

# FOURTH AMENDMENT

Reasonable Expectation of Privacy

Automobile Exception

Warrantless Seizure of Cell Site  
Location Information

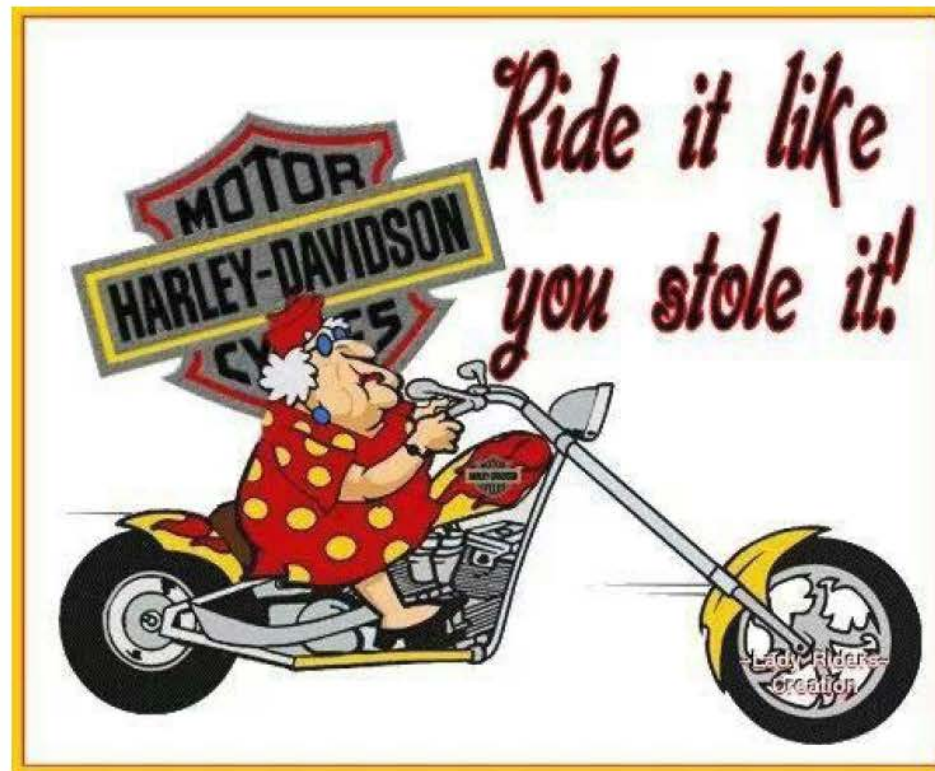
*Byrd v. United States,*  
No. 16-1371 (argued 1.9.18)



## *Byrd*

Question: Does a driver have a reasonable expectation of privacy in a rental car when he has the renter's permission to drive but is not listed on the rental agreement?

*Collins v. Virginia,*  
No. 16-1027 (argued 1.9.2018)



## *Collins*

Question: Does the Fourth Amendment's automobile exception permit a police officer, uninvited and without a warrant, to search a vehicle parked a few feet from a house?

*Carpenter v. United States,*  
No. 16-402 (argued 11.29.2017)



*"I got so fed up with dropped calls and no service, I bought my own cell tower and take it where ever I go."*

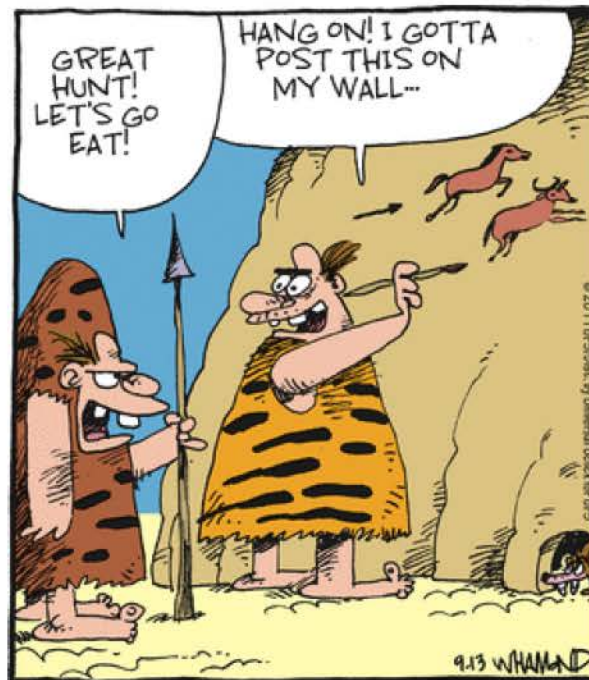
## *Carpenter*

Question: Does the warrantless seizure and search of historical cell site location information over the course of 127 days violate the Fourth Amendment?

# EVIDENCE

## Hearsay Exceptions

*United States v. Recio,*  
884 F.3d 230 (4th Cir. 2018)



## *Recio*

- ◆ Larry Recio convicted at trial for being a felon in possession of a firearm
- ◆ District Court admits Facebook post 8 months after date of alleged crime, over his objection:
  - ◆ It's Always Tucked, Kuz I'll B Damn If My Life Get Took!!

