *Jones* was placed on the defendant's vehicle in 2005 and the Supreme Court decision was issued in 2012. During that seven year period, consider the technological advances that occurred.

The court is deciding harder and harder cases, particularly as it tackles various fourth amendment issues in the context of ever-changing technologically-aided searches. And the court's jurisprudence is linear, one case at a time, while technology advances in quicker increasing increments: The Law of Accelerating Returns or Accelerating Changes[1] versus the Law of the Law – a linear case-by-case consideration of the facts of one case at a time. The jurisprudence tortoise will never catch up to the technology hare. Even legislation, which is somewhat quicker than Supreme Court decision-making has difficulty keeping up.

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[1] "An analysis of the history of technology shows that technological change is exponential, contrary to the common-sense 'intuitive linear' view. So we won't experience 100 years of progress in the 21st century—it will be more like 20,000 years of progress (at today's rate). The 'returns,' such as chip speed and cost-effectiveness, also increase exponentially. There's even exponential growth in the rate of exponential growth. Within a few decades, machine intelligence will surpass human intelligence, leading to the Singularity—technological change so rapid and profound it represents a rupture in the fabric of human history. The implications include the merger of biological and nonbiological intelligence, immortal software-based humans, and ultra-high levels of intelligence that expand outward in the universe at the speed of light." The Law of Accelerating Returns, Ray Kurzweil, March 7, 2001.

The decision in *Jones* from a technological point of view is already laughably antiquated. A GPS device? How quaint. Having to place a device on the car in order to track its movement? How primitive!

CELL TOWER RECORD SEARCHES

What about cell phone tower tracking? Even without a phone call being made, even without a text, the providers are able to locate a phone at all times and with ever-improving record keeping. Providers can, in many circumstances, furnish to the government the location of the cell phone (within a matter of yards) at all times both historically and in real time.

Recent cases and scholarship on cell phone tower tracking reveal the extent to which this is the new frontier for fourth amendment analysis. At least for now.

Does the acquisition of cell tower tracking information constitute a search? Does the government need a search warrant to obtain this information? Are current statutory provisions sufficient to protect suspects' privacy rights?

A. What is cell tower tracking information?
B. Is the acquisition of this information from a provider, a "search"?
C. Is the search permissible without restriction, because the information is "shared" with a third party (i.e., the provider)?
D. Does it matter for what period of time the cell tower information is sought (i.e., for a couple days, or for an extended period of time)?
E. What is (or should be) the difference between law enforcement's acquisition of historical information (where you have been) and future or real-time information, i.e., prospective information (so the police can track you in real time for the next sixty days)?
F. Does it make a difference if the information requested is for full "triangulation" cell cite information (24/7 location information, regardless of whether there was a call in progress, or not), as opposed to simple call "location" cell site location information that identifies only a particular tower that was used during a call? Customers may know that when they make or receive a call, a record is made of their location, but what about when no call is in progress and the phone is simply "staying in touch" with the nearby towers?
G. Does the acquisition of this information require a warrant, or may the government use the statutory framework of the Stored Communications Act, 18 U.S.C. § 2703(c)-(d)?
H. How will *Jones* impact the answer to each of these questions?
    a. If the third party rule is outmoded?
    b. If secrecy is not indispensable to privacy?

Cell Site Data can reveal:

1. Where a cell phone was located
    a. When the call began
    b. During the duration of the call
    c. When the call ended
    d. In 1999, the number of reported wireless minutes of use was less than 200 billion. A decade later, the number has grown to more than 2.2 *trillion* minutes.
2. Where a cell phone was located even when a call was not in progress, as the cell phone "keeps in touch" with towers in case a call is received or sent.
3. The location of the cell phone when a text message was sent or received
    a. According to a recent survey, carriers reported handling over 1.5 trillion text messages in 2009, a rate of nearly **five billion text messages per day.**
4. Based on the average number of calls and texts per day, according to recent surveys, even if limited to the beginning and end of actual phone calls and text messages, cell site data for a typical adult user will reveal between 20 and 55 location points a day. *See In re U.S. for Historical Cell Site Data*, 747 F. Supp. 2d 827 (S.D. Tex. 2010).[2]
5. The location of cell phone when the internet was accessed.

How prevalent is the use of cell site location in current law enforcement practice?

- In 2011, there were 1.3 million law enforcement requests for caller location information in U.S.
- There were "thousands of requests" per day to various cell service providers.
- AT&T responds to 700 requests per day.
- Sprint receives 1,500 data requests per day.

[2] "According to statistics published by the CTIA–The Wireless Association, the number of cell phone subscribers in the United States has increased from 28.1 million in 1995 to 327.6 million in June 2011, 103.9 percent of the nation's population. Significantly, an increasing percentage of households, 29.7 percent in June 2011, are considered "wireless only" with at least one cell phone and no wired telephone in the household. Cell phone usage has increased from 31.5 billion call minutes in 1995 to 2.2 trillion call minutes in June 2011, or an average of 6 billion call minutes per day. Text messages exchanged between cell phone users has increased from 57.2 billion in 2005 to 2.1 trillion in June 2011, or an average of 5.7 billion text messages per day. As of June 2011, cell providers have installed over 250,000 cell towers to handle increased cell phone usage and consumer demand for wider and better wireless coverage." Using Historical Cell Site Analysis Evidence in Criminal Trials, DOJ Bulletin Vol. 59, #6 (Nov. 2011).

- The police have asked for the identity of *everybody* who was within range of a tower at a particular point in time (so hundreds or thousands of people's location will be revealed by that one request)

These cases illustrate the types of issues (statutory and constitutional) and the line-drawing that is occurring in this area of the law:

A recent decision in the Sixth Circuit addressed the issue whether law enforcement needs to obtain a warrant or establish probable cause in order to acquire "ping" information about a suspect that enables law enforcement officers to track a suspect through his cell phone location:

United States v. Skinner, 690 F.3d 772 (6th Cir. 2012)

A magistrate issued an order directing the phone company to provide "ping" information to law enforcement. The agents were then able to "ping" the target's phone and determine his location while he was en route delivering drugs. The Sixth Circuit held that the defendant had no expectation of privacy in the data emanating from his phone that showed its location. The Sixth Circuit distinguished *Jones* with the observation that the plurality in *Jones* relied on the trespass that occurred when the GPS device in that case was planted on the defendant's car. No such intrusion occurred in this case. The court also distinguished Justice Alito's concurring opinion in *Jones* (which did not rely on the trespass), because the tracking in this case only lasted three days, which does not reach the threshold for "intensive monitoring" that Justice Alito described as sufficient to invoke the Fourth Amendment.

Smarr v. State, 317 Ga. App. 584, 732 S.E.2d 110 (2012)

The Georgia Court of Appeals held that the defendant's Fourth Amendment rights were not violated when a judge authorized the police, pursuant to 18 U.S.C. § 2703 to obtain Cell Site Location Information that pinpointed defendant's location to the vicinity where a burglary occurred. *See also* OCGA § 16-11-66.1(a). The court held that the Fourth Amendment does not require the police to obtain a warrant based on probable cause in order to obtain cell site location information, because the defendant's location on a public street is not subject to a reasonable expectation of privacy.

In the Southern District of Florida, a recent decision by Judge Rosenbaum, held that a § 2703(d) Order does not require a showing of probable cause and relied on the third-party doctrine to hold that there is no expectation of privacy in cell site location information. *United States v. Madison*, 2012 WL 309535 (S.D. Fla. 2012).

