

# Criminal Procedure Update: Drones, Dogs and Delay

Professor Laurie L. Levenson  
Loyola Law School  
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- ## TOPICS
- **Investigative**
    - Drones
    - Dogs
    - Cell Tower Data
    - Apple v. FBI
    - Eyewitness IDs
  - **Adjudicative**
    - Speedy Trial
    - Retroactivity
    - Batson challenges
    - Forfeitures
    - Sentencing issues

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# INVESTIGATIVE CRIMINAL PROCEDURE

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## Hypo #1

- Police decide to use drones to conduct surveillance in a high-crime neighborhood. The drones buzz at about 200 feet over homes, backyards and public spaces. They have been very effective in detecting backyard marijuana farms and gang hang-outs. Is the use of the drones constitutional?



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## Drone Law 101

- **4<sup>th</sup> Amendment**
  - REP (Katz) & Trespass (Jones)
  - Knotts, Karo, Kyllo
  - Ciraolo (1,000 ft.)
  - Florida v. Riley (500 ft.)
  - Dow Chemical (open areas)
- **Federal & State Statutes**
  - Regulating drones
  - "Freedom from Drone Surveillance Act" (Illinois)
  - "Freedom from Unwarranted Surveillance Act" (Fla., Tenn.)

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## Developing Case Law

➤ State v. Brossart (N.D. 2012)

- Border patrol drone used by local police



➤ State v. Davis (N.M. 2015)

- Overflight by helicopter at 50 feet violates 4<sup>th</sup> Amendment

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## “Orwellian” Future

➤ Speech at Oklahoma City University (2014)

- Need to consider how use of drones can impact our privacy in the future



- “We are in that brave new world, and we are capable of being in that Orwellian world, too.”

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## Hypo #2

- Police suspect that Joe’s home is being used to stash drugs. They send out their K-9 squad to sniff the home’s front door and cars in the driveway. Is the use of the dogs constitutional?



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## Dog Sniffs 101

### ➤ Sniffs on street and at airports

- Caballes (2005)

### ➤ Sniffs of cars

- Rodriguez (2015)

### ➤ Sniffs of homes

- Jardines (2013)



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## Florida v. Jardines (2013)

Scalia, J:

But when it comes to the Fourth Amendment, the home is first among equals. At the Amendment's "very core" stands "the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." Silverman (1961). This right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window.

We therefore regard the area "**immediately surrounding and associated with the home**" — what our cases call the curtilage — as "part of the home itself for Fourth Amendment purposes."

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## Hypo #3

- Government agents want to obtain cell phone tower records to track the location of the target of their investigation. Does this request require court authorization?



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## Cell Tower Data

➤ **No search warrant is required**

- *United States v. Graham* (4<sup>th</sup> Cir. 5/31/16)
- Third, Fifth, Sixth and Eleventh Circuits
- 3<sup>rd</sup> party records (*Smith v. Maryland*, 442 U.S. 735 (1979))
- **But consider:**
  - *United States v. Jones* (USSC 2012) (Sotomayor, J. concurring)
  - States requiring warrants (Florida, NJ, Mass)
  - USDC (Cal. & NY)

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## Hypo #4

- Prosecutors want to use the All Writs Act to obtain a court order requiring a cell phone manufacturer to create a program that will decrypt its locked phones. Should the court issue the order?



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## Apple v. FBI

- **Scope of "All Writs Act"**
- U.S. v. NY Tel. Co. (1977)
  - In re Order (E.D.N.Y. 2016)
  - Marquez / Judge Pym's Order (Feb. 2016)
- **Fourth Amendment issues**
- "reasonableness"
  - Balancing approach



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## Hypo #5

- Police respond to a 911 call. They see two men surrounding another man. The men explain that they chased after the suspect after someone yelled he had just assaulted a person. The police take the man into custody. As they walk the suspect down the street, one of the Good Samaritans points to the suspect and says to the victim, "Isn't it great we caught that guy?" The victim then identifies the suspect. Is the ID admissible?