## *Recio*

- ◆ Fourth Circuit affirms.
  - ◆ Facebook post is adoptive admission
    - ◆ “sufficient foundational facts from which the jury could infer that the defendant acquiesced in the statement”
      - ◆ No quotation marks
      - ◆ Didn't attribute to the artist
      - ◆ No other signals that someone else authored the words
      - ◆ No additional explanation to refute adoption
  - ◆ Relevant to conduct and motive, not excludable under FRE 403 or 404(b)

# SENTENCING

Procedural Unreasonableness

*United States v. Blue,*  
877 F.3d 516 (4th Cir. 2017)



**"In response to your request for better communications,  
I'm going to increase my lengthy explanations by 50%."**

## *Blue*

- ◆ Blue pleaded guilty to armed bank robbery and brandishing a firearm during a crime of violence
  - ◆ PSR determined he was a career offender and total range was 272 to 319 months
  - ◆ Blue requested sentence of 176 to 199 months
  - ◆ Government requested low end of the Guideline range
- ◆ District Court imposed sentence of 272 months

## *Blue*

- ◆ District Court explained it:

“considered arguments on behalf of [Blue] with respect to history and characteristics. The Court notes [Blue]’s substantial criminal history category and the seriousness of the offense. The Court notes [Blue], with respect to his history and characteristics as well, was influenced a great deal by an older sibling who had a history of engaging in similar criminal activity. The Court notes as well Defendant has experienced a substantial opiate addiction which has contributed to some of his conduct in this case.”

- ◆ Blue appealed, arguing sentence was procedurally unreasonable because District Court failed to address 6 of 8 non-frivolous arguments for a downward variance

## *Blue*

- ◆ Fourth Circuit vacated and remanded.
  - ◆ “Perfunctory recitation” of defendant’s arguments or 3553(a) factors is not enough
  - ◆ Adequacy of the sentencing court’s explanation depends on the complexity of each case
  - ◆ Sentencing court’s explanation referenced only 2 of 8 arguments
  - ◆ Presumption of substantive reasonableness on appeal does not apply to procedural reasonableness
  - ◆ Court must provide opportunity to make arguments AND properly consider them
  - ◆ *Montes-Pineda* means only that we will not vacate sentence where context makes PATENTLY OBVIOUS

# PLEA AGREEMENTS

Appellate Waivers

*Class v. United States,*  
138 S. Ct. 798 (2018)



"I'm innocent. I've just never been able to pass up a good plea bargain."

## *Class*

- ◆ A guilty plea, by itself, does not bar a federal criminal defendant from challenging the constitutionality of his statute of conviction on direct appeal

## *Class*

- ◆ Rodney Class charged with possessing firearms on Capitol grounds
- ◆ Alleged statute violates the Second Amendment, does not provide fair notice under Due Process Clause of the Fifth Amendment
- ◆ District Court denied motion to dismiss

# *Class*

- ◆ Class pleaded guilty pursuant to a written plea agreement:
  - ◆ Expressly waived:
    - ◆ Defenses based on statute of limitations
    - ◆ Several specified trial rights
    - ◆ Right to appeal sentence at or below maximum guideline range
    - ◆ Most collateral attacks on conviction and sentence
    - ◆ Various rights to request information regarding prosecution of his case
  - ◆ Expressly did not waive:
    - ◆ Claims based on newly discovered evidence
    - ◆ Ineffective assistance of counsel
    - ◆ Claims under certain sentence-reducing statutes

## *Class*

- ◆ Plea stated it was “complete agreement”
- ◆ At plea colloquy, district court stated Class was “giving up [his] right to appeal [his] conviction” and Class agreed
- ◆ D.C. Circuit held Class waived his constitutional claims by pleading guilty

# *Class*

- ◆ Supreme Court reversed and remanded
  - ◆ Guilty plea does not, by itself, waive “privileges which exist beyond the confines of the trial”
  - ◆ Constitutional claims are not inconsistent with admissions made in plea
  - ◆ FRCP 11(a)(2) governing conditional pleas is not the exclusive way to preserve constitutional claim after guilty plea
  - ◆ Plea colloquy is necessarily tethered to terms of written plea agreement and “does not expressly refer” to this type of waiver

## *Class*

◆ Great news, right?

◆ Well, yes, but:

◆ Read your plea agreement carefully to see precisely what is expressly waived. Neither party argued constitutional claims *may not* be expressly waived in a plea agreement.

◆ Be on the alert for changes to plea agreements in the wake of this decision for precisely that reason.

# Pending Petitions for Certiorari

## ◆ Burglary Crimes Under ACCA

◆ *Smith v. United States*, No. 17-7517

◆ *United States v. Stitt*, No. 17-765

◆ *United States v. Sims*, No. 17-766

## ◆ Double Jeopardy/Separate Sovereigns Exception

◆ *Gamble v. United States*, No. 17-646

◆ *Tyler v. United States*, No. 17-5410

◆ *Bearcomesout v. United States*, No. 17-6856

◆ *Gordillo-Escandon v. United States*, No. 17-7177

◆ *Ochoa v. United States*, No. 17-5503

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