In the Northern District of Georgia, the leading decision (now somewhat antiquated in light of *Jones*), on the topic of cell cite tracking was written by Magistrate Baverman four years ago:

United States v. Suarez-Blanca, CR 1:07CR0023MHS/AJB, 2008 WL 4200156 (N.D. Ga. Apr. 21, 2008) (The Court finds that the historical cell site information is akin to other business records maintained in the course of business. Since individuals do not have an expectation of privacy in these other business records, there can be no Fourth Amendment violation based on law enforcement's decision to seek records from cell phone providers about the cell towers associated with past cell phone calls . . . As a result, the Court finds that in dialing certain numbers, the defendants also voluntarily agreed to turn over information about which towers were being used in placing these calls. Under these circumstances, *Smith* indicates that there is no Fourth Amendment violation . . . [Alternatively] the Court finds that there is no Fourth Amendment search in tracking the location of the cell phone towers used in making phone calls because such towers would not reveal the location of an individual in private quarters [relying on *Karo* and *Knotts* – both of which were not followed in *Jones*]. As a result, the defendants cannot show a search for Fourth Amendment purposes based on tracking cell phone towers used in making cell phone calls).

The most recent decision by a court in the First Circuit was by Magistrate Collings in Massachusetts, who noted the applicability of *Jones* and the possible Fourth Amendment implications of historical cell site location information, but, in essence, punted until Congress or the First Circuit decided whether probable cause and a search warrant was required: *In re Application of U.S. for an Order Pursuant to Title 18, U.S. Code, Section 2703(d) to Disclose Subscriber Info. & Cell Site Info.*, 12-MJ-1084RBC, 2012 WL 989638 (D. Mass. Mar. 23, 2012) (Until either the First Circuit Court of Appeals or the Supreme Court rule otherwise, or Congress enacts legislation dealing with the problem, the Court will follow the ruling of Judge Stearns in the case of *In Re Applications of the United States of America for Orders Pursuant to Title 18, United States Code, Section 2703(d), supra,*[see below for citation] and not require a showing of probable cause before issuing an Order pursuant to § 2703(d) authorizing the acquisition of records containing historical cell site information.) In part, Magistrate Collings relied on the decision in *Graham* out of Maryland, also cited below. *Graham*, however, hypothesized that the information was covered by the Fourth Amendment, but would not be suppressed because it was acquired in good faith reliance on existing precedent. Why the good faith exception to the exclusionary rule would authorize a *new* Order approving the acquisition of this information post-*Jones* seems very questionable.

The previous District Court decision in Massachusetts that Magistrate Collings referred to is *In re Applications of the United States of America for Orders Pursuant to Title 18, United States Code, Section 2703(d)*, 509 F.Supp.2d 76 (D. Mass 2007), which had endorsed the use of §2703(d) to acquire historical cell cite data.

Other decisions in various courts around the country have decided the issue in a variety of ways:

In re Application of the U.S. for An Order Authorizing the Release of Historical Cell-Site Info., 736 F.Supp.2d 578 (E.D.N.Y. 2010), *rev'd*, 736 F.Supp.2d 578 (E.D.N.Y. 2010);

In Re Application of U.S. for an Order Directing a Provider etc., 809 F.Supp.2d 113 (E.D.N.Y. 2011) (holding that government effort to acquire cell cite location information for a period of 113 days requires a search warrant, based on *Maynard*, the lower court opinion that was affirmed in *Jones*).

In re U.S. for an Order Authorizing Release of Historical Cell-Site Info., 11-MC-0113 JO, 2011 WL 679925 (E.D.N.Y. Feb. 16, 2011) ("As I have previously explained elsewhere, as a statutory matter, I interpret the relevant provisions of the Stored Communications Act ("SCA") to permit the relief the government now seeks. *In The Matter Of An Application Of The United States Of America For An Order Authorizing The Release Of Historical Cell–Site Information* (*"Historical CSI I"*), —— F.Supp.2d ——, 2010 WL 3463132, at *2 (E.D.N.Y. Aug. 27, 2010) (citing cases); 18 U.S.C. § 2703(c)-(d). However, as further explained in *Historical CSI I,* **I also conclude that when the government seeks access to historical CSI records for an extended period, it must satisfy the requirements for a warrant under the Fourth Amendment**. *See Historical CSI I,* 2010 WL 3463132, at *3–14; *see also In The Matter Of An Application Of The United States Of America For An Order Authorizing The Release Of Historical Cell–Site Information* (*"Historical CSI II"*), 2010 WL 5437209, at *2–3 (E.D.N.Y. Dec. 23, 2010) (citing later decisions in other jurisdictions that bolstered the authority on which I relied in *Historical CSI I*)."

In re Application of the U.S. for an Order Authorizing the Release of Historical Cell-Site Information, 2011 WL 3678934 (E.D.N.Y Aug. 22, 2011) (Garaufis, J.);

In re Application of U.S. for an Order Authorizing Release of Historical Cell-Site Information, 2010 WL 5437209 (E.D.N.Y. Dec. 23, 2010) (Orenstein, M.J.);

In re Application of U.S. for an Order Authorizing Release of Historical Cell-Site Information, 2011 WL 679925 (E.D.N.Y. Feb. 16, 2011) (Orenstein, M.J.) (granting application under section 2703(d) of the Stored Communications Act to compel provider to disclose historical cell-site data on theory that short period of surveillance did not trigger warrant requirement);

In re Application of the U.S. for an Order Directing a Provider of Elec. Communications Serv. To Disclose Records to the Gov't., 620 F.3d 304 (3rd Cir. 2010) (the *only* federal appellate court to address these issues, to date).

United States v. Graham, CRIM. RDB-11-0094, 2012 WL 691531 (D. Md. Mar. 1, 2012) ("Even if the government's acquisition of historical cell site location records for defendants' cellular telephones from the telephone service provider pursuant to court

orders issued under the Stored Communications Act, without a warrant based on probable cause, violated defendants' Fourth Amendment rights, it was objectively reasonable for the officers who obtained the records to rely on the Stored Communications Act and the court orders issued thereunder, and thus, the good-faith exception to the exclusionary rule applied to render the records admissible against the defendants at trial. U.S.C.A. Const.Amend. 4; 18 U.S.C.A. § 2703."). The *Graham* court held that even post-*Jones*, if the search was illegal, the exclusionary rule would not apply based on *Davis* (*see infra*).

The D.C. District, in *United States v. Jones* – the same case that the Supreme Court decided in January 2012 on the GPS question – decided that the use of cell site data to track Jones and Maynard may or may not have been a Fourth Amendment violation, but based on the decision in *United States v. Davis*, the police were acting in good faith when they used this information because of the lack of any decision dictating that this did amount to a search and therefore, the exclusionary rule would not apply. *United States v. Jones*, Crim. No. 05-0386 (ESH) (D.D.C. December 14, 2012).

In re Application of the U.S. for an Order Authorizing Disclosure of Location Information of a Specified Wireless Telephone, 2011 WL 3423370 (D. Md. Aug. 3, 2011) (concluding that prospective collection of GPS and cell site location information is a search for Fourth Amendment purposes).

