Supreme Court Case Summaries: Professor Rory Little's Perspective[1]

A Service from the ABA Criminal Justice Section, *http://www.abanet.org/crimjust*

Greetings, CJS members. It feels like months since my last Supreme Court summary – oh wait, it has been months since the Term ended last June (and since my complete Summaries for the Term were published by the ABA at http://www.americanbar.org/content/dam/aba/publications/criminaljustice/Supreme_Court_Summaries_2012.pdf. But now that all the oral arguments for this Term (OT 2012) are finished, the Court will be issuing decisions regularly between now and July 1. In fact, the Court has already issued some 14 criminal-law-related decisions this Term. Below is a list of opinions issued so far – and following that, Summaries of two recent opinions. More to come, so stay tuned!

USSCt Criminal Law and Related Opinions (So far) in the October Term ("OT") 2012:

Case name	Opinion date	Topic
Ryan v. Gonzales	Jan. 8	Federal habeas and ADEPA deference.
Smith v. US	Jan. 9	Conspiracy: rules for withdrawal defense.
Fla. v. Harris	Feb. 19	4th A: A dog sniff can constitute probable cause.
Bailey	Feb. 19	4th A: Can't detain occupants of target search warrant house who are unaware of police action and have left the scene.
Johnson v. Williams	Feb. 20	Federal habeas and ADEPA deference.
Chaidez v. US	Feb. 20	*Padilla* not retroactive.
Evans v. Michigan	Feb. 20	Double jeopardy. Judge acquittal based on insufficient evidence bars retrial, even when based on legal error.
Henderson v. US	Feb. 20	Plain error determined at the time of appeal, not trial court ruling.
Clapper	Feb. 26	No standing to challenge international electronic surveillance.
Fla. v. Jardines	March 26	4th A: A dog sniff is a "search."
Marshall v. Rogers (summary reversal)	April 1	Federal habeas and ADEPA deference: Circuit may not draw "clearly established law" solely from lower court opinions; here no rule is "clearly established" for the evaluation of a request to proceed *pro se* after having waived that right for trial.
Missouri v. McNeely	April 17	4th A: Nonconsensual blood draws for BAC tests presumptively need warrants (summarized below).
Moncrieffe v. Holder	April 23	Aggravated felony, for immigration removal, does not include distribution of small amount of drug for no remuneration (summarized below).
Boyer v. Louisiana	April 29	Speedy Trial issue, but Writ dismissed as improvidently granted (with a 10-page, four-Justice, dissent, and a three-Justice concurrence.)

[1] These summaries are created by Professor Rory K. Little, U.C. Hastings College of the Law, San Francisco (littler@uchastings.edu) soon after the Supreme Court's opinions are released. They represent his quick, personal and unofficial reading of the Justices' opinions. Remarks in [brackets] are usually Professor Little's own editorial comments. Punctuation and other small changes may appear without indication. The original opinions should be consulted for authoritative content.

Summary of April 17 decision:

Missouri v. McNeely, No. 11-1425 (April 17, 2013), affirming 358 S.W.3d 65 (Mo. 2012):
5-4 -- **Sotomayor** for the Court in part and for a four-Justice plurality in part; *Kennedy* concurring; Roberts dissenting in part with Alito and Breyer; Thomas dissenting.

Holding: "In drunk-driving investigations, **the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant."** "[E]xigency in this context must be determined case by case based on the totality of the circumstances." **[Ed. Note:** Significantly, the Court does not address the constitutionality of police-administered blood draws on the scene, although that question clearly lurks in the background. The Court proceeds on the assumption that time to get to a hospital for a blood draw is the relevant fact.] The Court is severely divided and produced four separate opinions; perhaps most surprising is the Justice Scalia quietly joined Justice Sotomayor's majority and plurality opinion in all respects.

Facts: McNeely was stopped at 2am and the officer noted that McNeely demonstrated "several signs that [he] was intoxicated." McNeely was arrested for DWI after he refused to take a breath test for BAC (blood alcohol concentration). He was taken to a local hospital and his blood was involuntarily drawn, about 27 minutes after the stop, for a BAC test. His BAC was .154, well over the .08 legal limit. Because he had two prior drunk-driving convictions, McNeely was charged with a felony that carried a maximum four-year imprisonment penalty. But the trial judge suppressed the BAC evidence, ruling that there were "no circumstances suggesting the officer faced an emergency in which he could not practicably obtain a warrant." The Missouri court of appeals stated an intention to reverse but certified the question to the Missouri Supreme Court. That court affirmed the trial court's suppression order, ruling that *Schmerber* (384 U.S. 757 (1966)) "requires more than the mere dissipation of blood-alcohol evidence to support a warrantless blood draw."