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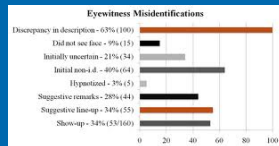
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## Problems with Eyewitness Identifications

- 75% of wrongful convictions involve eyewitness identifications
- No correlation between eyewitness confidence and accuracy
- Cross-racial identification particularly unreliable
- Passage of time
- Subtle ways to influence identifications



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## Perry v. New Hampshire (2012)



- Due Process analysis only applies if suggestive circumstances arranged by police

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## Rights Protecting Against Bad Identifications

### ➤ Right to Counsel (6<sup>th</sup> A.)

- Only after formal charges
- Only trial-like IDs

### ➤ Due Process (5<sup>th</sup> A. & 14<sup>th</sup> A.)

- Undue suggestiveness
- "Totality of the circumstances"

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## Ernesto Miranda Line-up Unduly suggestive?



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## ADJUDICATIVE CRIMINAL PROCEDURE

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## Hypo # 6

- Defendant is charged with mail fraud. He quickly pleads guilty, but spends the next year in jail awaiting sentencing. The presentence report takes many months, counsel needs an extension to file a sentencing memoranda, and the trial court is slow in setting a sentencing hearing. Were defendant's speedy trial rights violated?



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## Sentencing and Speedy Trial Laws

- *Betterman v. Montana* (USSC 2016)
  - No 6<sup>th</sup> Amendment right to speedy sentence
  - Covered by Due Process
- *United States v. Ray* (2d Cir. 2009)
  - 15-year delay in sentencing violated Due Process

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## Hypo #7

- Defendant is sentenced to LWOP for a crime. After his appeal is denied, the USSC holds that it is illegal to sentence a defendant to LWOP under that law because it is unconstitutionally vague. Does the new ruling apply to the defendant?



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## Teague v. Lane (1989)

- **Procedural rules** vs. **Substantive rules**
  - “Watershed”
  - E.g., Gideon
- Retroactive
- No authority under law

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## Retroactivity

- **Montgomery v. La. (USSC 2016)**
  - *Miller v. Alabama* is retroactive
  - “Substantive change” in law
- **Welch v. U.S. (USSC 2016)**
  - *Johnson v. U.S.* is retroactive
  - “Substantive change” in law

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## Hypo #8

- Defendant is on trial for bank robbery. Prosecutors excuse 2 Hispanic and 2 Black jurors. When defendant objects, the prosecutors claims that Juror #1 refused to look the prosecutor in the eye, Juror #2 had complained about prior jury service, Juror #3 appeared to be a loner, and Juror #4 had a child who had been convicted of theft. Has there been a Batson violation?



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## Batson v. Kentucky

- 3 Steps
  - Pattern of discriminatory challenges
  - Race-neutral explanation
  - Court evaluation of whether intentional discrimination
- Foster v. Chatman (2016)
  - Explicit notes proving discrimination

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## Hypo #9

- Defendant is charged with violating health care and banking laws. Prosecutors seek an order freezing her assets because they may be subject to forfeiture. D objects. How should the court rule?



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## Sixth Amendment and Freezing Assets

- Caplin & Drysdale (1989)
- U.S. v. Monsanto (1989)
  - Forfeiture permitted
  - Tainted assets
- Luis v. U.S. (2016)
  - Assets not necessarily "traceable" to the crime
  - Seizure violated 6<sup>th</sup> A. right

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## Hypo #10

- D is sentenced by the court, but it turns out that the court used the wrong sentencing guidelines in imposing sentence. What does the defendant have to show to get a remand for resentencing?



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## Molina-Martinez v. United States (2016)

- No requirement under Rule 52(b) that D show “additional evidence” to be eligible for resentencing.



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## Bonus Question

- Police are patrolling a high-crime neighborhood. They illegally stop a suspect. When they do so, they learn there is an outstanding warrant for his arrest. They then arrest defendant and, pursuant to a search incident to arrest, find drugs on his person. Legal or illegal search?



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## New Cases

➤ *Heien v. North Carolina* (2014)

- Good faith mistakes by officers do not invalidate stops

➤ *Utah v. Strieff* (June 20, 2016)

- Does illegal stop taint arrest with warrant?

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## Attenuation Doctrine

➤ Three Factors:

- (1) Temporal proximity
- (2) "Intervening circumstances"
- (3) Purpose and flagrancy of official misconduct

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STAY TUNED

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THANK YOU

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