In re U.S., 441 F. Supp. 2d 816 (S.D. Tex. 2006) ("Limited cell site information could not be obtained prospectively under the dual or hybrid authority of the Pen/Trap Statute and the Stored Communications Act (SCA); this decision, by Magistrate Smith, provides a detailed analysis of both the technology and the interplay between the various statutes that are at play in this area of the law).

In re Application of the U.S., 727 F.Sup.2d 571 (W.D.Tex. 2010) (requiring probable cause in order to obtain § 2703(d) Order requiring disclosure of location information).

In re U.S. for Historical Cell Site Data, 747 F. Supp. 2d 827 (S.D. Tex. 2010) (In several respects, the historical cell site records sought here are more invasive than the GPS data revealed in *Maynard* [the lower court decision that later was upheld in *Jones*]. The duration and volume of information sought is more than doubled—60 days as opposed to 28 days of movement. As we have found, the level of detail provided by cell site technology now approaches that of GPS, and its reliability in obtaining a location fix actually exceeds that of GPS. Moreover, as Judge Orenstein points out, cell phone tracking is likely more revealing than a GPS device attached to a car, because the cell phone is carried on the person. It will also inevitably be more intrusive, because the phone can be monitored indoors where the expectation of privacy is greatest. By contrast, the GPS device in *Maynard* revealed no information about the interior of a home or other constitutionally protected space . . . For all these reasons, I join Judge Orenstein in holding that *Maynard's* prolonged surveillance doctrine precludes the Government from obtaining two months of cell phone tracking data without a warrant).

In *In re U.S ex rel. Order Pursuant to 18 U.S.C. 2703(d)*, 2012 WL 4717778 (S.D.Tex. Sept. 26, 2012), the district court refused to issue a § 2703(d) Order which sought the identification of *all* cell phones within range of a particular tower (the site of the crime). This type of disclosure is known as a cell tower "dump." Among other problems with the government's application was the failure to explain what would happen to all the records acquired by the government relating to innocent individuals.

The Fifth Circuit is currently considering the Texas case on appeal and there are numerous amicus briefs and briefs from the government that fully explain the history and implications of GPS and cell site location searches:
Government's Appellate Brief in the Fifth Circuit: 2012 WL 604860
ACLU Amicus Brief: 2012 WL 1029813
Electronic Privacy Information Center Amicus Brief: 2012 WL 1029812

Oral argument in the Fifth Circuit case was conducted during the first week of October, 2012.

Some of these same considerations apply to the use of the Stored Communications Act as a vehicle for the government to obtain the contents of emails that are recorded and saved by an ISP. *United States v. Warshak*, 631 F.3d 266, 288 (6th Cir. 2010) ("Accordingly, we hold that a subscriber enjoys a reasonable expectation of privacy in the contents of emails 'that are stored with, or sent or received through, a commercial ISP.' *Warshak I,* 490 F.3d at 473; . . . The government may not compel a commercial ISP to turn over the contents of a subscriber's emails without first obtaining a warrant based on probable cause.").

Before leaving the topic of GPS searches, it is worth noting that most courts that have considered the question have applied the case of *United States v. Davis*, in the GPS context: That is, the "change in the law" occasioned by *Jones* does not lead to exclusion of the evidence, because prior to the decision in *Jones*, virtually every other Circuit had approved this type of warrantless search and therefore the police were acting in good faith in using this search procedure. Therefore, the exclusionary rule did no apply.

How about the use of a GPS device without a warrant? Was that objectively reasonable prior to the decision in *Jones*? Besides *Maynard* (the DC Circuit case that was the subject of *Jones*), no other court had held that long-term use of GPS was a "search" and Supreme Court precedent (i.e., *United States v. Knotts*, 460 U.S. 276 (1983)) had held that monitoring outside the homes was not a search.

So will *Davis* be applied to GPS evidence? Probably so: *United States v. Leon*, 2012 WL1081962 (D. Hawaii 2012); *United States v. Amaya*, 5:11-cr-04065 Doc. 350 (N.D. Iowa, 4/10/2012). In *United States v. Nwobi*, 2012 WL 769746 (C.D.Cal 2012), the court held that *Davis* did bar invocation of the exclusionary rule in the Ninth Circuit, because there

was clear binding authority in the Ninth Circuit that extended use of a GPS devise was not a search. The *Nwobi* court, however, held that the exclusionary rule would apply in the *Jones* case on remand, because there was no binding authority in the D.C. Circuit when *Maynard* was decided (or, so at least Judge Ginsburg on the D.C. Circuit held when he wrote *Maynard*).

The Fourth Amendment and Computers

Justice Alito and Justice Sotomayor state in their opinions that new technological advances requires the court to discard traditional notions of "privacy" and to employ newer formulas to gauge whether a search has occurred. Simply stated, we can't simply use old rules and apply them by rote to new technologies.

How will this affect the court's assessment of computer searches? Up until now, the vast majority of computer search cases have simply applied traditional formulas. Some courts – and many defense attorneys – have argued that a computer search, the search of a person's laptop, for example, needs to be viewed *not* as if it is the same as the search of a briefcase or a purse or a file cabinet. As computers' memory increases, the amount of information that the police acquire when they seize a computer is vastly more detailed and intrusive than the typical search of a person's briefcase, or file cabinet, or even a typical search of a home that may last a few hours.

The courts may be wrestling with the issues relating to computer searches for many years, particularly in a futile attempt to keep up with the technological advances.

Think how many decisions have been authored by the Supreme Court to decide the parameters of the search of a car and its occupants. The number of cases that have focused on the Fourth Amendment with regard to automobiles is rather remarkable. In just the past thirty-four years, for example, my quick survey of cases shows that the Supreme Court has decided at least thirty-five cases that address the Fourth Amendment in the context of automobile searches

How many decisions will be needed to delineate the boundaries of a computer search?

And given that a Model "T" is not that much different than a Hummer, the automobile case law had no trouble keeping up with the new automotive technology without being obsolete before the Supreme Court decision rolled off the line.

How will the Court keep up with the new technology? Only the district courts can achieve anything even approaching real-time jurisprudence.

More Developments To Come on the Question: "What is a Search"?

So we know that the answer to the question "What is a search?" is very much in doubt in the technological context.

But this area of the law is not limited to technological advances such as *Kyllo*, *Quon* and *Jones*.

Consider *Jardines*, a case that arose in Florida.

Low – Tech Searches

Does Bringing a Dog to the Front Door of a House and Allowing It To Sniff the Door Amount to a Search (The Results of Which Will Authorize the Issuance Of a Search Warrant)?

The Miami police believed that Jardines was growing marijuana in his house. Based on this suspicion, a drug dog, Franky, was brought to the front door of the house. After Franky alerted, a detective also used his nose and he, too, smelled marijuana. The police then obtained a warrant, and ultimately marijuana was found in the house.

Jardines moved to suppress the search on the ground that Franky's alert at his door violated the Fourth Amendment, which prohibits unreasonable searches and seizures. The Florida Supreme Court agreed, holding that the dog sniff was a "search" that required a warrant.