Sotomayor (joined by Scalia, Ginsburg and Kagan in whole, and by Justice Kennedy in part): "Our cases have held that a warrantless search of the person is reasonable [under the Fourth Amendment] only if it falls within a recognized exception." Exigent circumstances in one such exception, and it includes acting without a warrant "to prevent the imminent destruction of evidence." But that exception normally "looks to the totality of the circumstances" and "demands that we evaluate each case based on its own facts and circumstances…. [S]ee also *Richards v. Wisconsin*, 520 U.S. 385 (1997) (rejecting a *per se* exception" to the knock and announce rule for drug cases). Footnote 3: "the general exigency exception … naturally calls for a case-specific inquiry."

Meanwhile, "a compelled physical intrusion beneath McNeely's skin and into his veins" is "an invasion of bodily integrity [that] implicates an individual's most personal and deep-rooted expectations of privacy." In *Schmerber*, we permitted a warrantless blood draw in a DUI case, but only on the cases "special facts" where "there was no time to seek out a magistrate and secure a warrant." It is true that BAC blood evidence is "inherently evanescent" and "gradually declines soon after [a person] stops drinking." Thus "some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency" and a warrantless blood draw. "That, however, is a reason to decide each case on its facts, as we did in *Schmerber*, [and] not accept the 'considerable overgeneralization' that a *per se* rule would reflect" [quoting *Richards*, supra]. Although "some delay between the time of the arrest or accident and the time of the test is inevitable," "a situation in which the warrant process will not significantly increase the delay" – for example, where one officer applies for the warrant while another officer transports to the hospital – does not "justif[y] … an exception to the warrant requirement." And there are today even "more

expeditious" techniques for getting warrants quickly (phone, email, "standard-form warrant applications"), "without undermining the neutral magistrate judge's essential role as a check on police discretion." On this record, where the officer "testified that he made no effort to obtain a search warrant" and the trial court found "no exigency," we do not have "an adequate analytic framework for a detailed discussion of all the relevant factors." We simply affirm the Missouri Supreme Court.

Sotomayor for plurality (Scalia, Ginsburg and Kagan): We reject the Chief Justice's proposed "modified *per se* rule" because it distort[s] law enforcement incentives." It "might discourage efforts to expedite the warrant process." Moreover, the Chief Justice "does not say that roadside blood draws [by officers as opposed to medical personnel] are necessarily unreasonable" -- [**Ed. Note:** neither does the plurality, other than by implication here] -- and under the Chief's approach "they would become a more attractive option for the police." We also reject the idea that a case-by-case approach does not produce sufficient guidance for police. Case-specific justifications are common under the Fourth Amendment, and a "motorist's privacy interests in preventing an agent of the government from piercing his skin" are significant. While the drunk driving problem is large and serious, many States already limit or prohibit "nonconsensual blood tests" unless a warrant if first obtained. "We are aware of no evidence" indicating that these States have less effective "drunk-driving enforcement efforts."

Kennedy concurring in part: I agree that it is "prudent" to hold that "always dispensing with a warrant for a blood test … is inconsistent with the Fourth Amendment." However, general "rules, procedures and protocols" may well be possible, and we may have to "explore" them "in later cases."

Roberts (with Breyer and Alito) concurring in part and dissenting in part: I think we should provide more guidance, and "the proper rule is straightforward." "If an officer could reasonably conclude that there is not [time to secure a warrant before blood can be drawn] …, the blood may be drawn without a warrant." "The ultimate touchstone of the Fourth Amendment is 'reasonableness,'" and we should specify "a general rule" for "the typical case." We should presume that the natural dissipation of alcohol in the bloodstream" qualifies as an exigency. "The reasonable belief that evidence is being destroyed gives rise to a compelling need." And reliable BAC evidence is important. For example, we have held that, generally, there is a "burning building" exception to the warrant requirement. Tyler (1978). Even though "fire can spread gradually, … that does not lessen the need and right of the officers to respond immediately." Similarly, just because BAC level can be extrapolated backwards from a later blood draw based on averages and time lapse, that does not lessen the need for the better and more direct evidence from an immediate blood test. "Second-best evidence" does not lessen the exigency when first-best evidence is being lost.

Of course, "[t]here might … be time to obtain a warrant in many cases." "Requiring a warrant whenever practicable" is the normal rule. (The Chief notes that "in one county in Kansas" officers send email warrant requests "to judges' iPads" and get the warrant back in 15 minutes.) Thus we agree that "if there is time to secure a warrant before blood can be drawn, the police must seek one." But if an officer "could reasonably conclude that there is not sufficient time" – or he applies for a warrant but does not get it in time -- then "a warrantless blood draw may ensue." I simply would offer the police "more meaningful guidance" than the majority does, and I would remand to the Missouri courts for consideration of "the rule I describe," rather than affirm.

Thomas dissenting **[Ed. Note:** If memory serves, Justice Thomas early on served in the Missouri Attorney General's office, and he votes in their favor here.] "Because the body's natural metabolization of alcohol inevitably destroys evidence …, I would hold that a warrantless blood draw does not violate the Fourth Amendment." I think *Schmerber*, and our more general "destruction of evidence" exception, requires this categorical rule. The police should not be required to "guess" at

how long it may take to get a warrant. Moreover, Missouri itself "still requires written warrant applications," not phone or email. Thus I dissent.