Florida Supreme Court:

> The dog "sniff test" that was conducted in the present case was an intrusive procedure. As explained more fully below, the "sniff test" was a sophisticated undertaking that was the end result of a sustained and coordinated effort by various law enforcement agencies. On the scene, the procedure involved multiple police vehicles, multiple law enforcement personnel, including narcotics detectives and other officers, and an experienced dog handler and trained drug detection dog engaged in a vigorous search effort on the front porch of the residence. Tactical law enforcement personnel from various government agencies, both state and federal, were on the scene for surveillance and backup purposes. The entire on-the-scene government activity—i.e., the preparation for the "sniff test," the test itself, and the aftermath, which culminated in the full-blown search of Jardines' home—lasted for hours. The "sniff test" apparently took place in plain view of the general public. There was no anonymity for the resident.
>
> Such a public spectacle unfolding in a residential neighborhood will invariably entail a degree of public opprobrium, humiliation and embarrassment

> for the resident, for such dramatic government activity in the eyes of many—neighbors, passers-by, and the public at large—will be viewed as an official accusation of crime. Further, if government agents can conduct a dog "sniff test" at a private residence without any prior evidentiary showing of wrongdoing, there is nothing to prevent the agents from applying the procedure in an arbitrary or discriminatory manner, or based on whim and fancy, at the home of any citizen. Such an open-ended policy invites overbearing and harassing conduct. Accordingly, we conclude that a "sniff test," such as the test that was conducted in the present case, is a substantial government intrusion into the sanctity of the home and constitutes a "search" within the meaning of the Fourth Amendment. As such, it must be preceded by an evidentiary showing of wrongdoing.
>
> And second, we note that the parties in the present case have failed to point to a single case in which the United States Supreme Court has indicated that a search for evidence for use in a criminal prosecution, absent special needs beyond the normal need of law enforcement, may be based on anything other than probable cause. We assume that this is because, as explained more fully below, all that Court's precedent in this area indicates just the opposite. And that precedent, we recognize, applies with extra force where the sanctity of the home is concerned. Accordingly, we conclude that probable cause, not reasonable suspicion, is the proper evidentiary showing of wrongdoing that the government must make prior to conducting a dog "sniff test" at a private residence. Jardines v. State, 73 So. 3d 34, 36-37 (Fla. 2011) cert. granted in part, 132 S. Ct. 995, 181 L. Ed. 2d 726 (U.S. 2012).

And, as a side note, if the court holds that the government *can* do this kind of unwarranted dog sniff at your front door without any probable cause or articulable reasonable suspicion, does the recent decision in *Kentucky v. King* cause you any concern? It should:

In *Kentucky v. King*, 131 S. Ct. 1849 (2011), the Supreme Court held that the exigent circumstances exception to the search warrant requirement applies even if the law enforcement agents "created" the exigency, unless the agents created the exigency by engaging or threatening to engage in conduct violating the Fourth Amendment. The fact that certain legal investigative techniques may create an exigent circumstance, even if it is foreseeable, does not foreclose reliance on that exception to the search warrant requirement. In *King*, the police smelled marijuana coming from an apartment. The police knocked on the door loudly, announcing that they were the police. They then heard noise indicating that evidence might be destroyed and the police entered. The Court held that there was nothing about the officers' conduct that foreclosed reliance on the exigent circumstances exception to the search warrant requirement (though the case was remanded for further fact-finding by the trial court). (The good news is that the Kentucky Supreme Court later held that the state failed to prove that there were, in fact, exigent

circumstances to justify the warrantless entry, *King v. Kentucky*, --- Ky. --- April 26, 2012).

Coupling a pro-government result in *Jardines* with *King* could result in this scenario: The police bring a drug dog to your front door. The dog alerts and does so in a loud way that manages also to alert the occupants, who are heard by the police officer to be moving around the house. The police, therefore, have exigent circumstances to enter the house without a warrant.

Oral argument in *Jardines* focused on some of the age-old questions in Fourth Amendment cases:

Does this mean the police can come to any door of any house, without the slightest suspicion and see if the dog alerts?

Does it make a difference if the police are motivated to search for drugs, or just happen to be "in the neighborhood," and are not motivated by a search for drugs?

How do we gauge "community expectations"? Is that the controlling question when we decide Fourth Amendment questions (compare *Randolph*)?

Does the Fourth Amendment accommodate an expectation of privacy in contraband?

Can a drug dealer (or any home owner) simply say, "No dogs allowed" and thereby prevent the police from coming to the door?

What would the courts hold about the ability of the police to come to the door with a dog in the eighteenth century (i.e., was that a trespass)?

Does a Dog Alert Amount To Probable Cause to Search a Car

Harris v. State, 71 So.3d 756 (Fla. 2011): Held: Dog alert to a car creates a suspicion, but not probable cause. CERT GRANTED. Argued in the United States Supreme Court on October 31, 2012):

The State of Florida: The Florida Supreme Court's *Harris* decision ignores the conclusion of the Supreme Court that a canine sniff by a well-trained narcotics detection dog is unique and provides probable cause to search a vehicle because only the presence or absence of narcotics, a contraband item, is disclosed. *United States v. Place*, 462 U.S. 696, 707 (1983). The Supreme Court further reaffirmed and explained in *Caballes*, that a dog sniff conducted during a lawful traffic stop that reveals no information other than the location of contraband that no individual has any right to possess, does not violate the Fourth Amendment. *Illinois v. Caballes*, 543 U.S. 405, 410 (2005).

Defendant: The decision below merely applies a "totality of the circumstances" approach to the determination whether a drug-detector dog's alert to a vehicle constitutes probable cause to search, and does not conflict with this Court's holdings that a drug-dog sniff is not a fourth amendment search.

How reliable are dogs? One recent study in which handlers were told (falsely) that there were drugs hidden in specific locations, resulted in nearly 50% alerts at that location by the dogs. In other words, handler error causes dog error. (Though some of these errors were attributed to a handler falsely reporting an alert).

GET OUT OF MY BODY

Two other Fourth Amendment cases this term will focus on when the government can obtain information from inside your body:

Missouri v. McNeely, 11-1425 Argued on January 9, 2013
Whether a law enforcement officer may obtain a nonconsensual and warrantless blood sample from a drunk driver under the exigent circumstances exception to the Fourth Amendment warrant requirement based upon the natural dissipation of alcohol in the bloodstream?

Maryland v. King, 12-207 To Be Argued on February 26, 2013
Whether the Fourth Amendment allows the states to collect and analyze DNA from people arrested and charged (but not convicted) of serious crimes?

CRIMINAL CASES IN THE OCTOBER TERM 2012 ARGUED AS OF DECEMBER 31, 2012

Oral Argument Date:

Tues., Oct. 30:

11-820 — *Chaidez v. U.S.* — retroactivity of *Padilla v. Kentucky* on required legal advice to immigrants facing deportation after committing a crime

11-770 — *Bailey v. U.S.* — whether, if police have a warrant to search a home, they may detain the suspect elsewhere while they do the search

Wed., Oct. 31:

11-564 — *Florida v. Jardines* — scope of Fourth Amendment application to police use of a drug-sniffing dog on the exterior of a private home (grant limited to Question 1)

11-817 — *Florida v. Harris* — drug-sniffing dog's "alert" as probable cause to search a car or truck

Tues., Nov. 6

11-8976 — *Smith v. U.S.* — does the prosecution or defense have the burden of proving to a jury whether an accused withdrew from a conspiracy and thus could not be prosecuted for a role in the plot

11-1327 — *Evans v. Michigan* — does a judge's directed verdict of acquittal in mid-trial, based on a legal error, bar a new trial because of double jeopardy

11-9307 – *Henderson v. United States* – Whether the plain error rule applies when the law was unsettled at the time of trial, but was settled in the defendant's favor by the time of an appeal.

RECENT CASES IN AREAS OTHER THAN THE FOURTH AMENDMENT

Fifth Amendment Issues -- Confessions

United States v. Lall, 607 F.3d 1277 (11th Cir. 2010) (after reading *Miranda* warning to defendant, officer explained that he wanted to know about the crime for which the defendant was a victim, not the crimes that the defendant had perpetrated; ensuing confession to crimes that the defendant perpetrated were involuntarily obtained and were inadmissible under the Due Process Clause).

Howes v. Fields, 132 S. Ct. 1181 (2012).

The necessity of issuing a *Miranda* warning only applies if the defendant is "in custody." Someone in jail is *not* "in custody. Of course. (This holding applies when an incarcerated defendant is "invited" to speak to police in a room which he is free to leave and return to the "yard" or his pod and he is not further restrained, and is then questioned about some offense that occurred prior to his incarceration).

J.D.B. v. North Carolina, 131 S. Ct. 2394 (2011)

The necessity of issuing a *Miranda* warning only applies if the defendant is "in custody" when viewed objectively. Does the age of the suspect matter in deciding whether the "objective" facts would lead the suspect to believe that he was "in custody"? Yes.

Immunity

In a recent decision in the Eleventh Circuit, the Court explained how "act of production" immunity doctrine applies when a defendant is ordered to decrypt a computer. Based on *Hubbell*, the Eleventh Circuit held that a defendant who has received "act of production" immunity to compel him to decrypt a computer may not have the decrypted computer then "used" against him, because the contents of the computer – the decrypted files – represent the indirect use of the immunized statement. *In re: Grand Jury Subpoena Duces Tecum Dated March 25, 2011*, 670 F.3d 1335 (11th Cir. 2012). In short, the court held that once "act of production" immunity is given to the defendant, the contents of the documents or computer files that are produced may not be used against him, because the contents represent the fruits of his immunized testimony.

Proffer Agreements

In *United States v. Hill*, 843 F.3d 807 (11th Cir. 2011), the defendant signed a proffer agreement that provided "Anything *related to* the proffer cannot and will not be used against [the defendant] in any Government case-in-chief. . . [T]he government is completely free to pursue any and all investigative leads derived in any way from the proffer." These two sentences are inconsistent, because the "related to" language in the first sentence suggests a *Kastigar*-like derivative use immunity, while the second sentence reflects a standard "use immunity" proffer agreement that would allow the government to introduce evidence derived from the debriefing. The Eleventh Circuit concluded that the proffer agreement in this case must be interpreted as a *Kastigar* use and derivative use immunity agreement and the matter was remanded to the district court for a full evidentiary hearing on whether the government's case was built entirely independent of any information obtained, or derived from, the immunized cooperation of the defendant.

Mens Rea

Section 1324(a)(2) of Title 8, makes it a crime to bring an alien into the country, knowing, or in reckless disregard of the fact that the alien had not received prior official authorization. In *United States v. Dominguez*, 661 F.3d 1051 (11th Cir. 2011), the court concluded that a specific intent to violate the law is not required. All that is required is that the defendant act "knowingly," *not* necessarily with specific intent to violate the law.

Thus, if the defendant knows that the alien did not have prior authorization, the defendant is guilty of the offense, even if the defendant believed that it was legal to bring that alien into the country based on some misunderstanding of the requirements for legal entry.

In *United States v. Sanders*, 668 F.3d 1298 (11th Cir. 2012), the court held that in a § 841 drug prosecution, the government is only required to prove that the defendant knew that he possessed with intent to distribute *a controlled substance* and it is no defense that the defendant thought it was a controlled substance other than the one identified in the indictment. Additionally, the government is not required to prove that the defendant knew the quantity of the controlled substance that he possessed with intent to distribute. Of course, the government must prove what controlled substance was involved and must prove to the jury a certain quantity if it wants to invoke certain statutory ranges or mandatory minimum sentences, but there is no corresponding requirement that the government prove the defendant's *mens rea* as to either the type, or quantity of drug involved.

In *United States v. Tobin*, 676 F.3d 1264 (11th Cir. 2012), the court held that "willfulness" is not an element of a § 841 offense (distribution of a controlled substance) and therefore, it is no defense that the defendant did not realize that his conduct was illegal *or* that he had consulted with a lawyer and the lawyer said the conduct was not illegal (this was an Internet Pharmacy prosecution). However, to be convicted of conspiracy to distribute a controlled substance, the defendant is required to act with knowledge of the illegality of his conduct, because under § 846, willfulness is an element of the offense and therefore, advice of counsel is a defense to a § 846 offense.

In contrast with *Tobin*, consider the case of *United States v. Duran*, 596 F.3d 1283 (11th Cir. 2010): Although conspiracy is a "specific intent" crime, this does not necessarily increase the proof that is required if the underlying crime is a general intent crime. For example, it is a federal crime to act as a foreign agent without notifying the Attorney General. 18 U.S.C. § 951. This is a general intent crime: the government must show that the defendant failed to notify the Attorney General, but is not required to prove that the defendant was aware of the law requiring notification. If the defendant is charged with conspiracy to violate § 951, the government is required to show that the defendant conspired with another person not to notify the Attorney General, but the government is not required to prove that the defendant was aware (or that the co-conspirator was aware) of the duty to notify the Attorney General. *United States v. Duran*, 596 F.3d 1283, 1297 (11th Cir. 2010). *See also United States v. Feola*, 420 U.S. 671, 686–87 (1975) (the conspiracy statute does not impose its scienter requirement upon the general intent offense that is the object of the conspiracy).

Indictments -- Variances

In *United States v. Lander*, 668 F.3d 1289 (11th Cir. 2012), the court held that a prejudicial variance occurred in the mail fraud prosecution of the defendant, a county attorney. The indictment alleged that he defrauded the citizens of the county by accepting (in essence) a bribe from certain developers and that the developers were falsely told that they had to pay him money as part of a "performance bond." At trial, however, the government proceeded on the theory that the defendant defrauded the developers by telling them that their "payments" to him were for certain development costs that he would escrow or to "ensure" that the project obtained approval from the county officials. No developer testified that the defendant said the money was needed to pay for a performance bond. The Eleventh Circuit held that this amounted to a material and prejudicial variance.

Brady

Smith v. Cain, 132 S. Ct. 627 (2012): New Orleans, again. Need I say more?

In *Guzman v. Secretary, Dept. of Corrections*, 663 F.3d 1336 (11th Cir. 2011), a police officer testified falsely about whether any benefit had been provided to a key witness. The officer denied that any benefit had been provided, but, in fact, the officer had given the witness, a crack addict, $500.00. The prosecutor was not aware of this benefit and was not aware that the officer testified falsely. Nevertheless, the knowledge (and false testimony) of the officer was attributed to the prosecutor and a new trial was ordered.

In *United States v. Shaygan*, 652 F.3d 1297 (11th Cir. 2011), the court reversed an award of attorney's fees, holding that the determination of whether a prosecution was vexatious or frivolous must be viewed from an objective point of view. Thus, the fact that the AUSA may have been personally motivated by animus directed at the defendant or his attorney, if there was an objective basis for proceeding, an award of attorney's fees would not be appropriate. "Bad faith is an objective standard that is satisfied when an attorney knowingly or recklessly pursues a frivolous claim." *Id*. at 1312. However, if a prosecutor is motivated by a factor such as race, or religion or some other impermissible factor, this is also a factor that the court may consider. The exercise of discretion, in other words, is not unlimited, even if there is an objective basis for proceeding.