Summary of April 23 Decision:

Moncrieffe v. Holder, No. 11-702 (April 23, 2013), reversing 662 F.3d 387 (5th Cir. 2012):
7-2: **Sotomayor**; Thomas dissenting; Alito dissenting.

Holding: A state drug-trafficking offense that by its terms can also extend to **"the social sharing of a small amount of marijuana" is not an "aggravated felony"** under our normal "categorical" approach.

Facts: A noncitizen who has been convicted of an "aggravated felony" of "illicit [drug] trafficking" may be deported from the U.S. without any opportunity for discretionary relief. Such a felony includes any state crime that would be "punishable" as a felony under federal controlled substances laws. Moncrieffe came to the U.S. at the age of three, from Jamaica. In 2007 when he was 26, police in Georgia found 1.3 grams of marijuana ("the equivalent of about two or three marijuana cigarettes") in his car. He pled guilty to a Georgia felony that permits withholding of a judgment of conviction and complete expungement if probation is successfully completed. Nevertheless the federal government sought to deport Moncrieffe, because he currently stands "convicted" and his Georgia offense could meet the federal felony definition of "possession with intent to distribute," 21 U.S.C. § 841(a). Moncrieffe argued that § 841(b)(4) provides that marijuana distribution is a misdemeanor if it involves "a small amount of marijuana for no remuneration," and because the Georgia statute at issue would encompass such an offense, it "categorically" could constitute the federal misdemeanor rather than an aggravated felony. But the BIA and the Fifth Circuit rejected this view.

Sotomayor (for 7): We reverse. **[Ed. Note:** the complicated statutory and precedental details are largely omitted in this Summary.] We apply a "categorical approach" to evaluating whether state crimes are "aggravated felonies" for immigration purposes. *Nijhawan* (2009); *Lopez* (2006); *Taylor* (1990). Whether the person's "actual conduct" involved more serious facts is "quite irrelevant;" "we must presume that the conviction 'rested upon nothing more than the least of the acts' criminalized." [Former CA2 Judge Sotomayor memorializes these quotes as, now, the Supreme Court's law, from the patron saint of CA2, Judge Learned Hand, in *U.S. ex rel. Guarino v. Uhl*, 107 F.2d 399 (CA2 1939) (emphasis added, punctuation altered).] "The reason is that the INA asks what offense the noncitizen was 'convicted' of, not what acts he committed." *Carachuri-Rosendo* (2010).

Under this analysis, Moncrieffe's conviction for "possession with intent to distribute" could be, without more, the misdemeanor offense described in 841(b)(4): possession of a small amount of marijuana for no remuneration. (Footnote 7: "small amount" is not defined but the BIA suggests 30 grams as a "useful guidepost" – we don't decide this.) We reject the argument that 841(b)(4) is merely a "mitigating exception" and that 841(a) "presumptively" defines any such offense as a felony. That is "simply incorrect." And in *Carachuri-Rosendo* we rejected the view that actual "conduct" can or must be examined. Moreover, the government's view could "render even an undisputed misdemeanor an aggravated felony" (describing a New York state offense). We don't believe Congress ever intended such a result. We also reject the idea that a noncitizen could be allowed to prove the misdemeanor conduct at his removal hearing – that is "entirely inconsistent with both the INA's text and the categorical approach," as well as realistically undesirable. "The cure is worse than the disease," and "we prefer … [to] err on the side of underinclusiveness." The government's approach, for the "third time in seven years, … defies the commonsense conception" of the statute. It makes more sense

simply to hold that the Georgia offense, so broadly written, does not meet the specific definition of an "aggravated felony."

Thomas dissenting: I have dissented from the Court's "categorical approach" since *Lopez*, and I continue to think it wrong. Georgia law defines what Moncrieffe pled guilty to as a felony, and it is undoubtedly "punishable" as such under the federal statute. That should be the end of the matter. "The only principle uniting [the precedents] … appears to be that the Government consistently loses."

Alito dissenting: The Court's decision "leads to a result that Congress clearly did not intend." In Florida Moncrieffe's crime would be an "aggravated felony;" but across the line in Georgia it now is not. But Congress intended to create uniform federal law for immigration purposes. I agree with the Court that 841(b)(4) indicates that Congress would not want to treat distribution of a small amount of marijuana for no remuneration as an "aggravated felony." So I would not use the pure "categorical" approach, but rather would allow noncitizens to prove that their offenses involved the conduct excepted in 841(b)(4), at their removal proceeding. This best achieves the legislative intent while allowing federal courts to apply the federal laws uniformly, despite different wordings in state criminal statutes. Here, Moncrieffe did not attempt to show that his conduct actually met the 841(b)(4) standard. So "I think we have no alternative but to affirm."

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