The court recently denied rehearing *en banc* over a "spirited" dissent by Judge Beverly Martin. (April, 2012). Cert petition was denied in the Supreme Court.

Plea Agreements – Guilty Pleas

United States v. Davila, 664 F.3d 1355 (11th Cir. 2011)

A magistrate judge who encouraged a defendant to think seriously about rejecting a plea and risking a long prison sentence violated Rule 11 and tainted a subsequent plea. The conversation with the magistrate occurred when the defendant sought to replace his court-appointed attorney (or proceed *pro se*), based on the attorney's encouragement to plead guilty. The Magistrate essentially encouraged the defendant to seriously consider the wisdom of the attorney's advice and also informed him about the two versus three point acceptance of responsibility reduction. The Eleventh Circuit held that prejudice is presumed whenever the judge contrasts the sentence that would be imposed if the defendant enters a guilty plea and the sentence that would be imposed following a conviction.

Rule 404(b)

There is such a thing as a prior drug offense that is not admissible in a drug prosecution. Of course, admitting it was harmless error:

In *United States v. Sanders*, 668 F.3d 1298 (11th Cir. 2012), the court held that introducing evidence of a minor marijuana sale that occurred twenty-two years prior to the major cocaine smuggling operation that was the focus of this prosecution was error under Rule 404(b). The amount of marijuana was so small (i.e., the criminal behavior was relatively insignificant) and the remoteness in time was so significant, that any probative value was non-existent. The court concluded, however, that admitting the evidence was harmless error.

United States v. Miller, 11-1038 (7th Cir. 3/12/12)

The admission of a prior conviction for possession with intent to distribute crack was error in this prosecution for possession with intent to distribute crack. The Seventh Circuit condemns the routine use of other crimes evidence in drug cases and declares that henceforth a rational explanation of how the prior offense establishes a fact in dispute must be made and simple statements such as, "it proves the defendant's intent" will no longer be satisfactory. Here, the drugs were found in proximity to the defendant. He claimed the drugs were not his. The fact that he previously possessed with intent to distribute drugs did not prove his "intent" in this case, because he did not contest that whoever owned the drugs in this case intended to distribute them. He denied that he was the owner of the drugs. The court also stressed the need to engage in the Rule 403 analysis.

United States v. Scott, 677 F.3d 72 (2d Cir. 2012)

The defendant was observed by the police taking something from a woman on a street corner and then retrieving something from a hole in a tree and giving it to the woman. The defendant was arrested for possession with intent to distribute. He did not deny that he was the person that the police observed at the scene, but claimed that he was engaged in legal conduct and did not participate in a drug transaction. The government

offered evidence that they had seen the defendant many times in the past and that they had spoken to him. The trial court admitted this testimony. The Second Circuit reversed the conviction. First, the Second Circuit held that Rule 404(b) is not limited to other crimes or other wrongful conduct. The Rule's limitation also applies to "other acts" and thus the evidence of these prior encounters must have had some relevance other than propensity evidence. Moreover, the "other acts" are not required to be "bad acts" in order to be subject to Rule 404(b). Second the court held that there was no relevance to this testimony, other than creating jury speculation that the defendant was, in fact, involved in other prior encounters with the law enforcement officers. Importantly, the defense was not questioning the officers' identification of the defendant (if that were the defense, then their ability to recognize him and their prior familiarity with him, would be relevant).

Confrontation

In 2009, the Court considered a Massachusetts statute that allowed the state to introduce a certificate or affidavit of lab results or some other scientific test result, rather than bringing to court the technician. The Supreme Court held that such lab results qualify as "testimonial" and the results may not be admitted through out-of-court declarations, certificates, or affidavits. *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009). The only exception to this rule barring the use of certificates would be if the defendant consents to the use of such a procedure, thus waiving his Confrontation Clause right.

In 2011, the Court addressed a question left open in *Melendez-Diaz*: Does the actual analyst who performed the test have to testify, or can the state produce any analyst who can read the test results? In *Bullcoming v. United States*, 131 S. Ct. 2705 (2011), the Court decided that in order to satisfy the Confrontation Clause, the actual analyst who performed the test (or perhaps a supervisor, or someone else who had some involvement in the test) must testify. Simply recruiting any analyst to read the test results in court does not satisfy Confrontation Clause demands.

Williams v. Illinois, --- S. Ct. --- (2012)

A very complicated decision that appears to alter the landscape of the *Bullcoming* and *Melendez-Diaz* terrain. In this case, a DNA test established that the blood of the perpetrator had certain characteristics. Nobody from Celllmark testified. However, an expert was permitted to testify that the DNA results from Cellmark matched the DNA of the defendant. This was a bench trial, a fact stressed by Judge Alito in his plurality opinion. He concluded that the Cellmark test results were not actually introduced for the truth of the matter asserted. He also concluded that even if they were introduced for that purpose, it was not a Confrontation Clause violation. The fifth vote, by Justice Thomas, agreed that it was not a Confrontation Clause violation for an entirely different reason.

Justice Breyer, who agreed with Justice Alito, stressed the fact that it was a bench trial. Four Justices concluded that this was a Confrontation Clause violation.

The Eleventh Circuit applied the analysis of *Bullcoming* in *United States v. Ignasiak*, 667 F.3d 1217 (11th Cir. 2012). In *Ignasiak*, the defendant, a doctor, was charged with over-prescribing pain medication resulting in the deaths of certain patients. Over a Confrontation Clause objection, the government was permitted to introduce autopsy reports through the testimony of a medical examiner who did not perform the autopsy. The *Ignasiak* court held that the autopsy reports qualified as "testimonial" evidence. The government argued that the reports were admissible under the business records exception to the hearsay rule. The Eleventh Circuit rejected this argument. The exceptions to the hearsay rules are not automatically exceptions to the Confrontation Clause. Of course, most business records are not "testimonial" in nature, because they are not prepared in anticipation of being used "prosecutorially." Autopsy results, however, are prepared with this expectation. Thus, the Confrontation Clause applies and the reports should only have been admitted through the testimony of the person who actually performed the autopsy.

The Ninth Circuit reached the same result in *Merolillo v. Yates*, 663 F.3d 444 (9th Cir. 2011), a case in which the prosecution called certain experts who testified about the pathology results and conclusions regarding "cause of death" that were authored by another expert.

GUILTY PLEAS – INEFFECTIVE ASSISTANCE OF COUNSEL

Missouri v. Frye, 132 S. Ct. 1399 (March 21, 2012):

Failure to communicate to the defendant a plea offer is ineffective assistance of counsel. To show prejudice where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability both that they would have accepted the more favorable plea offer had they been afforded effective assistance of counsel and that the plea would have been entered without the prosecution's canceling it or the trial court's refusing to accept it,if they had the authority to exercise that discretion under state law.

Lafler v. Cooper, 132 S. Ct. 1376 (March 21, 2012):

Where counsel's ineffective advice led to an offer's rejection, and where the prejudice alleged is having to stand trial, a defendant must show that but for the ineffective advice, there is a reasonable probability that the plea offer would have been presented to the court, that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the actual judgment and sentence imposed.

The analytical framework for the *Lafler / Frye* decisions:

1. Was there a constitutional violation?

2. Was there a violation, but because a fair trial, no prejudice?

3. The problem of formulating a remedy.

Was there ineffective assistance of counsel?

How can the court decide, as a practical matter, that the defendant would have accepted the plea, if the bad advice would not have been given? Let's say the lawyer said, "Don't worry, you will never be convicted of cocaine possession, because it is legal to possess cocaine on Tuesdays. So reject the 8-year offer." The defendant does not take the plea, goes to trial and is convicted, (even though he did, in fact, possess the cocaine on a Tuesday). He is sentenced to 10 years. He then files a habeas and says, had I known that it was illegal to possess cocaine on Tuesdays, I would have accepted the plea.

Is it necessary for the judge to decide whether it is true, actually, that the plea would have been accepted had he been given good advice? How does the judge go about making that decision? Obviously, in all cases, $8 < 10$.

Is there a difference between a lawyer giving erroneous legal advice about the chance of success (i.e., a mistake of law about an element of an offense) and a lawyer giving bad advice based on a mistake of fact?

What if the lawyer thinks – incorrectly – that a witness has disappeared?

What if the client agrees with the advice, knowing that it is a prediction, rather than erroneous legal advice about the facts and the likelihood of a conviction?

Imagine a common occurrence in Fulton County. All lawyers know that exactly when to enter a guilty plea is the most important strategic decision that a lawyer can make in an overcrowded court. Let's assume a not-too-unrealistic situation:

> There are two co-defendants.
> The first co-defendant is represented by counsel from a big Philadelphia firm. He knows the defendant has no chance at trial and wants to be the "first in the door" because his experience in Philadelphia is that the "first in the door" always gets the best deal. He is sentenced to five years in custody.
> The second co-defendant is represented by an old-hand in Fulton County. She knows that you simply have to "wait them out" because the DA's office eventually always makes the offers better and better as time goes on. DA's switch courtrooms. The defendant with the "old-hand" waits for a couple years – yes, years – and is eventually given probation for the same offense.

Can the first defendant claim ineffective assistance of counsel?

In other words, what is the difference between failing to alert the defendant to an earlier favorable offer and the failure to be aware of a soon-to-arrive better offer?

The problem of providing a remedy

Was there a violation and prejudice, but no way to "unscramble the egg?"

What if the judge learns a new fact during the trial that was not known (or would not have been known), if, and when, the plea had been accepted?

New Facts mean the judge cannot grant "specific performance" in good conscience.

What if the defendant is charged with murder and is offered a plea to voluntary manslaughter and 5 years, but rejects the plea for irrational "ineffective" reasons. He is convicted of involuntary manslaughter (acquitted of murder and voluntary manslaughter) and is sentenced to 10 years. Is the plea agreement specific performance reasonable?

What if the entire reason for offering the plea was the fact that the DA did not want the young sexual abuse victim to be forced to endure a trial, and did not want to endure the expense of a seven-week trial?

Is the same offer still made – specific performance – even after trial and the seven weeks has been spent and the child has endured the trial. And the judge asks, "Why is this offer to three years being made? And the prosecutor responds, "To avoid a trial . . ."!!!!

SHOULD THERE BE A NEW PRACTICE?

- ALL PLEA OFFERS IN WRITING
- ALL TRIALS PRECEDED BY FORMAL EXPLANATION OF THE PLEA OFFER AND THE REJECTION?
- HOW ABOUT THE REASON FOR THE REJECTION?

Justice Scalia says that the only relevant question is: "Did you knowingly and voluntarily waive your right to trial and admit your guilt?" If so, you had a constitutionally fair and adequate proceeding.

MONEY LAUNDERING
LAWYERS BEWARE IN THE FOURTH CIRCUIT!

United States v. Blair, 661 F.3d 755 (4th Cir. 2011):

Rejecting the reasoning of the Eleventh Circuit in *United States v. Velez*, 586 F.3d 875 (11th Cir. 2009), the Fourth Circuit holds that a lawyer who knowingly receives tainted money from a client (in this case, drug money) and uses it for his fee, as well as the fee for criminal lawyers representing co-conspirators, may be prosecuted for money laundering, notwithstanding the safe harbor provision of 18 U.S.C. § 1957(f)(1). The facts in this case are not the typical case in which a legitimate criminal defense attorney accepted a fee. The lawyer was involved in various crimes with the client and others. Nevertheless, the Fourth Circuit rejected the notion that § 1957(f)(1) protects a lawyer when he knowingly accepts drug money to represent a criminal defendant.

RECENT GEORGIA CASES

Speedy Trial

(2012) – *Sosniak v. State*, 734 S.E.2d 362.

A denial of a Motion to Dismiss Based on Speedy Trial violation is no longer directly appealable. To appeal a pretrial denial of a motion to dismiss, the defendant must proceed pursuant to the interlocutory appeal procedures. *Callaway v. State*, 275 Ga. 332 (2001) is overruled.

(2012) – *Richardson v. State*, 733 S.E.2d 444.

The defendant filed a Motion to Dismiss based on a violation of his right to a speedy trial. The trial court denied the motion. The Court of Appeals reversed, holding that the trial court did not properly apply the *Barker v. Wingo* factors. The case was then remanded to the trial court and the trial court complied with the appellate court's decision regarding flawed analysis, but the trial court failed, on remand, to factor in the additional 13 months that had passed since the first hearing (i.e., the time it took to complete the appeal of the earlier decision). This was error and a remand was required, yet again, to factor in the additional 13 months in deciding how to apply the *Barker v. Wingo* factors.

Strict Liability Offenses / Proximate Cause

(2012) – *State v. Ogilvie*, 734 S.E.2d 50.

In a strict liability offense prosecution, the defense of accident is only available to the extent that the "accident" establishes that the prohibited act was committed involuntarily, for example, because of an unforeseeable physical ailment or some external force. In this case, the defendant was charged with misdemeanor vehicular homicide, based on having struck a child in a crosswalk. She did not contend that driving into the crosswalk was caused by some external force, or as the result of an unforeseen physical ailment or, for that matter, that she did not drive into the crosswalk voluntarily. Instead, she claimed that she could not avoid hitting the child because he ran across the street in front of her. This testimony was relevant to whether her conduct was the proximate cause of the death, but was not a basis for instructing the jury on the law of accident.

Burglary – Demurrers

(2012) – *Coleman v. State*, 732 S.E.2d 466.

The defendant was charged with attempted burglary. The indictment alleged that the defendant committed attempted burglary by attempting to enter the premises of the victim through the patio and tried to pry open a window. The indictment did not allege that the defendant was planning to commit a theft once in the premises. This indictment was insufficient to allege the offense of attempted burglary. Trial counsel provided

ineffective assistance of counsel by failing to file a special or general demurrer. A special demurrer would have challenged the failure to allege with specificity the predicate felony in this burglary case; a general demurrer would have challenged the failure to allege an offense at all. A special demurrer is required to be filed within ten days of arraignment; a general demurrer may be filed at any time, even after trial, though if it is filed after trial, it is characterized as a motion in arrest of judgment and must be filed during the term of court in which judgment was entered. The failure to file any of these motions was ineffective assistance of counsel and the conviction was reversed.

Hindering a 9-1-1 Call
Hearsay

(2012) – *Feagin v. State*, 731 S.E.2d 778.

The defendant was charged with (among other things) hindering a 9-1-1 call. The victim testified at trial that she picked up her cell phone in order to throw it at the defendant. The defendant grabbed the phone and broke it. This evidence did not support a conviction under OCGA § 16-10-24.3. The state contended that the victim's statement to the police, which was admitted without objection at trial, was a prior inconsistent statement that supported the conviction (she told the police that she retrieved her phone in order to call 9-1-1). The Court of Appeals held that the state failed to lay the proper foundation for the introduction of the prior inconsistent statement and it was, therefore, hearsay. Even hearsay that is admitted without objection may not be considered by the appellate court. Note that after January 1, 2013, hearsay that is admitted without objection may be considered by the appellate court and the result in this case would be different under the new rules. That is, failure to object to evidence – even hearsay – waives a claim that the evidence may not be considered on appeal when evaluating the sufficiency of the evidence.

Search and Seizure – Generally

(2012) – *Brundige v. State*, 291 Ga. 677.

Heat loss from the defendant's home that is captured by a thermal imaging device is not the type of evidence that the police may seek to obtain via a search warrant. A search warrant may only be used to gather "tangible evidence" and heat emanating from a house is not tangible evidence.

Wiretaps

(2013) – *Luangkhot v. State*, --- Ga. --- (January 7, 2013).

A Gwinnett County judge may not sign a wiretap order that allows the police to wiretap cell phones absent proof that the cell phone would be used in Gwinnett County, or that that the listening post would be in Gwinnett County, even if the crime under investigation was alleged to be occurring in Gwinnett County. In this case, the listening

post was in Fulton County and there was no proof offered regarding where the cell phones were being used.

Defendant's Right to Be Present

(2012) – *Zamora v. State*, 731 S.E.2d 658.

On three occasions during the trial, while the defendant was present in court, the trial judge conducted a bench conference with counsel to discuss a problem with a juror. Both attorneys agreed that the juror should be excused and following the third bench conference, the juror was excused. In his Motion for New Trial, the defendant complained that these proceedings occurred in his absence and that the appropriate remedy was a new trial. The Supreme Court agreed that the defendant's right to see *and hear* all proceedings was violated by this procedure. The Court held, however, that the evidence developed at the hearing on the Motion for New Trial indicated that the defendant was aware of what occurred during the bench conferences and apparently acquiesced to the proceedings occurring in his absence. She also did not raise this claim during the hearing on the Motion for New Trial. The Court also noted that the defendant is not required to show actual prejudice when raising this kind of claim on direct appeal.

Jury Selection – *Batson* – proffered explanations

(2012) – *Toomer v. State*, 734 S.E.2d 333.

Overruling several prior decisions from the appellate courts, the Supreme Court held that an attorney's explanation of why a peremptory strike was exercised is not required to be "concrete, tangible, specific, or case-related." All that is required during the "step two" *Batson* inquiry is that the lawyer articulates a race-neutral reason. During the step-three analysis, however, the trial court is permitted to consider the extent to which the explanation is case-related and logical in deciding whether the explanation was simply a pretext for what was, in actuality, a race-based peremptory strike. The extent to which the explanation was logical, concrete and case-related makes it more likely that it was, in fact, the reason why the strike was exercised, whereas a frivolous or nonsensical explanation may well be viewed as a pretext.

Authentication

(2012) – *Jones v. State*, 733 S.E.2d 72.

In this case, decided prior to the effective date of the new evidence code, the court held that if a witness makes a phone call to a person, but does not personally know the person, does not recognize her voice, and has never met the person, the fact that the person on the other end of the line identifies herself and gives the witness her phone

number (which matches that of the person), this evidence is not sufficient to authenticate the call and the witness may not state what the person on the other end of the line said, because there is insufficient information to prove who that person was. The appellate court indicated that the result might be different under the new code, OCGA § 24-9-901(b)(6)(A), which provides that a telephone call may be authenticated by evidence that a call was made to the number assigned at the time by a telephone service provide to a particular person or business if in the case of a person, circumstances including self-identification, show the person answering to be the one called.

Pre-Arrest Silence

(2012) – *State v. Moore*, 733 S.E.2d 418.

The defendant was suspected of raping an acquaintance. At trial, the state offered evidence that the police called the defendant on the phone and asked the defendant if he would talk to him about the allegation of rape. The defendant responded that he had to go to Augusta and did not want to meet with the police. The conversation continued briefly, but concluded with the defendant stating that he was unwilling to talk to the police. The prosecutor relied on this evidence in his closing argument, suggesting that the reason the defendant refused to talk was because he did not want to say in response to the allegation of rape. Failing to object to this evidence was ineffective assistance of counsel. The defendant's refusal to talk to the police was not admissible evidence.

Sentencing – first offender

(2012) – *Higdon v. State*, 733 S.E.2d 750.

The defendant was charged in four separate charging documents in two different counties. The defense and prosecution agreed that all four cases could be disposed of in one proceeding in one county. (OCGA § 17-2-4(a) permits a court to accept a guilty plea in one county, for charges arising in another county, if the defense and prosecution agree). The defendant requested First Offender sentencing for the sentence that was imposed for the four cases. The Supreme Court held that First Offender sentencing was not available in this situation, even though the sentence occurred in one hearing. The cases were not consolidated for trial and were handled separately by the trial court: four separate sentences were imposed. The Court held, however, that regardless of the number of counts or crimes in one indictment, First Offender sentencing is permitted for a sentence imposed for separate charges in one indictment.

Sentencing – Vindictive sentencing

(2012) – *Hudson v. State*, 733 S.E.2d 360.

The defendant was initially convicted of aggravated sexual battery and child molestation. He was sentenced to life on the sexual battery charge with 25 years to serve and 30 years on the child molestation charge, with ten to serve concurrent with the battery charge. The Court of Appeals held that the two offenses merged so the case was remanded for re-sentencing only on the child molestation charge. On remand, the trial court sentenced the defendant to 30 years to serve 25 on the child molestation offense. The defendant appealed, arguing that an increased punishment on the child molestation charge violated the principle set forth *North Carolina v. Pearce*, 395 U.S. 711 (1969). The Court of Appeals explained the difference between the count-by-count approach and the aggregate approach and held that prevailing law is that the presumption of vindictiveness is applied on a count-by-count basis and the sentence was therefore presumed to be vindictive. In order to justify a longer sentence on the child molestation offense, the judge was required to articulate circumstances that occurred after the tim of the original sentencing.

Appeal – Plain Error

(2012) – *Durham v. State*, 734 S.E.2d 377.

Prior to the adoption of the New Evidence Code, plain error review was only available in three situations: the sentencing phase of a trial resulting in the death penalty; a trial judge expression of opinion in violation of OCGA § 17-8-57; and a jury charge affecting substantial rights of the parties as provided under OCGA § 17-8-58(b). The new Evidence Code changes this, effective January 1, 2013, allowing a court to consider plain errors "affecting substantial rights although such errors were not brought to the attention of the court." OCGA § 24-1-103(d).

Death Penalty – Jury Selection

(2012) – *Ellington v. State*, 2012 WL 5833566.

A defendant in a death penalty case is entitled to ask prospective jurors whether they would automatically vote for a death sentence in any case in which two of the murder victims were young children. Prohibiting this questioning in this case resulted in vacating the death sentence.